

OPUS2

The Financial Conduct Authority vs. MS Amlin Underwriting Limited and others

Day SC2

November 17, 2020

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1 Tuesday, 17 November 2020
 2 (10.33 am)
 3 LORD REED: Welcome to the Supreme Court of the
 4 United Kingdom where we are today beginning the second
 5 day of the hearing in the proceedings between the
 6 Financial Conduct Authority and a number of insurance
 7 companies.
 8 The basic issue in the proceedings is whether the
 9 insurers are under a liability to indemnify insured
 10 parties who took out business interruption insurance
 11 with them and then sustained losses as a result of the
 12 COVID-19 pandemic.

13 We're currently hearing arguments presented by the
 14 insurers and when we closed yesterday afternoon we were
 15 hearing Mr David Turner QC on behalf of
 16 Royal & Sun Alliance. I will turn now to Mr Turner.

17 Submissions by MR TURNER (continued)
 18 MR TURNER: My Lord, last night I left RSA1 with just one
 19 further topic to cover which is the question of
 20 causation as it specifically relates to RSA1. In our
 21 written case at paragraph 75(b), the reference is
 22 {B/9/319} we suggest that for the purposes of testing
 23 causation under RSA1 it is sufficient to remove the
 24 disease within the specified proximity and any measures
 25 to contain it imposed as a direct consequence of the

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1 local disease and specifically upon holiday rental
 2 accommodation.

3 Now, in its respondent's case, the FCA seizes upon
 4 what we say in paragraph 75(b) as being directly
 5 inconsistent with what Hiscox says in its case and one
 6 can see that in the footnote, footnote 438 to the FCA's
 7 case reference {B/10/468}, where the FCA says that
 8 Hiscox's position on its hybrid clauses is that one
 9 strips out the consequences of the restrictions, not the
 10 consequences of the disease.

11 Now, inevitably Mr Gaisman is right in his written
 12 case and I am wrong in mine. We were guilty, as is the
 13 FCA, of conflating two different causal enquiries. In
 14 the context of RSA1, there are two discrete steps, each
 15 is subject to the words "as a result of". The first
 16 step is to ask whether the disease within the specified
 17 radius proximately caused any relevant closure or
 18 restrictions placed upon the premises.

19 The second, and applying the contractual definition
 20 that one sees at {C/15/1186} to which I took you
 21 yesterday, that's the contractual definition of "loss of
 22 gross revenue", is to ask whether such closure or
 23 restrictions were the sole cause, and I emphasise "sole
 24 cause", of any loss of gross revenue. If and to the
 25 extent to which there was any concurrent cause of the

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1 loss of gross revenue which could include the general
 2 presence of COVID-19 in the country and also include the
 3 presence of COVID-19 within the specified radius,
 4 (inaudible).

5 Sorry, was that my Lord, Lord Briggs?

6 I will carry on. If and to the extent to which
 7 there was any concurrent cause, including the general
 8 presence of COVID-19 in the country and also including
 9 the presence of COVID-19 within the specified radius,
 10 that's a concurrent cause of the loss of gross revenue,
 11 then the answer to the second question could only be no,
 12 and we would test the position in this way.

13 It is or should be common ground that RSA1 does not
 14 provide cover for loss caused by disease in itself but
 15 only for loss caused by restrictions or closure placed
 16 on the premises caused by a disease within the specified
 17 radius. But if you conflate the two causal enquiries
 18 and thereby reverse out disease in its entirety, the
 19 effect would be to reduce the causal linkage between the
 20 loss and the restrictions to the status of a proviso.

21 I suspect Mr Gaisman will have more to say on that
 22 subject and how one approaches the question of causation
 23 in hybrid clauses.

24 Could I turn then to RSA3, which is the Eaton Gate
 25 commercial combined wording, and one finds that wording

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1 in {C/16/1200} for those using tabs and it starts at --
 2 my Lord, I am getting feedback because I suspect someone
 3 is not muted. It starts at page 1200.

4 My Lord, by a way of summary our position -- my
 5 Lord, Lord Leggatt.

6 LORD LEGGATT: I am a bit slow and behind you, Mr Turner,
 7 but did I understand the gist of what you've just said
 8 to be, before you move on, that if there were
 9 restrictions that were a result of both cases within the
 10 radius and cases outside the radius, to the extent that
 11 those restrictions would have been imposed because of
 12 COVID outside the radius anyway, cover is defeated?

13 MR TURNER: Yes, because the "but for" test is not satisfied
 14 at the link between the restrictions and disease.

15 LORD LEGGATT: That is so, is it, on your case even if the
 16 cases within the area, let's suppose hypothetically,
 17 would have been sufficient on their own to result in the
 18 restrictions?

19 MR TURNER: Yes.

20 LORD LEGGATT: That is a counter-intuitive result, isn't it?

21 MR TURNER: Well, we say that is a consequence of applying
 22 the "but for" test, my Lord.

23 LORD LEGGATT: Perhaps that's a reason why we should look
 24 pretty closely at the trends clause and see whether that
 25 is really how it is to be construed, or maybe somebody

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1 else is dealing with that particular aspect.
 2 MR TURNER: With RSA1 there is no trends clause, it is
 3 purely the definition of loss of gross revenue which
 4 requires that the sole cause of the loss be the insured
 5 peril by the time one has manipulated the wording.
 6 LORD LEGGATT: Right, okay.
 7 MR TURNER: My Lords, RSA3, by way of summary, the first
 8 point by way of summary is that disease cover is
 9 provided again only as an adjunct to the primary
 10 business interruption cover which is itself parasitic
 11 upon insured material damage to, or loss of, the
 12 insured's property.
 13 Secondly, this policy only responds to the
 14 consequences of the notifiable disease either at the
 15 premises or within the specified radius of the premises.
 16 Insofar as the disease is outside the specified radius,
 17 then it does not form part of the insured peril.
 18 Third, loss due to epidemic is excluded from cover;
 19 and fourth, to the extent that it matters, the word
 20 "following" should be construed as requiring as
 21 a minimum "but for" causation, we say it should be
 22 construed as requiring proximate causation.
 23 Can I take you to the relevant policy terms and if
 24 we start at {C/16/1201} you'll see the contents list.
 25 Notably missing from the contents list is section 2

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1 which is, in fact, the business interruption cover but
 2 you will see that there are various types of cover
 3 provided by means of different sections each of which is
 4 operative only if indicated in the schedule. So again
 5 we have a composite policy.
 6 The first section is "property damage cover"
 7 followed by "business interruption cover" which, before
 8 one comes to its extensions, is parasitic upon the
 9 insured property damage cover. Provision is also made
 10 for employers and public liability covers as well as
 11 a number of standard bolt-ons, such as goods in transit,
 12 money and assault and commercial legal expenses.
 13 Again we see a one-document provision on page 1202
 14 {C/16/1202} which refers specifically to the general
 15 exclusions in the context of the entire policy being
 16 read as one document. On page 1207 {C/16/1207} at the
 17 top of the page, you will see again a signpost towards
 18 the general exclusions, to which the reader is
 19 encouraged to pay special attention.
 20 Section 2 "Business interruption" starts at
 21 page 1231 {C/16/1231} and one finds it halfway down the
 22 page on page 1231. Section 2 "Business Interruption"
 23 and the second set of bold text draws specific attention
 24 to general exclusions which apply to this section.
 25 The definition of "Business Interruption" or the

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1 standard definition is to be found at the bottom of 1231
 2 {C/16/1231} and, going over to page 1232 {C/16/1232}, is
 3 damage-based, as one would expect. There is
 4 a definition of "Incident" which is relevant because the
 5 trends provision refers to "incident" on 1232
 6 {C/16/1232} and again the definition of "incident" is
 7 damage-based.
 8 The BI insuring clause, the main BI insuring clause,
 9 is at page 1233 {C/16/1233}, the third block of text
 10 under the heading of "Cover". That refers to
 11 business interruption, so the standard BI insuring
 12 clause is through the reference to the defined term of
 13 "Business Interruption" referring effectively to insured
 14 damage.
 15 Basis of claim settlement starts on 1233, slightly
 16 lower down {C/16/1233} and there is a trends provision.
 17 I will just check the reference for that.
 18 (Pause)
 19 My Lord, I will come back to the reference. Sorry,
 20 the trends provision actually is where you would not
 21 expect it to be, it's at the top in between the heading
 22 for "the definition of Vicinity" on page 1233 and the
 23 insuring clause. So there's a special provision tucked
 24 away without its own heading which is a trends provision
 25 and the trends provision is in standard form but refers

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1 to an incident.
 2 Again it is common ground for the purposes of this
 3 appeal that the trends provision is to be read as if the
 4 word "incident" is replaced by a reference to the
 5 insured peril and that is to be discerned from the
 6 judgment below at paragraphs 119 to 122 {C/3/71}.
 7 The infectious diseases extension starts at 1237,
 8 towards the bottom of the page. One can see the
 9 extensions start on page 1236 {C/16/1236} with
 10 a reference to cover being provided under the section
 11 being extended to include, and these were automatic
 12 extensions, where business interruption cover is
 13 provided.
 14 Extension vii is the "Infectious Diseases"
 15 extension. An indemnity:
 16 "... in respect of interruption of or interference
 17 with the Business during the Indemnity Period following:
 18 "(a) any:
 19 "i. occurrence of a Notifiable Disease (as defined
 20 below) at the Premises or attributable to food or
 21 drink ...
 22 "ii. discovery of an organism at the Premises ...
 23 "iii. occurrence of a Notifiable Disease within
 24 a radius of 25 miles of the Premises ..."
 25 And (b), (c) and (d) are familiar extensions, again

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1 premises—related, which will be familiar to you and
 2 I will leave you to read, if I may.
 3 The "Infectious Diseases" extension, so
 4 extension vii, whether it is dealing with infectious
 5 diseases or other aspects of infectious diseases, is
 6 subject to what are in fact special conditions but are
 7 preceded by the heading "Additional Definition in
 8 respect of Notifiable Diseases". The first is the
 9 definition of "Notifiable Disease" itself and that is in
 10 the same terms that you saw yesterday in relation to the
 11 Amlin policy.
 12 The second reads:
 13 "For the purposes of this clause:
 14 "Indemnity Period shall mean the period during which
 15 the results of the Business shall be affected in
 16 consequence of the occurrence discovery or accident."
 17 That's a reference back to the perils in the
 18 extension itself. And item 4 is:
 19 "We shall only be liable for the loss arising at
 20 those Premises which are directly affected by the
 21 occurrence discovery or accident ..."
 22 Then what should be a separate special condition is
 23 a redefinition of the term "Maximum Indemnity Period".
 24 Sectional exclusions appear at page 1240
 25 {C/16/1240}. There are no relevant sectional

1 exclusions, but what is relevant is that where the
 2 sectional exclusions are introduced two-thirds of the
 3 way down page 1240 {C/16/1240} there is again then
 4 a reference to the need to see the general exclusions.
 5 Next in time, page 1285 {C/16/1285} within the
 6 general terms and conditions of the policy, two-thirds
 7 of the way down under numbered general condition 10.9
 8 but forming a separate unnumbered general condition is
 9 a general condition in relation to interpretation. Sub-
 10 condition (e) makes the point that "headings are for
 11 reference only and shall not be considered when
 12 determining the meaning of [the] Policy".
 13 The general exclusions themselves start at page 1290
 14 {C/16/1290} and again start with a reminder that those
 15 exclusions apply to all sections of the policy unless
 16 stated otherwise.
 17 General exclusion L, which is the general exclusion
 18 with which we are concerned at 1292 {C/16/1292}, is to
 19 be found — sorry, page 1292 starts with the rubric:
 20 "Applicable to all sections other than Section 5 —
 21 Employers' Liability and Section 6 — Public
 22 Liability ..."
 23 And then below that one sees the words
 24 "Contamination or Pollution Clause". My Lords, in the
 25 Divisional Court the FCA took the point that the words

1 "applicable to all sections other than section 5 and 6"
 2 were part of the heading and therefore one could discern
 3 from that that one was entitled to look at the headings,
 4 rather than being bound by what is said in the general
 5 conditions.
 6 I, in our submission, those words "applicable to"
 7 precede but are not part of the heading, they are simply
 8 directory. The point taken by the FCA was, with
 9 respect, an example of what Aristotle might have
 10 described as hair-splitting wordsmithery.
 11 Under the general exclusion there are four
 12 provisions which are helpfully numbered (a), (b) and
 13 then (a), (b), so I will refer to the second (a) as "(a)
 14 bis" and the second (b) as "(b) bis".
 15 (a) contains the operative exclusion:
 16 "The insurance by this Policy does not cover any
 17 loss or Damage due to contamination pollution soot
 18 deposition impairment with dust chemical precipitation
 19 adulteration poisoning impurity epidemic and disease or
 20 due to any limitation or prevention of the use of
 21 objects because of hazards to health."
 22 It might be observed that the draftsman is
 23 obviously allergic to the use of punctuation.
 24 (b) says that:
 25 "The exclusion does not apply if such loss or Damage

1 arises out of one or more of the following Perils ..."
 2 And I will leave you to read those.
 3 And then we come to (a) bis:
 4 "If a Peril not excluded from this Policy arises
 5 directly from Pollution and/or Contamination [with,
 6 'pollution' capitalised and 'contamination' capitalised
 7 and both words in bold] any loss or Damage arising from
 8 that Peril shall be covered."
 9 My Lords, I should observe at this stage that
 10 neither pollution nor contamination is a defined term in
 11 this policy and indeed those words are capitalised and
 12 emboldened at random in different places within the
 13 policy, sometimes they are capitalised, sometimes
 14 they're not, and sometimes they're emboldened and
 15 sometimes they're not and sometimes you get both or
 16 neither.
 17 (b) bis is the final part of this exclusion:
 18 "All other terms and conditions of this Policy shall
 19 be unaltered and especially the exclusions shall not be
 20 superseded by this clause."
 21 Can I start next with the scope of the
 22 insured peril. The starting point, as my Lord,
 23 Lord Hodge observed in Impact Funding Solutions at
 24 paragraph 7, the reference — I don't ask you to turn it
 25 up — is {G/60/1031}, where Lord Hodge said:

1 "The extent of [insurers'] liability is ...
2 ascertained by reading together the statement of cover
3 and the exclusions in the policy. An exclusion clause
4 must be read in the context of the contract of insurance
5 as a whole. It must be construed in a manner which is
6 consistent with and not repugnant to the purpose of the
7 insurance contract."

8 In our submission, that approach is consistent with
9 that articulated more generally by Lord Justice Chadwick
10 in *Taylor v Rive Droite Music* which you will find in
11 bundle E, tab 39, page 1140 {E/39/1140} at paragraph 27,
12 where he said in the context of potentially inconsistent
13 clauses that:

14 "The court must start from the premise that the
15 parties intended that effect should be given to each of
16 the clauses in their agreement; so that 'to reject ...'"

17 And he at this stage quotes from Lord Goff's opinion
18 in the *Yien Yieh* case, the *Yien Yieh Commercial Bank*
19 case:

20 "... 'to reject one clause in a contract as
21 inconsistent with another involves a rewriting of the
22 contract which can only be justified in circumstances
23 where the two clauses are in truth inconsistent' ..."

24 As Lord Goff went on to say in the *Yien Yieh* case,
25 and quoted by Lord Justice Chadwick:

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1 "... the overwhelming probability is that, on
2 examination, an apparent inconsistency will be resolved
3 by the ordinary processes of construction."

4 Paragraph 40 in the same judgment {E/39/1143}, so
5 the *Taylor* case, Lord Justice Chadwick went on to say
6 that:

7 "The question, in each case, is whether the
8 provisions can sensibly be read together; whether
9 a reconciliation of the provisions can conscientiously
10 and fairly be achieved."

11 I pause there to note that fairness, in our
12 submission, connotes the principled application of the
13 relevant rules of construction, not, as the FCA would
14 have it, avoiding a result which one party doesn't like.

15 We say that the starting point, therefore, is to
16 read the coverage clauses and the exclusion clauses
17 together to ascertain the scope of the cover that's
18 being provided under the disease extension. As to that,
19 what we submit is that it is perfectly possible to
20 construe the infectious diseases clause and exclusion L
21 together. They give rise to a coherent scheme whereby
22 the consequences of local occurrences -- and I use the
23 word "local" as a convenient and relative shorthand and
24 not as an invitation to the FCA to suggest that the
25 effect of a 25-mile disease radius is not very local and

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1 therefore must be taken to embrace the entire country --
2 whereby the consequences of local occurrences of disease
3 within the 25-mile radius are covered, but the
4 consequences of epidemics and of disease outside the
5 specified radius are not. This, and only -- my Lord,
6 Lord Leggatt.

7 LORD LEGGATT: It's asking -- it's a totally unreasonable
8 ask of the reader of the policy, isn't it, to expect
9 somebody when they read the disease cover that they've
10 got to construe that in the light of some small print
11 that appears 50 pages later amongst general exclusions?
12 It's an absurd approach to construction.

13 MR TURNER: Well, my Lord, I submit it's not and it's not
14 because the reader's attention is drawn repeatedly to
15 the general exclusions and to say that one shouldn't
16 take account of the general exclusions because they are
17 to be dismissed as small print is effectively to draw
18 a red line through the general exclusions despite the
19 fact that they are signposted repeatedly during the
20 course of the policy. To dismiss --

21 LORD LEGGATT: Well, one way of approaching it is to say
22 that when you read "epidemic" and "disease" here, you
23 don't read it as cutting down the cover that you've
24 already got in your disease clause (inaudible)
25 applicable to other things.

15

1 MR TURNER: Well, there is nothing else to which the
2 exclusion in respect to epidemic, with respect, could
3 relate, and I'll come to it.

4 LORD LEGGATT: Throughout the entire policy?

5 MR TURNER: Not as far as I have been able to identify. No
6 doubt Mr Edelman will correct me if I'm wrong --

7 LORD LEGGATT: Then why is it in the general exclusions and
8 not put in the only clause you say it's relevant to?

9 MR TURNER: Well, my Lord, it could have been better
10 expressed in the general exclusions, but it's not, it is
11 where it is. That doesn't provide a justification for
12 putting a red line through it. There is, in our
13 submission, no authority that would support taking such
14 an approach to general exclusions that effectively they
15 are to be dismissed as small print, and that goes far
16 beyond any principled approach to construction.

17 If I may, we say that on its face general
18 exclusion L seeks -- my Lord, Lord Briggs.

19 LORD BRIGGS: Yes, assuming that the two clauses can be read
20 together in the way you say, what if the outbreak within
21 the 25-mile radius is itself part of an epidemic? Does
22 that mean that the epidemic exclusion excludes it or do
23 you read them the other way round, that epidemics
24 generally are excluded but not ones which happen within
25 25 miles?

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1 MR TURNER: Only the latter because there is no -- there
 2 is -- sorry, epidemic generally is excluded. There is
 3 no cover for disease outside the 25 miles. So if one is
 4 seeking to give effect to the exclusion, we say that is
 5 how one construes it. We say --
 6 LORD BRIGGS: But just so I understand, so if the occurrence
 7 within 25 miles it is part of an epidemic it's excluded,
 8 but if it's not part of an epidemic it's not excluded.
 9 Is that right?
 10 MR TURNER: That is right.
 11 LORD BRIGGS: How does one tell whether an occurrence is or
 12 isn't part of an epidemic?
 13 MR TURNER: Well, that is, my Lord, a question of fact to be
 14 determined in any given case, but there may be issues as
 15 to whether something is an epidemic on the margins, but
 16 not in the context of COVID-19 and a worldwide pandemic
 17 which is simply an aggregation across the world of
 18 national epidemics.
 19 LORD BRIGGS: Thank you.
 20 MR TURNER: What we say is that on its face exclusion L
 21 seeks to exclude loss due to epidemic. We say that not
 22 all notifiable diseases have any obvious potential to
 23 result in something which can properly be characterised
 24 as epidemic and you were taken yesterday briefly by
 25 Mr Crane to the list of notifiable diseases which you

1 will find at the back of the regulations at {E/5/88} and
 2 you were taken there before an intervention that was
 3 both misconceived and unfair.
 4 It was misconceived because what Mr Edelman had
 5 forgotten was that the ruling that he was referring to
 6 was made in respect of his attempt to call expert
 7 evidence as to the meaning or the likely epidemiological
 8 consequences of specified diseases within the
 9 Ecclesiastical policy as if the reasonable person
 10 reading that policy would have in his back pocket a very
 11 eminent epidemiologist to tell him what the potential
 12 implications were rather than relying upon the court as
 13 the proxy of the reasonable reader of the policy to
 14 understand what the implications of the specified
 15 diseases might be.
 16 He was unfair because Mr Crane uniquely amongst the
 17 insurers' counsel in front of you was not aware of that
 18 particular genesis of the particular point and the court
 19 below held that Mr Edelman was seeking to introduce
 20 extraneous evidence to support his construction.
 21 But if one looks at the list of notifiable diseases,
 22 there are a number which have no obvious potential to
 23 result in an epidemic. For example, acute encephalitis,
 24 rabies, tetanus and even malaria can be discounted as
 25 something which could realistically give rise to

1 an epidemic within the United Kingdom. And
 2 Legionnaires', although you might get a number of people
 3 infected who have been to the same building being
 4 an environmental pathogen, legionella, the chances of
 5 that causing an epidemic are remote.
 6 We say that the infectious diseases extension, so
 7 far as relevant, is intended to provide cover only for
 8 occurrences of an infectious disease either at the
 9 premises, (subclause (a)(i)) which the FCA accepts is
 10 a fortuity which is focused on the disease at the
 11 premises and not a wider outbreak -- it's respondent's
 12 case at paragraph 194 {B/10/394} -- or within 25 miles
 13 of the premises, and we say there is no clue in the
 14 language that allows a syntactical distinction to be
 15 drawn between the nature of the 25-mile radius peril and
 16 the peril at the premises.
 17 If the 25-mile radius provision is construed as
 18 delineating cover for only a local outbreak of a
 19 notifiable disease, there is nothing inconsistent or
 20 remarkable about insurers wishing to exclude liability
 21 for an epidemic as a qualification to but far from
 22 a negation of the disease cover. It certainly can't be
 23 suggested that it is repugnant -- my Lord, Lord Briggs,
 24 sorry.
 25 LORD BRIGGS: So sorry. The exclusion in (a) isn't just of

1 epidemics, is it?
 2 MR TURNER: No.
 3 LORD BRIGGS: It's a comprehensive concept involving
 4 epidemic and disease or due to any limitation or
 5 prevention of use of objects because of the hazards to
 6 health. Are you sort of quietly accepting there may be
 7 some repugnancy in the rest of it but epidemic survives?
 8 MR TURNER: Yes.
 9 LORD BRIGGS: Or are you submitting the whole of the very
 10 broad ambit of that apparent exclusion?
 11 MR TURNER: No, I accept that you can't read that clause as
 12 excluding liability for disease, full stop, because that
 13 would be in direct conflict with the disease cover and
 14 those two clauses could not live alongside each other in
 15 those circumstances. But the fact that one can't give
 16 effect to the exclusion in respect of disease does not
 17 inhibit one from giving effect to the exclusion in
 18 respect of epidemic.
 19 LORD BRIGGS: Thank you.
 20 MR TURNER: My Lords, as I was saying, it cannot be
 21 suggested it is repugnant to the disease cover for
 22 insurers to impose a qualification on the disease cover
 23 excluding liability for epidemic and indeed, if I could
 24 ask you to look at the FCA's respondent's case at
 25 paragraph 191 {B/10/393}, what they say in terms is:

1 "It is rather that, in circumstances where the
 2 policies contemplate (and naturally include) disease
 3 outbreaks that could amount to a pandemic ..."
 4 For relevant purposes that is to an epidemic because
 5 "pandemic" is an international concept:
 6 "... if the parties intended that there would be
 7 effectively no cover for a pandemic disease when it
 8 becomes a pandemic disease, the policies would have said
 9 so."
 10 It goes on to say there are various ways in which
 11 that could have been done. Just stepping back, we say
 12 there are the following pointers.
 13 First, the policy repeatedly makes clear that the
 14 cover which it provides is subject to general
 15 exclusions. There are two such reminders within the
 16 business interruption section itself as well as at the
 17 beginning of the general exclusions and at the beginning
 18 of general exclusion L.
 19 Second, the Divisional Court seems to have taken the
 20 view that an exclusion clause cannot be read so that it
 21 cuts down the specific covers provided in the insurance.
 22 Reference for that is judgment paragraph 115 {C/3/70}.
 23 But while it may be necessary to ensure that exclusions
 24 are not repugnant to the cover provided, the fact that
 25 an exclusion qualifies and therefore at least to some

1 extent cuts down the cover otherwise provided is
 2 unremarkable. That is the purpose of an exclusion
 3 clause.
 4 Third, given that general exclusion L does not apply
 5 to any liability covers within the policy, it is
 6 difficult, if not impossible, to see what other cover
 7 beyond the disease extension it might apply to.
 8 As we've noted in our written case, the court
 9 approached the general exclusion having effectively
 10 already determined that it should adopt a construction
 11 of the disease extension which avoided the result that
 12 there should be no effective cover if the local
 13 occurrence were part of a wider outbreak; judgment
 14 paragraph 107 and following {C/3/68}.
 15 Even if that were a tenable construction of the
 16 disease extension itself, it would not render the
 17 exclusion of epidemic repugnant so that it must be
 18 disregarded, but that is effectively what the
 19 Divisional Court did.
 20 The reliance on subclause (a) bis and (b) bis --
 21 and, my Lords, it may be helpful to have those available
 22 to you {C/16/1292} at this point -- provide no reason,
 23 we say, why the exclusion for epidemic should not be
 24 respected.
 25 The reference to pollution or contamination cannot

1 be read, or shouldn't be read, as encompassing
 2 everything in subclause (a). You can only get there if
 3 you read the words "pollution or contamination" in
 4 subclause (a) bis as referring to the heading of the
 5 disease exclusion -- sorry, the pollution or
 6 contamination exclusion. But you're not allowed to
 7 refer to the headings.
 8 Second, pollution or contamination, as I've noted,
 9 are not defined terms. But even if the FCA were right
 10 to say that subclause (a) bis is to be construed as
 11 referring back to the entirety of subclause (a), the
 12 submission misunderstands the nature of that subclause,
 13 just as much as the Divisional Court was wrong to accept
 14 the argument advanced for the first time in the FCA's
 15 oral submissions below, that subclause (b) bis means
 16 that the terms of the exclusion are not intended to
 17 overwrite express grants of cover. Judgment
 18 paragraph 117 {C/3/70}.
 19 The Divisional Court's approach would have the
 20 remarkable and, we submit with respect, nonsensical
 21 effect that having set out in subclause (a) a number of
 22 exclusions which could only be of relevance if and to
 23 the extent that they quantify express grants of cover,
 24 the parties then effectively draw a red line through the
 25 entirety of that subclause by means of what is said in

1 subclause (b) bis.
 2 There is, we say, a clear and coherent structure to
 3 the general exclusion as a whole, even if the drafting
 4 could have been improved.
 5 Subclause (a) sets out the exclusions from cover.
 6 They expressly apply to all sections save for liability
 7 sections. Subclause (b) sets out exceptions to those
 8 exclusions. Subclause (a) bis provides a write-back of
 9 cover in respect of non-excluded but ensuing causes. So
 10 where a peril not excluded arises directly from
 11 pollution and/or contamination, to use the words of the
 12 clause, then there's a write-back of cover.
 13 Thus, by way of illustration, if contamination of
 14 electrical equipment with soot led to a short-circuit
 15 and a fire, the ensuing peril of fire would be covered,
 16 but -- and this is where subclause (b) bis comes in --
 17 subclause (b) bis qualifies any such write-back by
 18 stipulating that it is subject to all other terms and
 19 conditions of the policy. But this is the purpose of
 20 (b) bis, it is signposted, we say very clearly by the
 21 explicit emphasis in (b) bis to be found in the words
 22 "especially the exclusions shall not be superseded by
 23 this clause" and therefore the words "this clause" in
 24 (b) bis can only sensibly be a reference to (a) bis.
 25 My Lords, the FCA invokes contra proferentem to

1 avoid going down that process of construction. We say
2 that that is an unprincipled approach if you get to
3 a proper construction by applying the normal rules of
4 construction, you don't have an ambiguity about the
5 parties' agreement and therefore there is no scope for
6 invocation of the contra proferentem principle and, just
7 for your Lordships' reference, we rely on paragraph 13
8 of Lord Justice Auld's judgment in *McGeown v Direct
9 Travel* {H/7/112}.

10 My Lord, on "following" I largely align myself with
11 what Mr Kealey said yesterday afternoon. The FCA is
12 right to concede that "following" connotes at least
13 a causal requirement but it mischaracterises what that
14 requirement is. The phrase — the unhelpful phrase —
15 "looser causal requirement than proximate cause" is not
16 only unhelpfully opaque, but it is actually, with
17 respect, a mealy-mouthed way of suggesting that it
18 indicates no requirement for any real causal
19 relationship at all, whether proximate or "but for".

20 We rely upon what my Lord, Lord Hodge said in
21 *McCann's Executors* {E/43/1197}, for which you already
22 have the reference, and we also say, like *Amlin*, that
23 the word "following" has to be construed in its context.

24 For RSA3, the true meaning of the word "following"
25 and the necessary causal connection it connotes is

25

1 signalled by clauses 2 and 4 of the so-called additional
2 definitions, which refer to the results of the business
3 being affected in consequence of the occurrence. Those
4 are clear words requiring at least "but for" causation.
5 We say that they are words consistent with proximate
6 causation, and also in item 4, the loss arising at the
7 premises directly affected by the occurrence.

8 We've set out our arguments there in paragraph 47 of
9 our written case {B/9/309}.

10 The Divisional Court concluded that neither of those
11 additional definitions indicated a requirement for
12 proximate causation because, it said, the occurrences of
13 disease would not have a direct effect on the business.
14 Judgment paragraph 96 {C/3/65}.

15 With respect to the Divisional Court, that
16 conclusion muddles both factual and legal causation.
17 The logical consequence of the Divisional Court's
18 analysis is that it would not matter what causal words
19 were used because the effect on the business of the
20 disease could only ever be indirect. But such
21 an approach not only conflicts with section 55(1) of the
22 Marine Insurance Act but it conflates proximate
23 causation with being the last event in the causal chain.

24 So in RSA's submission, by way of conclusion, it
25 does not matter whether proximate or "but for" causation

26

1 is required by the use of the word "following", the
2 simple point is that neither requirement is satisfied
3 unless the insured can establish that it would not have
4 suffered the relevant interruption but for the
5 occurrence of notifiable disease within the relevant
6 radius.

7 My Lords, unless I can assist you further, those are
8 my submissions.

9 My Lord, Lord Briggs.

10 LORD BRIGGS: One final question. We are back to repugnancy
11 again.

12 MR TURNER: Yes.

13 LORD BRIGGS: Might you know of any authority which assists
14 on the question whether, when testing, whether clause
15 (a) is repugnant with clause (b), you can do a sort of
16 blue pencil test to the apparently repugnant clause so
17 as to preserve such bits of it as may not be repugnant,
18 or have you got to look at the clause as a whole?

19 MR TURNER: My Lord, the question is whether you can fairly
20 read the two clauses alongside each other and that may
21 involve elements of applying a blue pencil test because
22 one may be writing down one of the clauses, but that is
23 a preferable approach to simply taking a red pen and
24 putting it through the entire clause. It's important to
25 note that exclusion L deals with many things in

27

1 subclause (a). It doesn't just deal with disease, it
2 deals with epidemics. It doesn't just deal with disease
3 and epidemics, it deals with lots of other things and
4 one is to be taken as inferring that the draftsman
5 expected or intended, subject to arguments about
6 repugnancy and making sure that these clauses can live
7 alongside each other, the parties to focus on those bits
8 of the clause that are relevant in the particular
9 context.

10 LORD BRIGGS: Thank you.

11 LORD REED: Well, thank you very much, Mr Turner. I think
12 we turn next to Mr Gaisman QC on behalf of Hiscox.

13 MR GAISMAN: My Lords, can your Lordships see and hear me?

14 LORD REED: Yes, perfectly.

15 Submissions by MR GAISMAN

16 MR GAISMAN: Thank you. At this stage of the appeal there
17 is a change of focus. We move away from disease clauses
18 to a different type of clause. The clause is to be
19 found at {C/6/401}. The operative Hiscox clause is not
20 a disease clause, which is what the FCA originally
21 called it and it's not much more informative to call it
22 a hybrid clause. Not only is it not a disease clause,
23 it is also not an emergency or a danger clause either
24 although the FCA mixes it up in the discussion with
25 quite different clauses which expressly refer to those

28

1 perils .
 2 This confusion enables the FCA to claim that
 3 Hiscox's clause "responds to an external emergency in
 4 the world". FCA respondent case 387. The Hiscox's
 5 clause is what its title calls it: it is a public
 6 authority clause. I will use the abbreviation "PA".
 7 Its essential nature is to respond to PA restrictions
 8 imposed in certain circumstances: vermin, drains, food
 9 poisoning, disease, death by human hand.
 10 The detection of mouse droppings in a leisure centre
 11 is not an external emergency in the world. The clause
 12 raises its own distinct questions both of construction
 13 and of causation. The first is obvious.
 14 As to causation and the counterfactual, the court
 15 below essentially gave the same answer for all insurers .
 16 That does not have to follow. The insurers with disease
 17 clauses have made their own submissions and I adopt them
 18 where appropriate. Although I am the fifth counsel to
 19 address your Lordships, I am naturally only concerned
 20 with Hiscox's distinct position.
 21 The structure and nature of the Hiscox's public
 22 authority clause give rise to a particular and, we
 23 submit, compelling argument that the court below
 24 constructed the wrong counterfactual in Hiscox's case.
 25 The idea when it comes to Hiscox of relegating the

1 public authority element in the public authority clause
 2 to a merely "adjectival" status -- FCA respondent's case
 3 para 428.1 -- that relegation is not possible as
 4 a matter of construction without eviscerating the
 5 clause.
 6 Now, the FCA's appellant case, paragraph 29, and
 7 it's worth looking at this {B/2/39} justifies the
 8 decision of the court below on this very point in these
 9 terms underlining it :
 10 "... the parties intended that the insured recover
 11 for losses that would have been incurred even without
 12 the public authority restrictions ."
 13 Para 29, my Lords.
 14 Now, that is very striking . The FCA's contention is
 15 that the insured recovers under a public authority
 16 clause losses which would have occurred without the
 17 public authority restrictions . How can that be right?
 18 Hiscox's promise was to hold insureds harmless against
 19 loss caused by PA restrictions of certain types. What
 20 my Lord, Lord Leggatt in Sartex called the specified
 21 loss or damage, emphasising the word "specified",
 22 paragraph 35 of that judgment.
 23 Now those very public authority or PA restrictions
 24 are said to be inessential to the breach of the
 25 insurer's promise to hold harmless against that

1 "specified loss". It, the breach, occurs anyway. Now,
 2 whatever that contract is, my Lords, it's not a contract
 3 of indemnity.
 4 The FCA is driven to argue the correctness of this
 5 proposition to support its own appeal on the pre-trigger
 6 downturn, but in the context of Hiscox at least it
 7 exposes the fallacy in the counterfactual which it
 8 advocated and which the court found. We call it the
 9 FCA's 13th chime point: see paragraph 132 of our
 10 respondent's case {B/2/70}.
 11 One further introductory point. Whether and to what
 12 extent it was predictable that the UK would be hit by
 13 a serious outbreak of a notifiable disease. In the case
 14 of Hiscox, that is not the question. The Hiscox clause,
 15 as we can see, insures against the consequences of PA
 16 restrictions of certain types. So the question is as to
 17 the extent to which the government reactions to the
 18 pandemic in March 2020 can have been objectively
 19 intended as risks which the parties were to insure at
 20 the time of contracting. The FCA inevitably admits that
 21 these actions were unprecedented in this country. It's
 22 respondent's case 156.
 23 At 391 it implicitly recognises that the parties
 24 could not have had "this draconian legislation" in mind.
 25 Mr Crane has covered this ground and I just make four

1 points.
 2 First, the FCA conflates the disease with the
 3 government reaction, saying that COVID is not different
 4 in kind from SARS. Respondent's case 391. That point
 5 may or may not be relevant to the disease clauses, but
 6 a clause insuring PA restrictions requires the parties
 7 to have intended those risks to be transferred and they
 8 were different in kind to anything previously known.
 9 Second, even assuming that all the powers buried in
 10 the 1984 Act are to be treated as reasonably available
 11 to the parties, the question is not as to the existence
 12 of those powers, which are in the most general terms,
 13 but the possibility of their exercise in the way in
 14 which they have been. All that the FCA can say,
 15 respondent's case 159, is that while the regulations are
 16 unprecedented "they did not appear out of nowhere".
 17 Third, I should draw attention -- I shall have to
 18 ask your Lordships to read this in your own time -- to
 19 paragraph 138 of the judgment {C/3/78} which expresses
 20 the matter much more guardedly, finding, as regards the
 21 disease clause, that all that could reasonably be
 22 expected at the date of the contract was that the
 23 outbreak of a SARS-like disease would have "an impact or
 24 some impact"; that is a very restricted finding.
 25 Fourthly, as others have submitted, that a risk is

1 foreseeable does not mean it is intended to be covered.
 2 That question is answered by the contract. In the case
 3 of Hiscox, this question arises in relation to what is
 4 conceded to be an extension to a property policy. It is
 5 easy to imagine a PA's reaction to Legionnaires' disease
 6 in the waterworks of a property being a covered risk.
 7 Lockdown in the wake of a worldwide pandemic is totally
 8 different .

9 So much, my Lords, by way of introduction.
 10 Given the very limited time I have, I cannot cover
 11 all eight of our grounds of appeal orally. I will have
 12 to be selective and I will focus on the first five .

13 As to those which I do not cover, I naturally refer
 14 your Lordships to our written case, familiarity with
 15 which I also assume in the submissions which follow.

16 So I want to turn first to ground 5: is Hiscox 4
 17 triggered? This is a coverage question. Questions of
 18 causation which arise in this question arise within the
 19 peril , and determine whether or not the peril has
 20 occurred.

21 The question is whether on their true construction
 22 Hiscox 4 policies respond to the March 2020 government
 23 measures. The Hiscox 4 policy contains a different PA
 24 clause to the one which I showed your Lordships. This
 25 one has a within one mile stipulation . We may take as

1 an example the wording at {C/22/1558}.
 2 That wording has both an NDDA clause, a non—damage
 3 denial of access clause, which is at {C/22/1559} and
 4 a PA clause which is at {C/22/1560}, although this is
 5 only true of some Hiscox 4 policies, the fact that they
 6 also had an NDDA clause in.

7 Now, as your Lordships will have read in the
 8 judgment, the court held that the NDDA clause did not
 9 respond at all in any Hiscox policy for several reasons,
 10 as we will see, including the fact that nothing that
 11 occurred within the one—mile radius caused the
 12 government measures. We'll look at that in due course.
 13 That's judgment 418.

14 The FCA does not appeal against the NDDA clause
 15 holdings. However, the court held that the Hiscox 4 PA
 16 clause did respond.

17 Hiscox appeals against that conclusion. The court
 18 reached its conclusion with express hesitation . It was
 19 no doubt mindful of the fact that the Hiscox 4 PA clause
 20 has much in common with QBE3, which the court held fell
 21 the opposite side of the line , as well as with the
 22 Hiscox NDDA clause, which fell the opposite side of the
 23 line . Whether the court was also affected by the
 24 temptation of elegance it would be presumptuous of me to
 25 say.

1 Now, Hiscox's argument proceeds in these stages.
 2 Some of these points have been made by others, but in
 3 the context of Hiscox 4, it is worth seeing just how
 4 many line up.

5 We've got {C/22/1560} I hope on the screen for those
 6 who are reading on the screen. First , the relevant
 7 element of the insured peril under Hiscox 4 is
 8 an occurrence of a notifiable disease within 1 mile of
 9 the business, and I will call that "the stipulated
 10 occurrence" because that's what it is .

11 Secondly, as has just been submitted, many
 12 notifiable diseases manifest themselves locally and not
 13 on a broad scale: Legionnaires' disease; tetanus is
 14 a notifiable infectious disease; an outbreak of German
 15 measles at a school and so on.

16 So it is a serious exaggeration for the FCA's
 17 appellant case 134 to say that insurers' construction
 18 gives "illusory cover for notifiable diseases". It is
 19 also wrong, as we have seen, for the FCA's respondent's
 20 case 387 to describe Hiscox 4 as expressly contemplating
 21 a serious emergency.

22 Thirdly, the fact that the parties , as has been said
 23 before, may have contemplated that notifiable diseases
 24 could be local or widespread does not mean that they
 25 intended to cover all incidents of all such diseases.

1 That remains the question to be answered.

2 The FCA's respondent's case 312 recognises that
 3 local cases met by local measures may be "more typical".
 4 It then exaggerates by saying that:

5 "... the unique identifying characteristic [of
 6 notifiable diseases] is their possibility of spreading
 7 broadly ... "

8 Food poisoning is a notifiable disease, so is
 9 tetanus. Again, the FCA respondent's case 204 says:
 10 "... disease outbreaks do not occur ... in
 11 a particular place."

12 Really? That's not right either . Only if you
 13 assume with hindsight that a pandemic, or something
 14 similar , is the paradigm or an epidemic is the paradigm.

15 Fourthly, my Lords, if we can go back to — or
 16 perhaps we still have it — 1560, {C/22/1560}. The
 17 public authority in this clause is the same type of PA
 18 as the one which imposes restrictions in the event of
 19 vermin, food poisoning, drains; in other words,
 20 a local authority reacting to a small—scale local event.

21 LORD REED: What about (a) murder or suicide?

22 MR GAISMAN: Well, the event may not be local, my Lord, but
 23 if the murderer, as it were, comes to a house which is
 24 near the premises, then the murderer is local . I accept
 25 that to that extent.

1 LORD REED: Well, all I had in mind was clearly it wouldn't
 2 be a local authority, it would be the police,
 3 presumably, who would --
 4 MR GAISMAN: Sorry, my Lord, I am using "public
 5 authority" -- I'm sorry, I did say "local authority" and
 6 of course I should have said "public authority", but it
 7 would be the local police force, my Lord, or it would be
 8 likely to be in the event of a murder or suicide.
 9 My Lords, in our appellant's case 112, I haven't got
 10 time to take your Lordships through it, we analyse in
 11 detail the other covers within the clause (a) and (c),
 12 (d) and (e) and we show how, of their nature and by
 13 reference to the relevant legal powers, they contemplate
 14 small-scale local events. I hope paragraph 112 doesn't
 15 misspeak in the way that my Lord, Lord Reed pointed out
 16 that I had had a moment ago in relation to the police.
 17 The point here is expressed in the Latin maxim
 18 *noscitur a sociis* and the fact that the public authority
 19 is capable of including a government does not prove that
 20 this clause was meant to cover national events.
 21 Fifthly, my Lords, Mr Salzedo addressed
 22 your Lordships on the meaning or the natural meaning of
 23 the word "occurrence" in the insurance context even
 24 before one gets to the one-mile limit as a textual
 25 indicator of specificity. He referred to the dictionary

1 and interestingly, I don't believe this has been resiled
 2 from, the FCA's skeleton below in footnote 329 equated
 3 the three terms "incident", "event" and, "occurrence"
 4 and of course your Lordships have been told about and
 5 indeed know about *Axa v Field and Lord Mustill*. This is
 6 also the ordinary way in which we use these words, to
 7 refer to something inherently particular and confined.
 8 As the Hiscox Action Group say -- and I gratefully adopt
 9 their submission -- the word "occurrence" is different
 10 from abstract, widespread concepts like "danger" or
 11 "emergency". They don't say that. What they do say in
 12 paragraph 39(1) is that "occurrence" is:
 13 "Typically contrasted with a general state of
 14 affairs."
 15 Like a pandemic.
 16 Read without hindsight and in context, it would not
 17 naturally be construed as applying to national states of
 18 affairs.
 19 Now, the clause at 1560 {C/22/1560} does not refer
 20 to an outbreak, it refers to a notifiable human disease.
 21 On the previous page, the definition of a notifiable
 22 human disease is a disease an outbreak of which must be
 23 reported to the local authority. But that doesn't
 24 advance the FCA's position, it's just describing what it
 25 is that has to be reported, what a notifiable disease

1 consists of. Anyway, of course, a single incidence of
 2 Legionnaires' disease is an outbreak.
 3 The judgment below, my Lords, provides some support
 4 for the submissions I am making because it was the
 5 very absence of the word "occurrence" in the Amlin
 6 clauses that assisted the court to hold that disease
 7 generally was covered there, not just local disease.
 8 That's judgment paragraph 196. And it is implicit that
 9 the converse is also true.
 10 Sixthly, my Lords, while there is no conceptual
 11 difference between a one-mile radius and a 25-mile
 12 radius, the former is, in practice, a pointer towards
 13 the Hiscox parties intending to confine the occurrence
 14 to those of a strongly local character. The area is
 15 just over 3 miles; even I can work that out.
 16 The court below expressly recognised the force of
 17 this point in relation to QBE3, which it held did not
 18 provide pandemic cover for this reason among others, 1
 19 mile is not just a lot less than 25 miles, it's a clue
 20 to a different contractual intention. That's judgment
 21 paragraph 237 {C/3/104}.
 22 It's simply not possible to regard this stipulation
 23 as merely adjectival and the court there didn't.
 24 Seventhly, my Lords, many Hiscox policies, including
 25 that at {C/22/1558} have a "non damage denial of access"

1 clause. May we look at it, please {C/22/1559}. This
 2 also has a one-mile radius stipulation:
 3 "An incident ..."
 4 If your Lordships have it:
 5 "... within a one mile radius ... which results
 6 in ..." the imposition of certain restrictions.
 7 Now, the court below held that this clause was
 8 confined to small-scale local events and did not cover
 9 something as geographically dispersed, variegated and
 10 non-specific as the pandemic: judgment 405 {C/3/146}.
 11 If I had time, I would read to your Lordships
 12 paragraphs 404 to 407 and ask your Lordships to read
 13 them.
 14 It is prima facie surprising that two identical
 15 radii in clauses both about restrictions imposed on
 16 premises by authorities on adjacent pages of the same
 17 contract should be held to serve such diametrically
 18 opposed purposes.
 19 Eighthly, my Lords, the word "within" occurs before
 20 the one-mile stipulation on page 1560 {C/22/1560}. As
 21 your Lordships have been told before, "within" more
 22 naturally denotes that the incident must be within the
 23 circle and not outside it, as in within these four walls
 24 or the premises will be supervised within the hours of
 25 daylight. But your Lordships don't have to take my word

1 for that, that is the meaning which the court gave the
2 word "within" in Hiscox's NDDA clause.

3 If your Lordships look — and again I have to ask
4 your Lordships to do this — your Lordships will see the
5 submission at paragraph 399 {C/3/145} and the only way
6 in which one can read the judgment, paragraphs 405 and
7 406 {C/3/146} is that that submission, namely that
8 "within" could only mean within and not outside, was
9 accepted. Surely the preposition "within" should have
10 the same meaning in both clauses.

11 The only answer to these points are in the, if I may
12 say so, uncharacteristically weak paragraph 312 of my
13 learned friend's respondent's case and they really stack
14 up to no more than, "Well, if that's what you meant, why
15 didn't you make it clearer?" Not a submission which
16 your Lordships presumably are often troubled with.
17 Cases that come to the Supreme Court, by definition,
18 haven't made them clearer.

19 So those are the eight points I want to make, as it
20 were, on construction but there are others. Why is the
21 requirement for close proximity inserted? The obvious
22 purpose, as others have submitted, is to ensure that
23 only local events are covered.

24 If the cover is intended to respond in the event of
25 a national pandemic, why have the parties stipulated for

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1 a radius at all? What's it for? The court's
2 construction has everything turn on whether a sufferer
3 adventitiously happens to encroach within the circle.
4 So the critical element of the cover constituted by the
5 radius is reduced to an adjectival precondition before
6 the assured can recover an indemnity for all the loss
7 caused by the pandemic.

8 In a moment of candour, the Hiscox Action Group at
9 paragraph 30 say, or concede — I use that word; this
10 may seem harsh. I suppose they mean harsh to a loser in
11 the postcode lottery that the court has construed this
12 clause as creating.

13 Well, they may say "harsh". Your Lordships may
14 think "completely arbitrary" is a better description.
15 If we look at the FCA's case, we'll look at this
16 {B/10/390} — the FCA's respondent's case 184 — the FCA
17 says, as if it were the law of the Medes and the
18 Persians, in this paragraph, last two sentences:

19 "An epidemic is covered, but only if the premises
20 are sufficiently close to it. A remote—only epidemic is
21 not covered."

22 Now, what sense does that make? My learned friend
23 Mr Edelman in paragraph 261 of his respondent's case
24 deflects this problem in saying that the examples
25 involving trawlers and aeroplanes are "fantastical".

42

1 They're not. My learned friend Mr Kealey alluded under
2 a thin disguise, which I'm sure your Lordships
3 penetrated, to the peregrinations of a notorious
4 COVID—suffering Scottish Member of Parliament. For
5 Hiscox 4 policyholders, the vast majority of whom by the
6 way do not live anywhere near the Royal Courts of
7 Justice, everything depends upon whether they happen to
8 have a house near the London to Edinburgh line.

9 Now, we say — and we have a finding in our favour
10 on this — the government measures in March were
11 self—evidently not in any sense caused by an occurrence
12 of disease within 1 mile of an insured's premises. If
13 we look at judgment paragraph 418 at {C/3/149}, we can
14 see that this finding is specifically made in respect of
15 the Hiscox's NDDA clause even assuming that a person
16 with COVID within the radius could be described as
17 an incident, which the court has said it could not.

18 So the court here says:

19 "The position under the FCA alternative case is no
20 better as regards causation. Even if the presence of
21 a person with COVID—19 within the radius or in the
22 vicinity could be said to be 'an incident' which it
23 cannot, for the reasons we have given, it simply cannot
24 be said that any such localised incident of the disease
25 caused the imposition by the government of the

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1 restrictions ."

2 So where does one go from here? Well, the answer is
3 this. Unless the occurrence in Hiscox 4 is construed
4 broadly enough to include the whole pandemic,
5 an occurrence within 1 mile means or includes the whole
6 pandemic. It necessarily follows that the FCA cannot
7 prove the recognised causal connection required between
8 the stipulated occurrence and the restrictions imposed.

9 My Lords, I see the time. I have a little more on
10 this point, but I don't think I can necessarily complete
11 it in three minutes, although I probably could complete
12 it in a few more than three minutes. I'm in
13 your Lordships' hands.

14 LORD REED: Well, shall we adjourn, then, for five minutes
15 and then we'll hear you further in five minutes' time.

16 MR GAISMAN: Thank you.

17 LORD REED: Thank you very much.

18 (11.42 am)

(A short break)

19 (11.50 am)

20 LORD REED: Yes, Mr Gaisman.

21 MR GAISMAN: My Lords, there is no appeal by the FCA in
22 relation to paragraph 418 of the judgment, and so, as
23 I say, unless the occurrence is construed broadly enough
24 to include the entire pandemic, it necessarily follows
25

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1 that the FCA cannot prove the required causal
2 connection.

3 Now, we need to look at one paragraph of the
4 judgment on this, paragraph 273 at {C/3/113} and we
5 respectfully criticise the following aspects of this
6 judgment.

7 First, in saying in line 3 that official responses
8 would likely be to the full extent of an outbreak, the
9 court was, with respect, begging the key question:
10 whether a clause in the terms of Hiscox 4 was intended
11 to respond to an outbreak beyond 1 mile.

12 My Lords, the only stipulated occurrence here is
13 an occurrence of disease within 1 mile and that has to
14 be a cause of the restrictions. In paragraph 272 as
15 regards Hiscox 1 to 3, the court recognised that that
16 requires a causal connection between the occurrence and
17 the government measures or whatever it happens to be.
18 However, in 273 it does not, as regards the stipulated
19 occurrence, ie the local occurrence, "following" means
20 only temporally posterior. That's the language used.
21 This was because the court treated the local occurrence
22 as part of the national outbreak. This is the court's
23 part of an indivisible cause reasoning which Mr Salzedo
24 and others have criticised.

25 For my part, I would only ask: indivisible for what

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1 purpose? Because, as Lord Hoffmann says, the proper
2 formulation of a value judgment depends upon the purpose
3 for which the judgment is being made. It is no good —
4 the FCA's respondent's case 356 — saying that common
5 sense dictates an inextricable linkage. Paragraph 356
6 feels the need to invoke common sense three times in
7 eight lines, three times within eight lines in fact.

8 As Lord Hoffmann said in his Chancery Bar lecture,
9 this appeal is a rhetorical device to divert attention
10 from the absence of reasoning. But going back to
11 Lord Hoffmann in his judicial capacity, you have to ask
12 for what purpose am I asking the question? Now, here
13 the contractual context is all-important and the
14 question that the parties require to be answered is
15 whether the stipulated occurrence has caused the
16 restrictions imposed. Extrication of the stipulated
17 occurrence from the pandemic to the limited extent
18 necessary to answer that question is easy. The court
19 did it in paragraph 418 {C/3/149}.

20 The answer is they found no causal connection. But
21 the exercise is necessary under the contract for this
22 reason, I'm sorry to fall back on quasi-algebra. Where
23 the contract requires one to decide whether X caused A,
24 you do not ask whether X is part of Y and whether Y
25 caused A. That's the wrong question. So what's gone

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1 wrong here is that the requirement of causation has been
2 transferred to the national disease and the result is
3 not only a very convoluted reading of a simple clause,
4 but, if I may borrow back Mr Kealey's filching of
5 a phrase in our mutual discussions, what is covered but
6 not causative has been conflated with what is causative,
7 but not covered.

8 Now, I've shown your Lordships the Hiscox
9 NDDA clause and I've shown your Lordships the causation
10 analysis. We do make the point that it is most peculiar
11 for the causation analyses within these two similar
12 clauses with the same limit nearly adjacent in the
13 contract to have such radically different outcomes, and
14 this must have happened, in our respectful submission,
15 because, with respect, the court's approach has been
16 influenced by hindsight.

17 Before February 2020, the parties will have been
18 familiar with local authorities closing down premises
19 because of rats or bad drains, and what has happened is
20 that the court has squeezed in the unprecedented events
21 of this year, despite the fact that there are clear
22 indications in this clause that that is not what these
23 parties objectively intended.

24 My Lords, that's all I want to say about Hiscox 4
25 and I want now to turn to grounds 1 to 4 of our appeal,

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1 causation and the counterfactual under all the Hiscox
2 clauses assuming that cover is triggered.

3 I now assume that a complete peril exists and the
4 question — when we talk about causation here, we're
5 talking about the relationship between the completed
6 peril and the loss and it's in that context that the
7 counterfactual questions arise.

8 My Lords, we don't need to spend any time on the
9 principles. The court below unequivocally applied
10 a "but for" analysis in Hiscox's case at judgment 278
11 {C/3/114} quite rightly. It's agreed that the question
12 is not what the principles are, but how they should be
13 applied. As my learned friend Mr Edelman says in
14 paragraph 9 of his respondent's case, the question is
15 not whether "but for" but "but for what"? Our answer is
16 that the principles should be applied in the same way as
17 in any other case.

18 The correct approach to the measure of indemnity
19 under the PA clause in the Hiscox policies involves two
20 enquiries. First, analysing the nature of the insured
21 peril. Secondly, in the light of that analysis,
22 constructing the correct counterfactual and comparing
23 that with the situation which the insured is in, and the
24 difference is the measure of indemnity.

25 My Lords, the counterfactual is the mirror image of

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1 the insured peril , and again we find ourselves in
 2 complete agreement with the Hiscox Action Group,
 3 footnote 15, who say that the role of the counterfactual
 4 is entirely dictated by the express terms of the policy .
 5 It is the insured peril , as Mr Kealey submitted to
 6 your Lordships, that is reversed out in the
 7 counterfactual, no more, no less. The authority for
 8 that proposition is Orient—Express, judgment
 9 paragraphs 46 to 47 {E/31/930} and 51 to 52 {E/31/931}
 10 and while I'm on the Orient—Express, just two other
 11 points.
 12 As my learned friend Mr Kealey showed your Lordships
 13 yesterday, there is no rule that one must reject the
 14 counterfactual if it is artificial . It is by definition
 15 a purely hypothetical construct. And again,
 16 Orient—Express clearly stands for that proposition, what
 17 could be more artificial than an undamaged hotel in
 18 a devastated city? Yet the court below expressly
 19 declined to accept our counterfactual on the grounds of
 20 artificiality , judgment 279 {C/3/115} thereby adopting
 21 precisely the argument that my Lord, Lord Hamblen
 22 rejected in the Orient—Express at paragraphs 46 and 47
 23 {E/31/930} of the judgment.
 24 I should also mention — sorry to be straying off
 25 topic — that the Orient—Express directly contradicts

1 the FCA's argument made at some length that trends
 2 clauses are confined to purely extraneous events which
 3 have no connection with the insured peril. The
 4 paragraphs of the judgment in the Orient—Express 48 and
 5 57 {E/31/930} .
 6 So I turn then to the public authority clause and if
 7 we can have it on the screen again {C/6/401} and looking
 8 at this in more detail.
 9 It's a fundamental point, my Lords, that this clause
 10 does not insure against business interruption caused by
 11 vermin, disease, drains, et cetera. In the A—B—C—D
 12 taxonomy adopted in our appellant's case, which I hope
 13 your Lordships have in mind, it is not insurance against
 14 A causing D.
 15 It's odd, then, that the Hiscox Action Group
 16 complains that our construction, impermissibly it says,
 17 is, "we will not cover you caused by X alone where X is
 18 rats, drains, disease". What's wrong with our saying
 19 that? We're back to the 13th chime point in the FCA's
 20 case, which, by the way, is repeated in their
 21 respondent's case at paragraph 454.
 22 Now, the FCA, when it acknowledges that public
 23 authority restrictions imposed are an essential element
 24 of the peril , as we have seen, treats that element as
 25 purely adjectival . It's treated like the radius in the

1 disease clauses .
 2 Well, my Lords, one is tempted to rebut that by
 3 saying: just read the clause. The FCA respondent's case
 4 at 388 and 389 seeks to justify this approach by saying
 5 that the underlying emergency will pre—date the public
 6 authority action and it must be contemplated that the
 7 former could cause loss of its own. Well, two points as
 8 to that.
 9 First , as previously submitted, contemplation of
 10 an eventuality does not imply an intent to cover it .
 11 Secondly, this is where the FCA's confusion of Hiscox's
 12 clause with the express emergency clauses that, for
 13 example, Arch has, is so unfortunate.
 14 In the case of the Hiscox clause, there is no
 15 necessary emerging peril or emergency at all. The whole
 16 thing may occur at the same time with the baleful knock
 17 at the door of the restaurant by the environmental
 18 health officer on a routine visit .
 19 In the typical case, it will be the public authority
 20 action which causes the loss.
 21 Now, two features stand out in this public authority
 22 clause which is on your screens, I hope. We can take
 23 these two features quickly because they are common
 24 ground.
 25 First, this is a composite peril consisting of

1 several elements which must all be present.
 2 Secondly, mere presence of these elements is not
 3 enough. It is not a case of ticking all the boxes, as
 4 the Hiscox Action Group says, paragraph 15 of its appeal
 5 case. The elements are arranged in a particular causal
 6 combination. The FCA agrees with that. Now these two
 7 features have three consequences and this is where we
 8 part company.
 9 First , until you have A causing B causing C causing
 10 D, the insured peril has not occurred. Now, the FCA
 11 agrees with that.
 12 The second step is the crucial one. We submit that
 13 it follows from the first that only in respect of loss
 14 caused by the elements acting in that causal combination
 15 can there be a breach of contract, namely the insurers'
 16 failure to hold the insured harmless against that
 17 combination causing loss. That must follow from the
 18 premises so far , but this is where the FCA has to
 19 disagree or the game is up. But it's wrong.
 20 Therefore, thirdly , for the purposes of the
 21 counterfactual, it is that causal combination and that
 22 loss alone which one reverses out.
 23 Now, loss caused by A—X—C—D is not covered loss and
 24 it's not reversed out in the counterfactual. That is
 25 what happened in the Orient—Express. What was covered

1 there was damage to the hotel causing interruption
 2 causing loss. Let us call that B—C—D. Even if the
 3 court below were right that the hurricane in
 4 Orient—Express was somehow part of the peril, that gives
 5 us A—B—C—D. It still does not mean that loss sustained
 6 due to damage elsewhere in New Orleans is covered
 7 because that would be A—X—C—D. Likewise here loss
 8 caused by the consequences of COVID not amounting to
 9 restrictions imposed is not covered whatever that is.

10 The next point is this: although the insured peril
 11 is composite and has several elements, it is not
 12 axiomatic that each element has equal weight. Whether
 13 this is so or whether the clause has a predominating
 14 element is a matter of construction. It matters because
 15 identifying the core of the insured peril demonstrates
 16 the scope of the indemnity and the appropriate
 17 counterfactual.

18 If the public authority action is the centre of
 19 gravity of the clause, it must be fallacious for the FCA
 20 to say in its 13th chime point that the parties intended
 21 that the insured recover for losses that would have been
 22 incurred even without the public authority restrictions .

23 Now, the FCA in substance agrees that searching for
 24 the essence of the peril is the right sort of question.
 25 It just gives a different answer. As I said, it

1 originally called the clause a disease clause, which was
 2 pure question begging, but its case is — and the
 3 references are in our appeal case paragraph 37 — its
 4 case is that the essence of this clause is as
 5 an insurance against rats, drains, et cetera. That is
 6 what it calls the insured event. I'm quoting from its
 7 skeleton below, as I say I've given your Lordships the
 8 reference. They say that the purpose of that
 9 condition — sorry, that's the insured event. They say
 10 the public authority action is simply a condition that
 11 has to be fulfilled to trigger cover, the cover being
 12 cover for rats and drains. And they say the purpose of
 13 that condition, it's in the same paragraph, is to ensure
 14 (1) that cover is only triggered by a serious case of
 15 rats and, secondly, to enable the insured to prove its
 16 claim.

17 Now, my Lords, we say this is not difficult . This
 18 is not a case of insurance against rats provided only
 19 that there's public authority action. It's an insurance
 20 against the stated consequences of public authority
 21 action provided that the reason is one of the things
 22 enumerated in clauses (a) to (e).

23 Now, we deal with this in our appellant case
 24 paragraph 34, which I have to take as read, but one can
 25 test the matter in this way. If we can go back to the

1 clause itself , what's the reference? {C/6/401}, thank
 2 you.

3 One can test the matter in this way. These
 4 sub—clauses (a) to (e) make clear that not all
 5 restrictions imposed by public authorities will trigger
 6 cover but only those imposed for the reasons identified .
 7 If those sub—clauses were not present, there could be no
 8 doubt that the maximum ambit of the indemnity was for
 9 the consequences of restrictions imposed. But (a) to
 10 (e) qualify the public authority action which is within
 11 the cover. They circumscribe the insured peril making
 12 clear that it only responds to a subset of all possible
 13 causes of restrictions imposed.

14 The presence of these limitations , therefore, cannot
 15 have the effect of expanding the peril or changing its
 16 character and since disease is not a peril in its own
 17 right, but, rather, its presence in the clause
 18 identifies the type of restrictions imposed, it cannot
 19 be right in principle to require Hiscox to indemnify the
 20 insureds for all losses flowing from it as if it was the
 21 independent peril which it isn't. So the FCA's
 22 construction turns the clause on its head in the way and
 23 for the reasons I have indicated.

24 Now, what happened below? The first thing that
 25 happened in the court below, my Lords, is that we made

1 these submissions and the court did not address them,
 2 and we would respectfully submit that that was the
 3 court's first mistake.

4 And it led to its second, which was to analyse the
 5 peril as one which merely required the presence of the
 6 constituent elements, rather than loss flowing from
 7 their causal combination. That error is explicit in the
 8 penultimate sentence of judgment paragraph 278
 9 {C/3/114}, where one has a few lines up:

10 "What the insured is covering itself against is, we
 11 consider, the fortuity of being in a situation in which
 12 all those elements are present."

13 So, in other words, in our probably rather tiresome
 14 illustrations , the court treated it as a case of
 15 adjacent tiles rather than superimposed tiles. Both of
 16 those errors, my Lords, led to the third error which is
 17 a supposition that the clause requires the stripping out
 18 of the outbreak of COVID, or the epidemic of COVID, in
 19 its entirety. That cannot be right for reasons I've
 20 already indicated, because COVID is not the
 21 insured peril and Hiscox is not in breach of contract as
 22 regards the consequences of COVID but only, to simplify
 23 the peril for the sake of clarity , in respect of loss
 24 caused by public authority restrictions consequent upon
 25 COVID. We never promised to hold the insureds harmless

1 for all loss flowing from the first element in the
2 causal chain, so how can that be the measure of damages
3 for our breach of contract?

4 In other words, the public authority restrictions
5 are like the damage requirement to the hotel in the
6 Orient-Express. They act as a filter, which makes clear
7 that it is not necessarily all the loss flowing from the
8 underlying cause which is covered but only some of it.
9 How much will depend on the facts.

10 The court's fourth error, my Lords, was to think
11 that our analysis wrongly leaves the disease in the
12 counterfactual and therefore fails to recognise that the
13 disease is an essential element. That was the court's
14 reasoning at 279 {C/3/115} but we recognise that the
15 disease is a necessary element, but it is not the
16 predominating element, as I have indicated -- my learned
17 friend and I disagree about that -- and we do strip it
18 out of the counterfactual but only to the extent that it
19 causes restrictions imposed.

20 Now, I'll come back, time permitting, but I think it
21 should permit, to the games which the FCA plays with
22 this submission in paragraphs 431 to 433 of its
23 respondent's case but I'll do that in a minute, if
24 I may.

25 The fifth error of the court below was to move away

1 from contractual construction to supposed problems of
2 proof -- and I need to spend a little time on this --
3 which were said to arise on Hiscox's construction
4 because that's what the court did in paragraphs 280 to
5 282 {C/3/115}. Now this is actually rather a bold thing
6 to do.

7 To fashion a counterfactual which is not the mirror
8 image of the insured peril, which it should be, because
9 otherwise the cover is "illusory" from the insured point
10 of view. What was the evidence that that was so on
11 Hiscox's construction? My Lords, there was none. There
12 is none. It's just the FCA's say--so.

13 Moreover, as far as the court was concerned, on
14 an extreme and doubly contrived example of a restaurant,
15 the sort of business with, by the way, 95% of Hiscox's
16 policyholders have nothing to do with, a restaurant,
17 one, overrun by rats; two, through no fault of the
18 owner, your Lordships may remember they migrated from
19 a nearby building site; and three, which is first
20 voluntarily closed and then compulsorily closed,
21 a special feature of my learned friend's example
22 deliberately included in order to obscure an otherwise
23 apparent trend. Now, let me spend a little more time on
24 these supposed difficulties of loss.

25 What the court has done without any evidence or

1 concrete foundation to ascribe to the parties a distinct
2 prospective intention to abdicate any attempt to work
3 out what loss was caused by the actual insured peril and
4 what loss would have incurred anyway on the basis that
5 they must have assumed in advance that the problem of
6 quantification of loss would be so difficult in
7 a business interruption insurance of all things that the
8 normal rules governing the measure of indemnity should
9 be discarded. There is no basis for this.

10 My learned friend for the
11 Financial Conduct Authority asserts without any
12 grounding that proof of the losses caused by the public
13 authority restrictions is impossible. It's a word he
14 uses many times: for example, respondent's case 459.
15 Not only is that not evidence, it's wrong. Now, this is
16 important.

17 Could we look at it, please, in the FCA's
18 respondent's case 450 {B/10/475}. The account of how
19 loss adjusting would take place in the present
20 circumstances is one that Hiscox simply does not
21 recognise. It bears no relation to reality and I will
22 demonstrate this with a simple case.

23 A restaurant is ordered to close on 21 March. It
24 reopens on the first available day in early July. The
25 FCA's question is: how can you tell what part of the

1 loss during the lockdown is due to public authority
2 closure and how much to the other effects of COVID,
3 assuming no closure? You can't, it says. So the
4 restaurateur should have 100% of his loss. The court
5 agreed.

6 Now, the obvious metric that the loss adjuster in
7 that example would no doubt propose is this: look at its
8 performance before it was made to close. Look at its
9 performance after it was allowed to reopen. What is the
10 problem with treating those numbers as a good
11 approximation of the loss caused by COVID as opposed to
12 the loss caused by the enforced closure?

13 Now, we are not after perfection here, my Lords.
14 The trends clauses in the Hiscox policies and many
15 others just say that the ascertainment of the position
16 has to be "as near as possible" to the position had the
17 peril not occurred. There's no difficulty here, my
18 Lords. May I tell your Lordships what the difficulty
19 is? The difficulty is in understanding how the FCA can
20 say that a business whose turnover went down to 30% of
21 normal in March and was 25% of normal when it was
22 allowed to reopen in July, can claim 100% of its normal
23 turnover in between the two on the grounds of some
24 supposed impossibility of extricating the effect of
25 closure and the effect of COVID at large.

1 My Lords, that is the complete answer to this whole
2 area of the FCA's case and no doubt we will hear from my
3 learned friend his explanation for why it is that he has
4 apparently seriously told your Lordships that his
5 estimate is that the claimants' loss adjuster or the
6 claimants' expert would have to produce a 2,000-page
7 report to prove loss. That's paragraph 454. He'll no
8 doubt explain why, the sort of approach I have outlined,
9 which is -- well, there's no evidence on this case, my
10 Lords, on either side.

11 So there are two answers to this paragraph 450
12 point. First, stripping out all the effects of COVID
13 after the peril is triggered will clearly over-indemnify
14 the insured and, secondly, the supposed inextricability
15 does not exist.

16 Then, my Lord, my learned friend, on a bit of a roll
17 at paragraph 454, invites the supposition that each
18 small or medium-sized enterprise insured with a low
19 limit will have to retain its own loss adjuster and
20 presumably its own expert producing that 2,000-page
21 report. That is also unrealistic. All the Hiscox
22 policies in this case contain arbitration clauses and I
23 can tell your Lordships, because the Hiscox Action Group
24 have chosen to put this into the public domain in
25 a press release, the fact that Hiscox has agreed to

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1 consolidate the members of the action group's 384
2 individual claims before a single panel of three
3 arbitrators reviewing four categories of policy.

4 It's also the case, of course, that the Financial
5 Ombudsman Service will also no doubt hear claims and he
6 or she, whoever it is, has a jurisdiction to take
7 a rough-and-ready approach based on -- and I'm quoting
8 from FSMA section 228 -- what is "fair and reasonable in
9 all the circumstances of the case."

10 And no doubt with low aggregate limits, that's
11 exactly what everybody would expect.

12 So in the circumstances of this pandemic, taking my
13 learned friend's favourite example of a restaurant,
14 where's the difficulty? Where's the insuperable
15 difficulty? Where is the difficulty that is so great
16 that the parties have torn up the rulebook when it comes
17 to constructing the counterfactual?

18 Now, what then happened below -- and luckily
19 I haven't got time to go into this a great deal -- is
20 that the parties traded -- your Lordships will have seen
21 this from the case -- cases involving food poisoning and
22 cases involving rats, and something rather unkind is
23 said about our food poisoning example. I must rise
24 I think to this fly at least. It's paragraph 392.3 of
25 my learned friend's case where he says that my example

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1 of somebody who is food poisoned and complains to the
2 authorities who close down the restaurants, where is the
3 problem with loss being caused by the closing down?

4 That example is criticised on the basis that I have
5 dodged, that's my learned friend's word, rather unkind,
6 dodged the case of the customer complaining to the
7 restaurant. No, I haven't. Let the customer complain
8 to the restaurant. Let the owner of the restaurant
9 report himself to the local authority. He's hardly
10 likely to close himself down voluntarily when one person
11 has complained of food poisoning in his restaurant. But
12 let the authority close him down. That has to happen
13 even on my learned friend Mr Edelman's case. All the
14 loss of trade will typically be caused by the closure,
15 and if a disgruntled customer has gone on social media
16 a week before the closure to publicise the episode, any
17 resulting downturn may be brought into the calculation
18 which is exactly consistent with the part of the
19 judgment that my learned friend Mr Edelman does not
20 like, namely the conclusion that the court reached in
21 relation to the pre-trigger downturn where it held that
22 it was legitimate to take into account the depressing
23 effect of the gathering storm or in this case Twitter
24 storm.

25 There is nothing wrong, my Lord, of Hiscox citing

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1 an example where the underlying cause would not have
2 affected the business such as Legionnaires' disease or
3 a suicide or a local measles outbreak. My learned
4 friend recognises that in these cases there would be no
5 difficulty in the insured proving his loss, so what he
6 says is that these are "outlying cases". That's
7 paragraph 393 {C/3/143}. Well, my Lords, I'm sorry but
8 who says? This is pure assertion, as so much of this
9 section of my learned friend Mr Edelman's case is.

10 Then we get the rat example which apparently
11 impressed the court. If we can get away from
12 contrivances involving building sites. There are two
13 possibilities here: either the rats or the cockroaches
14 or the mice are in the kitchen and customers don't know
15 about it. Well, the occult rat problem will lead in
16 casu to closure by the public authorities. No problem
17 in the insured proving his loss. Or, in the
18 alternative, the rat problem is known to customers,
19 amazingly the rats are in the public areas of the
20 restaurant.

21 In this case, it's not unreasonable to suppose that
22 the natural human antipathy to rats will depress
23 turnover before the public authority closure and that
24 decline would provide an approximation of the effect of
25 rats without public authority closure, thereby enabling

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1 the insured to prove the additional effect of the public
2 authority action.

3 My Lords, if I had time I would say other things
4 about my learned friend's examples, but just, as it
5 were, summarising here and then I've got maybe one or
6 two further areas I just need to deal with, the court
7 was over—impressed by the supposed difficulties of proof
8 which were an important part of its reasoning in
9 paragraph 281. My learned friend, encouraged by that,
10 keeps saying that modelling and proof remain impossible,
11 but there's no evidence of it.

12 Of course, he helpfully also reminds us that
13 Lord Mance in his book on insurance disputes says that
14 intangibles and hypotheticals are the very stuff of
15 business interruption insurance. He cites that in his
16 appellant's case, paragraph 6 and there's no getting
17 away from that.

18 The last point here perhaps — almost the last
19 point — is that this all presupposes that the burden is
20 on the insured, that's expressly assumed in judgment
21 paragraph 281, despite the fact that we expressly
22 recognised below that although it will depend on the
23 facts, once the elements of the clause have found to be
24 proven and loss has prima facie been shown to result,
25 the evidential burden may in a given case shift to the

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1 insurer to prove that the loss would have occurred
2 anyway. My learned friend, paragraph 459 of his
3 respondent's case contains no answer.

4 Fortunately, I have no time to waste on
5 *The Silver Cloud*, a decision which the court below
6 rightly regarded as a case on its own facts and really
7 the exercise of crowbarring the finding of
8 inextricability on the facts of that case into the facts
9 of this one goes well beyond the legitimate use of
10 authority.

11 My Lords, all I need to do now is just deal with my
12 learned friend's, as it were, teasing points on our
13 counterfactual in paragraphs 431 to 433.

14 Shorn of rhetoric, he raises two questions. First,
15 what does Hiscox mean by taking out "disease" insofar as
16 it causes restrictions imposed; and, secondly, which
17 restrictions imposed are taken out for the purposes of
18 the counterfactual? I will deal with the first
19 point first.

20 In the PA clause the restrictions must follow, i.e.
21 be caused by, in some sense, the disease and then the
22 restrictions must cause inability.

23 So as far as the insured peril is concerned, it is
24 the causal effect of the disease which is covered and
25 nothing else. That causal effect is the function of the

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1 disease and the clause, restrictions not caused by (a)
2 to (e) are not covered. The disease, therefore, needs
3 to be removed insofar as it causes the restrictions
4 imposed. That's not the same as removing the whole
5 pandemic, whatever paragraph 433.3 says. And if my
6 learned friend reminds himself of paragraph 421, he will
7 see that in relation to Arch he recognises that that's
8 not the effect of the argument.

9 Equally, and more importantly perhaps, contrary to
10 433.1, this does not involve working out what lower
11 level of disease might have been just sufficient to
12 cause relevant restrictions. Nothing as complicated as
13 that. With great respect, my learned friend is making
14 complications which don't exist. It arises because my
15 learned friend misunderstands our use of the expression
16 "insofar as" and implies that we're using the expression
17 quantitatively when we are using it causatively.

18 A similar point is in 433.5.

19 Lastly, my Lords, restrictions. What restrictions
20 are stripped out of the counterfactual?

21 The restrictions imposed, which are relevant to the
22 insured, are those which produce an inability to use the
23 insured's premises. Any other restrictions imposed are
24 irrelevant to the insured peril.

25 Taking the 26 March regulations, regulations 4 and 5

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1 are capable of being restrictions imposed.

2 Now, the example of something called a nail salon,
3 which was ordered to close by regulation 4 and
4 schedule 2, part 2. For a nail salon, the relevant
5 restrictions is regulation 4. It's not the whole of the
6 regulations. It's not the other regulations. They are
7 not a restriction imposed relevant to the nail bar.

8 Regulation 4 applies to all nail bars. Unlike the usual
9 case of rats or drains, this is not a case of
10 a restriction aimed at a single premises; the
11 restriction applies to all premises of a certain type.

12 So that restriction, which gives rise to
13 an inability to use the insured's premises is the one
14 that is removed for the counterfactual. That means you
15 don't remove the entire regulations, contrary to FCA 432
16 and 433.4. You don't assume in the counterfactual that
17 the insured's nail bar is the only nail bar open,
18 because the restriction applies to all nail bars, contra
19 FCA 432.2. Therefore, in the counterfactual all nail
20 bars are open and there is no question of windfall
21 profits. Contra FCA 433.3.

22 Now, in this part of the case the FCA seeks to set
23 up hard questions for the loss adjuster, but it is
24 simply a question of the court or tribunal deciding what
25 as a matter of construction is the relevant restriction

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1 imposed? The possibility of argument about what the
2 relevant restriction imposed is is a legal argument that
3 does not help the FCA's case. In any case such as this
4 one, there can be debate about the ambit as a matter of
5 law of the insured peril .

6 Accordingly, the possibility of debate over the
7 ambit of the insured peril exposes no conceptual flaw in
8 our analysis . If there is a dispute in any given case,
9 the legal tribunal will decide what are the relevant
10 restrictions imposed and the loss adjuster will then
11 deal with the consequences.

12 My Lords, those are my submissions, unless I can
13 help your Lordships any further.

14 LORD REED: Thank you very much, Mr Gaisman.

15 We now turn to the last of the counsels on behalf of
16 the insurers , Mr Lockety QC for Arch Insurance.

17 Mr Lockety.

18 Submissions by MR LOCKEY

19 MR LOCKEY: My Lords, good morning. Arch's appeal raises
20 issues of causation at the stage of the quantification
21 of loss where a prevention of access
22 business interruption extension has been triggered. In
23 the taxonomy used in this litigation , Arch is not
24 a disease clause insurer , nor a hybrid clause insurer ,
25 it's a prevention of access insurer .

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1 The relevant Arch policy contains a number of
2 non-damage business interruption extensions, only one of
3 which is relevant for these proceedings: the government
4 and local authority action clause, or GLAA,
5 (extension vii) which your Lordships will find at
6 {C/4/226} starting at page 226.

7 At 226 on the right-hand side you'll see under the
8 heading "Clauses", you'll see the stem language which
9 refers to and introduces the individual non-damage
10 business interruption extensions, and you will note the
11 language used "resulting from" at the end of the
12 introductory words before clause 1 "Prevention of
13 access". We can ignore 1 and 2 and we can skip over 3,
14 the disease clause.

15 Extension 3 does not apply in the present case
16 because there was a closed list of notifiable diseases
17 in the Arch policy which did not include COVID-19. So
18 we can ignore clause 3 for present purposes, although
19 its terms may be of relevance on the FCA's appeal on
20 ground 3 and we can look at that in due course if we
21 have to.

22 So if we turn the page to 227, your Lordships will
23 find at 7 {C/4/227} the relevant clause, the government
24 and local authority action clause, and obviously the
25 focus is upon the first three lines . It is clear , we

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1 would respectfully suggest, from its terms that it's not
2 every prevention of access to the premises which will
3 trigger this extension. To qualify, there must be a
4 prevention of access to the premises which is the result
5 of government or local authority action or advice, which
6 in turn is the result of an emergency of the requisite
7 type and the required sequence is set out in the clause
8 itself .

9 If my Lords turn back to pages 224 and 225 in C,
10 tab 4 {C/4/224}, {C/4/225}, the policy contains
11 provisions for the calculation of the indemnity for
12 business interruption losses and it's common ground that
13 these apply to the non-damage extensions as well as to
14 the standard business interruption cover which applies
15 where there has been damage to property with the word
16 "Damage", with a capital D, replaced throughout with the
17 language of the relevant insured peril under the
18 non-damage business interruption extensions. We explain
19 these provisions in our written case at paragraphs 13 to
20 25 and I don't have time to develop those points orally .

21 The key provisions are the indemnity in respect of
22 the loss of gross profit , which you will see on 225 at
23 the top of the right-hand column {C/4/225}.

24 The amount payable will be:

25 "in respect of reduction in turnover the sum

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1 produced by applying the Rate of Gross Profit to the
2 amount by which, due to the Damage, the Standard
3 Turnover exceeds the Turnover during the Indemnity
4 Period."

5 Then, if one turns back to {C/4/224}, at the foot of
6 224 in the right-hand column, we have the Arch trends
7 language, the trends clause under the definition of
8 "Standard Turnover", and I just ask you to note the
9 terms of the Arch trends clause there set out and it
10 continues at the top of 225 {C/4/225} in the left-hand
11 corner, closing with the words:

12 "The adjusted figures will represent, as near as
13 possible, the results which would have been achieved
14 during the same period had the Damage not occurred."

15 Now, my Lords, Arch's position as to when and in
16 what circumstances the GLAA clause was triggered was
17 accepted by the court at paragraphs 309 to 336 {C/3/122}
18 of the judgment. I'm not going to ask you to look at
19 that. You will no doubt read and reread that in due
20 course.

21 That position is reflected in the order made
22 following the trial . I'm not sure that anyone has
23 actually referred your Lordships specifically to this
24 document. Obviously, it forms the heart of the appeal,
25 the declarations which were made following the trial,

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1 and it's {C/1/8} and if you look at pages 8 and 9, at
 2 paragraph 14.4 and 14.5, you will see, so far as the
 3 trigger of coverage under the Arch policy is concerned,
 4 that the position was set out in paragraphs 14.4 and
 5 14.5 essentially as Arch had argued in the court below.
 6 In short, and summarising what is set out in 14.4
 7 and 14.5, and more generally in paragraphs 309 to 336
 8 {C/3/122} of the judgment, the court held that there was
 9 a qualifying prevention of access to the premises only
 10 for those businesses who were advised or required to
 11 close their premises by the government in late
 12 March 2020 as a response to the pandemic, the emergency
 13 for the purposes of the GLAA clause.
 14 That was the position which Arch had already taken
 15 in its dealings with its policyholders. Arch has
 16 accepted throughout that for certain classes of
 17 business, the GLAA extension has been triggered and the
 18 issue has been one of quantification, and Arch's appeal
 19 raises an issue of causation or issues of causation in
 20 that context where the policy has been triggered.
 21 Now, my Lords, in those paragraphs of the judgment
 22 which deal with policy trigger, the court held correctly
 23 that the pandemic, the emergency in the GLAA extension
 24 was not the insured peril. That's paragraph 309.
 25 And at paragraphs 328 and 329 {C/3/127} of the

1 judgment, the court also held, again we say correctly,
 2 that the social distancing advice and regulation 6 of
 3 the 26 March 2020 regulations, the direction that people
 4 were to stay at home unless they had a reasonable excuse
 5 for leaving, those regulations and that advice did not
 6 prevent access to insured premises for the purposes of
 7 the GLAA extension, and that conclusion is reflected in
 8 paragraph 14.5(b) of the declarations.
 9 So the key issue on Arch's appeal is whether, in
 10 adjusting claims where there has been a relevant
 11 prevention of access, Arch can seek to remove loss which
 12 the business would have suffered in any event by reason
 13 of the emergency and its economic consequences, even if
 14 the premises had not been required to close. And the
 15 court below ruled this out as a matter of law and it is
 16 this which our appeal challenges.
 17 The FCA's written case on its appeal acknowledges at
 18 paragraph 7.1 and the reference is {B/2/30} that many
 19 businesses may have suffered a reduction in turnover
 20 because of the emergency during the period after the
 21 policy was triggered, even if there had been no closure
 22 advice or requirement and we would say that in those
 23 circumstances it follows that it was not the
 24 prevention of access which caused that particular
 25 reduction in turnover.

1 But the court's judgment means that that reduction
 2 in turnover is recoverable and we respectfully submit
 3 that something has obviously gone wrong with the court's
 4 analysis, and that is because the GLAA clause clearly
 5 does not provide an indemnity for those losses which
 6 a business would have suffered even without the
 7 prevention of access.
 8 Now, my Lords, we of course all have sympathy for
 9 those running businesses, particularly small and
 10 medium-sized businesses, which have been severely
 11 impacted by the effects of COVID-19. But
 12 an expansionist approach to the construction of
 13 insurance clauses and to causation is not, we would
 14 submit, an appropriate or principled solution, nor is it
 15 one which is likely to be satisfactory in the long run.
 16 Ultimately, the question of what cover has been granted
 17 is dictated by the terms of the policy and not by
 18 reference to what may or may not have been reasonably
 19 foreseeable.
 20 My Lords, the FCA makes the point in its written
 21 case that the GLAA extension contemplates the existence
 22 of an emergency which could have many effects for
 23 a business beyond prompting government action which
 24 causes the prevention of access to the premises. And
 25 that may well be right, but that does not mean that one

1 should read the policy as if it said that all the
 2 effects of the emergency will be insured if access to
 3 the premises is prevented by government action taken in
 4 response to the emergency.
 5 We would respectfully submit that the policy clearly
 6 provides that it's the economic effects on the business
 7 of the prevention of access to the premises which are
 8 covered, not the economic effects on the business of the
 9 emergency in the round.
 10 The effect of the court's judgment -- and I will
 11 show you the relevant declarations in moment -- is that
 12 Arch is prevented from seeking to adjust claims on the
 13 basis that some or all of its policyholders would not
 14 have realised all or some of their expected gross profit
 15 even if the premises had not been closed, and that those
 16 businesses would have suffered a loss of gross profit in
 17 any event even if they had remained open because of the
 18 economic effects of the pandemic, including the
 19 reductions in footfall caused by regulation 6, the
 20 instruction to stay at home, and the social distancing
 21 guidelines, and other matters such as the general lack
 22 of consumer confidence and the economic recession
 23 brought about by the pandemic, none of which are
 24 insured perils. If you've still got the declarations
 25 order open, my Lords, can I just direct your attention

1 to the particular declarations of concern in this
 2 context. Declarations 11.1 and 11.2 {C/1/6} and in
 3 particular 11.2(b) for the Arch clause. These
 4 declarations prevent Arch —
 5 LORD REED: I'm sorry, could you remind us of the bundle and
 6 page number?
 7 MR LOCKEY: I am sorry, my Lord.
 8 LORD REED: Not at all.
 9 MR LOCKEY: It's {C/1/6}.
 10 LORD REED: Thank you very much.
 11 MR LOCKEY: Declarations 11.1 and 11.2(b). And, my Lords,
 12 those declarations prevent Arch from arguing by
 13 reference to the turnover in fact achieved by a relevant
 14 insured business in the months following the reopening
 15 of their premises when the business continued to be
 16 affected by the emergency and its economic consequences
 17 that the gross profit during the profit of closure would
 18 have been lower than the gross profit achieved over the
 19 same period in 2019, even if the premises had remained
 20 open, because of the wider effects of the emergency.
 21 And declarations 11.1 and 11.2(b) also rule out as
 22 a matter of law Arch's ability to point to evidence that
 23 businesses which were not required to close their
 24 premises from late March until early July 2020 suffered
 25 a reduction in turnover compared to the same period in

1 2019 because of the economic effects of the pandemic and
 2 the reduction in consumer footfall as a result of the
 3 emergency or the stay-at-home advice and regulation 6.
 4 We managed to salvage something on causation below
 5 in declaration 11.4(c), which is the subject of ground 1
 6 of the FCA's appeal: the pre-insured peril downturn
 7 point. But declaration 11.4(d), qualifying 11.4(c),
 8 precludes Arch from arguing or showing that a pre-peril
 9 downward trend in turnover due to the emergency would
 10 have accelerated during April, May and June 2020 even if
 11 the premises had not been required to close.
 12 So, my Lords, one asks, perhaps rhetorically: how
 13 did the court fall into error? And, in our respectful
 14 submission, it is an error in construing the GLAA
 15 clause. The court's judgment on the quantification
 16 issue starts at paragraph 337 in {C/3/129}. And the
 17 court's main conclusions, insofar as Arch is concerned,
 18 are at paragraphs 345 through to 348.
 19 Now, my Lords, the court did not set out the policy
 20 provisions for the calculation of an indemnity, and they
 21 proceeded instead — as you will see from 337, the court
 22 proceeded straight from dealing with which policies were
 23 triggered for which categories of business to the trends
 24 provision. They proceeded straight from examining the
 25 question of coverage to an analysis of the trends

1 clause, and the court appears, at least in this part of
 2 the judgment, to have concluded that the requirement for
 3 "but for" causation — and, as I said, we're here
 4 concerned with quantification and not with whether the
 5 peril has operated, we're here concerned with the
 6 quantification — the court appears to have concluded
 7 that the requirement for "but for" causation arose
 8 because of the trends clause and not otherwise.
 9 Now, my Lords, I accept that the point may be
 10 academic, because we do have a trends clause, but we do
 11 submit that the court below was in error if, as appears
 12 to be the case, it assumed that the requirement for
 13 "but for" causation only arose because of the presence
 14 of the trends clause. And we would submit that even in
 15 the absence of a trends clause, a policyholder whose
 16 premises have been closed because of government action
 17 is not entitled to claim a loss of gross profit which
 18 the policyholder would not have made if the premises had
 19 remained open.
 20 But be that as it may, the trends clause is present
 21 in the Arch policy and the FCA accepted, and the court
 22 found, that it mandates the application of
 23 a "but for" test of causation at the quantification
 24 stage.
 25 At paragraph 347 of the judgment {C/3/132} the court

1 held that the comparison required was with the
 2 hypothetical performance of the business as if there had
 3 been no emergency and thus no government actions or
 4 advice, including the social distancing advice and
 5 regulation 6, and that, in those circumstances, the
 6 rather — that Arch's case should be rejected.
 7 Arch's case in summary was, and it remains, that the
 8 appropriate counterfactual involves assuming that the
 9 insured peril did not operate. And the assumption is
 10 therefore that the premises remained open and that the
 11 relevant part of the regulation requiring that category
 12 of business to close its premises is assumed not to have
 13 been made.
 14 By the court's application of what it regarded as
 15 the "but for" the insured peril test, what the court
 16 below has done has in fact treated the emergency as
 17 being an insured peril once the GLAA clause has been
 18 triggered, and that, we would respectfully suggest, is
 19 just wrong.
 20 The effect of the court's conclusion is to widen the
 21 indemnity in the GLAA clause from one which covers the
 22 consequences for the business of the access to the
 23 premises having been prevented to one which covers all
 24 the consequences for the business of the emergency
 25 during the period when the premises are required to be

1 closed, and we say that that involves a substantial and
 2 impermissible rewriting of the GLAA clause. And we
 3 submit it's simply not possible to read the GLAA
 4 extension in the way in which the court read it. The
 5 court below appears to have concluded that each of the
 6 steps in the chain of causation set out in the GLAA
 7 clause takes effect as individual insured perils once
 8 the causal sequence is in place and the insured peril
 9 has operated. But that's simply not what the clause
 10 says.
 11 Labelling the clause as a composite peril, as the
 12 court did, does not improve the analysis. That label
 13 has no fixed legal consequences. And, more generally,
 14 as a matter of general principle there is no principle
 15 of insurance law or of contract law damages that
 16 requires the "but for" counterfactual to assume not just
 17 the non-operation of the insured peril or the breach of
 18 contract, but also the absence of everything in the
 19 causal chain which leads to it. And the court does
 20 appear to have thought that there was a general
 21 principle to this effect at least in insurance law, and
 22 I say this because of the court's reference to the
 23 insured peril in the Orient-Express and the court's
 24 opinion that the cause of the damage in that case was,
 25 to quote, at paragraph 526 of the judgment {C/3/177} --

1 perhaps I can ask you to look at that -- that the cause
 2 of the damage in that case was an integral part of the
 3 insured peril. The last sentence of 526 and then 527:
 4 "On the basis that the hurricanes were an integral
 5 part of the insured peril, we consider that when it came
 6 to the construction of the trends clause, the judge
 7 should have concluded that the words: 'had the Damage
 8 not occurred' meant that the counterfactual was one
 9 where both the damage to the hotel and the hurricanes
 10 and their effect generally were to be stripped out."
 11 Well, we would respectfully submit that there is no
 12 principled basis for arriving at that conclusion, that
 13 the cause of the operation of an insured peril is to be
 14 stripped out as part of the counterfactual.
 15 So far as the Arch policy is concerned, if one turns
 16 back to 346 and 347 in the judgment {C/3/131}, the court
 17 thought that the manipulated trends clause compelled the
 18 assumption that there was no emergency. And you will
 19 see this at paragraphs 346 and 347 of the judgment.
 20 At 346, the court set out -- we've seen on
 21 (inaudible) the policy itself at {C/4/224} -- the trends
 22 clause manipulated so as to incorporate, in place of the
 23 words "the Damage", "the insured peril under the GLAA
 24 clause". And we have no beef with the exercise of
 25 manipulation which is there engaged in. But what the

1 court then concludes in paragraph 347 is that it follows
 2 that upon the true construction of the Arch policy
 3 wording the comparison requires the removal of
 4 everything, including the emergency. But, with respect,
 5 it plainly does not follow. The unmanipulated trends
 6 clause in the ordinary case of accidental damage does
 7 not require an assumption that whatever has caused the
 8 damage to occur did not occur. And the position in this
 9 respect is identical, I would respectfully submit, to
 10 the analysis in the Orient-Express case, and in
 11 particular at paragraph 46.
 12 The language of the manipulated trends clause
 13 likewise does not lead to the conclusion which the court
 14 reaches at 347. If one asks on the language of the
 15 manipulated trends clause: but what is it that one
 16 assumes did not occur? It is simply the qualifying
 17 prevention of access. The plain language of the
 18 manipulated trends clause simply does not call for
 19 an assumption that the emergency has not occurred.
 20 Now, although the court does not say so in terms,
 21 the court does appear to have accepted that the trends
 22 clause only applies to matters which are unconnected to
 23 the insured peril. But no such limitations can be read
 24 into the Arch trends clause or indeed any of the other
 25 trends clauses in this case. The Arch trends clause

1 refers to any trends or circumstances, and the word
 2 "any" is hardly a promising start for a submission that
 3 there are limits on what may be a trend or circumstance.
 4 And we would respectfully point out that there's nothing
 5 in the language of the trends clause which says that
 6 something which is not an insured risk but which is part
 7 of the causal chain which leads to the operation of the
 8 insured peril cannot constitute a relevant trend or
 9 circumstance when it continues to have separate causal
 10 effect after the insured peril has operated. In other
 11 words, separate from its effect as part of the causal
 12 chain leading to the operation of the insured peril.
 13 Now, we have been treated -- I use the word
 14 advisedly -- to an examination of the textbooks on
 15 business interruption insurance by the FCA, but there's
 16 nothing -- when one looks at those extracts, there's
 17 nothing in those books which suggests that there is some
 18 rule that a trend or circumstance must be unconnected
 19 with whatever it is that has caused the peril. When the
 20 books refer to trends or circumstances as being
 21 something which is extraneous to the insured peril, the
 22 authors are making the obvious point that the
 23 insured peril is not itself a relevant trend or
 24 circumstance, and the authors are simply not addressing
 25 the issue which arises in the present case.

1 My Lords, finally, a word or two on inextricability
2 and practicality. Can I invite your Lordships'
3 attention to paragraph 348 in the judgment below
4 {C/3/132}.

5 My Lords, the court was of the view that its
6 conclusion on the counterfactual accorded with
7 commercial and practical reality, and that there was
8 an inextricable link between the various elements of the
9 insured peril.

10 Now, my Lords, it's not clear what the court meant
11 by "inextricability" in 348. The peril, the prevention
12 of access by reason of a government order to close in
13 response to the emergency, is obviously related to the
14 emergency which prompts the government order. But the
15 emergency had economic effects and, indeed, continues to
16 have economic effects quite apart from the government
17 action or advice which required closure of the premises
18 in March 2020.

19 We know, from the assumed facts, that some
20 businesses were suffering losses caused by the emergency
21 before the closure orders. We know that the emergency
22 continued to have adverse economic effects for many of
23 the businesses which remained open and which were
24 permitted to remain open between April and July 2020.
25 And we know that premises that were required to close

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1 were permitted to reopen generally from 4 July 2020, but
2 the emergency and its economic effects continued beyond
3 the date when they were permitted to reopen and, indeed,
4 continue to this day. And these points clearly
5 demonstrate that there is no inextricability between the
6 emergency and the prevention of access.

7 Separating out losses from the closure — separating
8 out losses caused by the closure from the other effects
9 of the virus which are uninsured is a matter of
10 adjustment and, as Mr Gaisman reminded you, adjustment
11 exercises are often far from straightforward where one
12 is seeking to establish trading results.

13 As the Orient—Express award recorded, all claims for
14 business interruption raise hypothetical issues, and
15 whilst the tribunal would acknowledge that the
16 evaluation required on the facts of the present dispute
17 is more difficult than most, this cannot affect what is
18 the correct approach in principle.

19 And, my Lords, there was certainly no accounting or
20 adjusting evidence before the court which would support
21 a finding of impracticality, and the declarations which
22 rule out attempts to adjust the loss in accordance with
23 what we say is the true position under the contract are
24 simply wrong as a matter of law.

25 My Lords, I have reached the conclusion of all that

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1 I propose to say orally. I obviously adopt what's set
2 out in our written case. Unless your Lordships have any
3 questions for me, that is all I propose to say.

4 LORD REED: Well, thank you very much, Mr Lockey.

5 At this stage in the appeal we turn to the response
6 on behalf of the Financial Conduct Authority, whose
7 counsel making the submissions will be Mr Edelman QC.

8 Mr Edelman, it scarcely seems worthwhile inviting
9 you to begin now, so we'll adjourn just now, but clearly
10 we'll take account of the fact that you're starting
11 a quarter of an hour later than had been scheduled.

12 So we'll adjourn for just now and resume at
13 2 o'clock.

14 (12.59 pm)

15 (The luncheon adjournment)

16 (2.00 pm)

17 Submissions by MR EDELMAN

18 LORD REED: So we turn now to the submissions on behalf of
19 the Financial Conduct Authority and Mr Edelman QC.
20 Mr Edelman.

21 MR EDELMAN: I am grateful, my Lord. I'm assuming also that
22 Lord Briggs is not at this stage appearing on video, and
23 so I will invite him to interrupt me as and when he
24 wishes for any questions he wants to ask.

25 My Lords, can I just start with a short foray into

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1 the background, since Lord Briggs is now here on video,
2 and can I start with the statutory background and the
3 Public Health (Control of Diseases) Act 1984 bundle G,
4 {G/36/245}, perhaps remembering what this actually says,
5 because this tells us something about the nature of the
6 disease risk. It is difficult for me. Of course if we
7 were in court I'd know you had it before you.

8 Section 13(1) provides that the Secretary of State
9 can make regulations under:

10 "(a) with a view to the treatment of persons
11 affected with any epidemic, endemic or infectious
12 disease and for preventing the spread of such diseases."

13 LORD REED: I'm sorry, Mr Edelman, can you just remind me
14 where you've taken us? I'm afraid I lost a few words
15 that you were saying.

16 MR EDELMAN: My Lord, it's {G/36/245}.

17 LORD REED: Thank you very much.

18 MR EDELMAN: And it's section 13 of the 1984 Act.

19 LORD REED: Yes, thank you.

20 MR EDELMAN: That's the source of the regulation—making
21 powers which applies to epidemic or endemic or
22 infectious diseases and it's to prevent — for their
23 treatment and to prevent their spread. While we're in
24 the bundle, it's perhaps worth turning forward to
25 page 251 {G/36/251} which are the sections which were

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1 added in 2010, with effect from 2010, to regulate
2 international travel at 45B. At 45C: "Health
3 protection regulations: Domestic" in sub-paragraphs 3
4 "Regulations under subsection (1) may... include in
5 particular provision ..."

6 And if we go to page 252 {G/36/252} we can see:
7 "Imposing or enabling the imposition of restrictions
8 or requirements on or in relation to persons, things or
9 premises in the event of, or in response to, a threat to
10 public health."

11 And those can also include special restrictions .

12 So that is the statutory background to this. Now,
13 if I turn to the history of the development of the
14 disease, and for that purpose if we could please go to
15 bundle {C/48/1988}. So it is bundle C, tab 48,
16 page 1988. There was another copy of this in our
17 submissions.

18 This is the map, if you have it, which shows how the
19 reported cases -- and I emphasise this is just reported
20 cases -- how those spread across the country during the
21 course of March. And it is a critical document in
22 understanding what this pandemic was all about because
23 we all hear about it, but this is the spread of reported
24 cases across the United Kingdom starting on 2 March, the
25 first map. Then 9 March, the second. Then 16 March,

1 when the government -- the Prime Minister made his first
2 announcement -- and then 23 March and you can see
3 there's only North Devon by then is the only place
4 without a reported case.

5 You can obviously also see that certain parts of the
6 country were hit more comprehensively first, but this
7 was a national epidemic and this would have been the
8 picture that the government and its scientists were
9 seeing. And that, we submit, of itself demonstrates
10 that there was one indivisible national epidemic, as the
11 court rightly found, and if you divide up the outbreak
12 into just reported cases, it's quite apparent that each
13 case has made its own equal or roughly equal
14 contribution to the overall picture.

15 But, of course, behind the reported cases,
16 particularly at that early stage of the disease, was
17 a swathe of unreported cases. Now, the parties couldn't
18 agree that the models that the government had relied on
19 were reliable, as insurers wanted to check
20 their reliability, so I don't rely on these as to the
21 actual level of under-reporting because insurers wanted
22 to contend that the actual level was or might be lower,
23 but what the parties did agree is reported in this same
24 bundle at page 1929 {C/48/1929} and it's at
25 paragraph 41. This is the language the parties were

1 able to agree:

2 "The actual presence of COVID-19 in the UK in
3 March 2020 would have been much higher than was
4 reflected by the number of Reported Cases. However, the
5 extent of the difference between the number of Reported
6 Cases and the actual number of people infected with
7 COVID-19 is not agreed."

8 But just so that you can see what the estimates
9 actually were, if we go to the next page {C/48/1930}
10 this just gives you a sense of the order of magnitude,
11 I'm not relying on these as accurate figures, but just
12 as a sort of ballpark as to where the government
13 scientists were putting this.

14 At paragraph 44:

15 "Imperial College report estimated that 2.7% of the
16 United Kingdom's population had been infected with
17 COVID-19 as at 28 March 2020."

18 In paragraph 45:

19 "Applying the 2.7% infection rate estimated by the
20 Imperial College Report (the correctness, accuracy and
21 reliability which is not agreed) to the UK population of
22 66 million--odd, the number of people infected would be
23 [a fraction under 1.8 million]."

24 Then if we go to the Cambridge analysis, which is
25 referred to in paragraph 47 and one useful illustration

1 is on the next page at 1931 {C/48/1931}, which is having
2 a look at the East of England.

3 You can see they did projections as to the curve of
4 the development of the pandemic and they had a lower
5 median and upper range, you can see on the graph, and
6 the median range was that, at 21 March 2020 in the east
7 of England region, that's essentially the East Anglia
8 area and around there, 89,000 cases.

9 As I emphasise, though, the precise numbers are not
10 critical for this appeal but they demonstrate, we
11 submit, the obvious and agreed fact that it was not just
12 reported cases but what the spread of reported cases was
13 telling you about the level of infection in the country
14 that was material. Some point below was made about the
15 fact that the infections -- a lot of the reported cases
16 were in care homes and of course overlooking the fact
17 that the infection had to get into the care homes.
18 Somebody brought it in and it would be those working or
19 visiting -- working in or visiting a care home.

20 So unsurprisingly, with what has proved to be
21 a highly contagious disease, on top of the reported
22 cases based on the limited testing being done in
23 March 2020 and the death data was a known unknown, if
24 you'll excuse that phrase, of very substantial numbers
25 of people who had become infected and who had infected

1 or were capable of infecting others.
 2 This is reflected in the minutes of the Scientific
 3 Advisory Group for Emergencies, SAGE, and we can stick
 4 with the C bundle, if you've got that PDF or file still
 5 open, and that is at {C/27/1773}. I just want to show
 6 you some very brief passages there.
 7 If we start with this at {C/27/1773} is 13 March.
 8 If we just go to the middle of the page, the situation
 9 update. This is paragraph 6:
 10 "SAGE is keen to make the modelling and other inputs
 11 underpinning its advice available to the public and
 12 fellow scientists .
 13 "There are probably more cases in the UK than SAGE
 14 previously expected at this point, and we may be further
 15 ahead on the epidemic curve, but the UK remains on
 16 broadly the same epidemic trajectory. The change in
 17 numbers is due to the 5–7 day lag phase in data
 18 availability for modelling."
 19 That had progressed, if we move forward to 1778
 20 {C/28/1778} on 16 March we have at the top of the page:
 21 "On the basis of accumulating data, including on NHS
 22 critical care capacity, the advice from SAGE has changed
 23 regarding the speed of implementation of additional
 24 interventions .
 25 "SAGE advises that there is clear evidence to

1 support additional social distancing measures be
 2 introduced as soon as possible."
 3 And then there's a situation update:
 4 "London has the greatest proportion of the UK
 5 outbreak. It is possible that London has both community
 6 and nosocomial transmission (i.e. in hospitals).
 7 "It is possible that there are 5,000–10,000 new
 8 cases per day in the UK (great uncertainty around this
 9 estimate).
 10 "UK cases may be doubling in number every 5–6 days.
 11 "The risk of one person within a household passing
 12 the infection to others within the household is
 13 estimated to increase during household isolation from
 14 50% to 70%."
 15 Then if we move forward to 1803 {C/31/1803}, which
 16 is 18 March. Just over halfway down the page it gives
 17 the number of cases in the UK. Then at 10:
 18 "The UK is following broadly the same exponential
 19 growth rate of cases as Italy, and there is consistency
 20 with patterns in other countries.
 21 "There is uncertainty on our exact position, but the
 22 consensus view is that we are 2–4 weeks behind the
 23 epidemic curve in Italy .
 24 "Assuming a doubling time of around 5–7 days
 25 continues to be reasonable, but this is before any of

1 the measures brought in have had an effect; these
 2 measures are likely to slow the doubling time even if
 3 there is still an exponential curve."
 4 Then at 1837 {C/36/1837}, 23 March, the last of the
 5 minutes I'll be showing you, a situation update at 7 —
 6 I should say:
 7 "7. The data suggests that London is 1–2 weeks
 8 ahead of the rest of the UK on the epidemic curve.
 9 Case[s] ... in London could exceed NHS capacity within
 10 the next 10 days on the current trajectory .
 11 "The accumulation of cases over the previous
 12 two weeks suggests the reproduction number is slightly
 13 higher than previously reported. The science suggests
 14 this is now around now 2.6–2.8."
 15 That's the R number we've heard so much about
 16 recently .
 17 "The doubling time for ICU patients is estimated to
 18 be 3–4 days."
 19 This was summed up and you've seen this quoted in
 20 our submissions and in the judgment in the subsequent
 21 statement that the Secretary of State for Health
 22 and Social Care, Matt Hancock, made and it's at
 23 page 1858 {C/41/1858} and this was in April. He said:
 24 "There was a big benefit, I think, as we brought in
 25 the lockdown measures, of the whole country moving

1 together. We did think about moving with London and the
 2 Midlands first, because they were more advanced in terms
 3 of the number of cases, but we decided that we are
 4 really in this together, and the shape of the curve, if
 5 not the height of the curve, has been very similar
 6 across the whole country. It went up more in London but
 7 it's also come down more, but the broad shape has been
 8 similar, which is what you'd expect, given that we've
 9 all been living through the same lockdown measures."
 10 And he goes on to talk about the R level, and he
 11 says in the last three lines:
 12 "... although the level of the number of cases is
 13 different in different parts, the slope of the curve has
 14 actually been remarkably similar across the country, so
 15 that argues for doing things as a whole country
 16 together."
 17 And, my Lords, going back now to 1988 {C/48/1988},
 18 the maps. As I pointed out, you can see that by
 19 16 March the reported cases, again I stress just the
 20 reported cases, were virtually everywhere in the
 21 country, and by 23 March, the only exceptions, I pointed
 22 out, was North Devon and one has to remember that with
 23 reported cases one is very much looking at the tip of
 24 the iceberg, because, of course, for every reported case
 25 there will be countless unreported cases which may be

1 symptomatic or asymptomatic.
 2 Now, the insurers with disease clauses rely on this
 3 presentation of the disease to say that no individual
 4 reported or known or unknown case anywhere in the
 5 country was a "but for" cause of the government action,
 6 which of course must be true, because if you've got huge
 7 numbers of people in the country infected with the
 8 disease, you can take one away and it's not going to
 9 make a difference. And so, therefore, they say none of
 10 their policies respond even though they cover the
 11 disease risk.

12 Now, for those with 25-mile radius clauses, just for
 13 illustrative purposes it's useful to look at the next
 14 page, 1989 {C/49/1989}, tab 49. This is just
 15 an indication of 25-mile circles in the country. Of
 16 course it's just fitting the country into 25-mile
 17 circles. Someone on the coast will have a chunk of
 18 their 25-mile radius in the sea, which is Mr Kealey's
 19 trawler example which he gets so excited about as being
 20 the entire answer to the case. What might happen on
 21 a trawler off the Scilly Isles.

22 But it does show, firstly, how large the 25-mile
 23 radius actually is. It's 2,000 square miles, just
 24 under. But it also demonstrates the artificiality of
 25 the points that these insurers are taking, because what

1 they're saying is that the government was reacting to
 2 the national picture and not any particular part of the
 3 pandemic and if you select any one circle and assume no
 4 COVID cases within it, they say that there would have
 5 been no or reduced intervention in that area, but the
 6 government, they say, would have -- no cases in that
 7 area, but the government would still have acted and
 8 there would still have been an effect on the economy,
 9 the business in the area would still have been
 10 interrupted.

11 So you can say, for example, the circle centred on
 12 Peterborough and it's surrounded by a circle centred
 13 near to Leicester and a circle in East Anglia, a circle
 14 taking in London and all around it, but if it so
 15 happened that in that Peterborough circle there were no
 16 cases, they would say that means, on their "but for"
 17 hypothetical, you assume no cases in that Peterborough
 18 circle, the government would still have acted because
 19 the whole of the surrounding area was infected with the
 20 disease, unless of course there was some magic
 21 impermeable barrier which meant that the disease
 22 couldn't cross the circle, which of course as we know
 23 isn't true.

24 Then they say that for each of these circles, any
 25 circle you go to, they say "well, you assume there's no

1 disease in that circle, but disease in all the other
 2 circles, the government would still have acted", and so
 3 no policy in the whole country pays even though each one
 4 of them has countless numbers of cases of COVID within
 5 the 25-mile radius.

6 Of course, if you have a one-mile radius you have
 7 far more circles, but the same point arises.

8 Now, of course an irony of insurers' submissions is
 9 if the outbreak started in one of these circles, for
 10 example as a result of individuals bringing the disease
 11 back from a foreign trip and it's initially addressed
 12 locally, there is cover caused for business interruption
 13 caused by those local measures. But on insurers' case,
 14 the minute the disease outbreak spreads so it is both
 15 within and outside the locality and more extreme
 16 measures are taken, either regionally or nationally,
 17 then suddenly insurers are no longer liable to
 18 indemnify; they are free of any insurance obligation
 19 because the "but for" test can no longer be satisfied
 20 for that particular circle. Because now what's
 21 happening in that circle is being caused as much by
 22 disease outside the circle as it is by disease inside.

23 What do insurers with composite insuring clauses
 24 say? They say, well, if you take out government action
 25 or prevention of access or something else and they can't

1 really decide between themselves what you take out, but
 2 I'll come back to that and they've changed their case on
 3 what you take out with monotonous regularity, they say
 4 you still have a national pandemic which would have
 5 interfered with or interrupted the business and if the
 6 government hadn't acted and so, again, no or very
 7 limited indemnity is payable.

8 So they again say although their clauses refer to
 9 outbreaks of disease or emergency, they say, "Ah, but
 10 the fact is you have the emergency. So even if we take
 11 things out you still have the disease or the emergency",
 12 and not one single policy in the country pays any
 13 indemnity by reference to the government action because,
 14 it's said, you would have lost that money anyway or you
 15 would have lost a very significant chunk of it.

16 But of course we have to recognise the reality that
 17 the government only acted as it did because of the
 18 national pandemic and those composite policies required
 19 the action of the authorities to have been prompted by
 20 an outbreak of disease or emergency. So what they are
 21 doing is trying to escape liability by reference to the
 22 underlying cause of that government intervention which
 23 the policies themselves contemplated and required.

24 It means that the more serious the underlying cause
 25 of the government intervention in those policies, which

1 it would have to be to attract national government
 2 action, the less cover there is or even no cover at all.
 3 Now, of course this court may find that it is driven
 4 to these extraordinary conclusions by the application,
 5 and, we would say, the inappropriate and slavish
 6 application of a "but for" test, but they would be, we
 7 submit, extraordinary conclusions to draw and the
 8 answer, we say, is to be found in the true construction
 9 of the disease clauses or, alternatively, a true
 10 application of causation and the correct identification
 11 of the composite peril in those other policies and the
 12 correct application of the trends clauses in those
 13 policies.
 14 But one aspect of the case which is perhaps the one
 15 that has attracted the most attention in relation to the
 16 law but also below was the focus of insurers' case is,
 17 of course, the causation issue and in particular the
 18 role of "but for" causation in insurance and the way in
 19 which the "but for" test under the trends clauses falls
 20 to be applied. And before I turn to the construction
 21 case on the policies, it may be convenient to deal now
 22 at this stage in an individual section with the
 23 causation issues that have been argued by Mr Kealey and
 24 others and that will of course take in the arguments on
 25 the trends clauses.

1 At the heart of their case has always been
 2 Orient-Express -- and I appreciate obviously members of
 3 this court were involved in that decision -- but it
 4 needs, in our submission, to be revisited. The topic
 5 has perhaps, I hope, attracted more attention in this
 6 case and has attracted more thorough attention from
 7 those arguing the case than it did in that case.
 8 Obviously Mr Schaff, when he appeared at first
 9 instance, was hidebound by the way in which the case had
 10 been argued below because he could only -- "I had to
 11 identify errors of law in the court's reasoning" and so
 12 he was constrained by the way in which the case had been
 13 argued below. So that is an important reminder as to
 14 the limitations on the decision in Orient-Express that
 15 the argument was conditioned by that.
 16 Now, we have dealt extensively with the
 17 Orient-Express judgment in our case and because time is
 18 short, unless the court wishes me to have, I hadn't
 19 intended to simply repeat the arguments that we've made
 20 in writing. What I want to do is just to highlight some
 21 points that we say Mr Kealey has overlooked and the
 22 judgment overlooked in dealing with the issues.
 23 Firstly, Mr Kealey overlooks, as with respect does
 24 the judgment in Orient-Express, that the definition of
 25 the word "damage" in the policy actually encompassed its

1 cause. It was defined -- and I think you've seen this
 2 before -- as "damage except as excluded herein."
 3 That is part of the definition and we say that that
 4 is shorthand for damage caused by any peril insured
 5 under this policy, because it was an all-risks policy
 6 and therefore "damage except as excluded herein" means
 7 damage by whatever fortuity unless it's an excluded
 8 fortuity.
 9 That is consistent and it's unsurprising and it's
 10 consistent with the standard requirement of
 11 business interruption cover on the basic damage element
 12 that the damage should be insured damage. And it is
 13 always a precondition of business interruption cover for
 14 material damage that the damage is covered either by
 15 that insurance, and it usually is the same insurance,
 16 but some policies also permit the damage to be covered
 17 by some other policy.
 18 Secondly, and perhaps, therefore, Mr Kealey wrongly
 19 approaches and Orient-Express wrongly approached
 20 business interruption cover in respect of damage as if
 21 it was a stand-alone form of cover. And that perhaps is
 22 because it is -- I won't say misleadingly, but where it
 23 can lead into error is that it is usually in a separate
 24 section of the policy. But one has to understand what
 25 the genesis of business interruption cover was and our

1 textbook extracts which are referred to in our case
 2 demonstrate and common sense demonstrates that what this
 3 is in reality is no more -- when it's applied to
 4 damage -- is no more than an extension of the scope of
 5 the indemnity for the damage caused by the insured peril
 6 so as to encompass consequential loss.
 7 You'll have seen references in the textbooks to the
 8 19th-century authorities that rejected claims by
 9 policyholders for their consequential loss following
 10 damage to their property by an insured peril, and the
 11 court said, no, the ambit of the indemnity is only the
 12 value of the property that's been damaged and not your
 13 loss of profits arising from your loss of use of the
 14 property because it's been damaged.
 15 The courts made that clear, that that was the
 16 limitation on property damage insurance. So,
 17 unsurprisingly, a market developed for cover for that
 18 consequential loss and if one views it that way, one
 19 understands entirely why the insured peril that causes
 20 the damage is part of the peril for the
 21 business interruption insurance. In fact, you'll see in
 22 the authorities we cite that what this was originally
 23 called was consequential loss cover and its label of
 24 business interruption cover comes in sometime later, but
 25 it's the same thing. It's just given a different

1 description and the earlier description would have given
2 a greater clue to what was actually being done here in
3 insurance policies .

4 But if you wrongly identify the peril in the
5 business interruption cover as being only damage rather
6 than damage and its cause, you end up with the
7 remarkable state of affairs that in the absence, for
8 example, of a prevention of access or loss of attraction
9 clause there would be no cover at all for
10 business interruption loss in circumstances where, as in
11 Orient–Express, the hotel was closed for two months for
12 repair because of hurricane damage in circumstances
13 where the hurricane itself had caused wide area damage
14 which would have prevented people from coming to the
15 hotel.

16 Although in Orient–Express, but I'll come back to
17 the point, the court drew comfort from the fact that
18 there was this additional cover, the logic of the
19 conclusion is if that cover had not been there, there
20 would have been no indemnity at all. The answer being
21 the worse the storm that damages the hotel, the less
22 cover you have, which is, in our submission,
23 counter–intuitive and contrary to the essential purpose
24 of insurance and that's really what insurers are
25 complaining about. They're saying, well, we insured

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1 perils but not ones that were going to cost us a huge
2 amount of money. We never contemplated that. Well,
3 that isn't an answer.

4 Now, my third point is to escape the logic of the
5 reasoning in the case of —

6 LORD REED: Mr Edelman, if I can interrupt, Lord Leggatt has
7 a question.

8 MR EDELMAN: Yes, I'm sorry.

9 LORD LEGGATT: The fundamental problem, as I saw it and
10 still see it at the moment in the Orient–Express case,
11 Mr Edelman, was that the cover, although you could say
12 the insured peril encompassed the hurricane, it only
13 covered property damage to the hotel caused by the
14 hurricane and interruption from that. It didn't cover
15 interruption caused by damage to other properties around
16 the city .

17 MR EDELMAN: Quite.

18 LORD LEGGATT: Now, I can see, however, that subject to the
19 trends clause, which I know you're going to address, one
20 might distinguish the present case if you're right in
21 your submission that the national restrictions can be
22 seen as a consequence of each individual occurrence of
23 the disease, in which case the interruption has been
24 caused by the occurrence.

25 MR EDELMAN: Well, it is leaping ahead in my notes but

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1 I have no problem with that. The answer to the point my
2 Lord made is this: if one looks at this in terms of
3 proximate causation, you have a hotel that has been so
4 severely damaged that it is closed two months for
5 repair. You also have wide area damage, if I can call
6 it that as a shorthand. There are two concurrent causes
7 of the hotel being unable to accept guests. The first
8 is that it's so severely damaged it needs to be closed
9 for two months for repair. The second is the wide area
10 damage.

11 Now, applying the proximate cause test, is it really
12 to be said that the damage to the hotel is not
13 a proximate cause of that loss of custom? There are two
14 concurrent causes: one insured, one not insured. It's
15 not excluded. It's just, on this hypothesis, simply not
16 insured. Our submission is that, on an orthodox
17 approach to proximate causation, it is sufficient that
18 if a concurrent cause is of equal efficacy, at least
19 equal efficacy, for it to count as a proximate cause and
20 this was of approximately equal efficacy because there's
21 nothing more fundamental to a hotel than the fact that
22 it has to be closed for repair.

23 So on that orthodox basis you have two equally
24 effective causes and the hotel being damaged is
25 a proximate cause. So you then ask yourself whether the

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1 other proximate cause is to be subtracted from the
2 equation and used in a counterfactual under a trends
3 clause, and that's where one comes in to what the
4 purpose of a trends clause is and we would say that when
5 the concurrent cause is in fact something which is
6 inextricably linked with the very peril that has caused
7 the damage, that is not something the trends clause is
8 contemplating.

9 Although I appreciate the court below distinguished
10 Orient–Express, in our submission it is important to
11 understand Orient–Express and, if necessary, identify
12 where it went wrong and, you know, obviously, with as
13 much respect as I can, but I have to say and I do say
14 that it was wrong.

15 It was wrong for a number of reasons. If you follow
16 through the logic of it, and this was a point I was
17 going to come to anyway, which Mr Kealey has yet to
18 grapple with is — adequately anyway — how one
19 rationalised not giving indemnity by reference to damage
20 to the hotel on the basis that the insurers had paid
21 indemnity under two other clauses which related to the
22 external damage. Can I explain this point?

23 Because if one is applying the insurers' beloved
24 "but for" causation as opposed to the statutory
25 proximate cause test, you have a situation where the

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1 claim under all three clauses fails on the
2 "but for" test. But for the damage in the wide area,
3 the hotel still couldn't have had any customers because
4 of the damage to the hotel and vice versa, so none of
5 them pass the "but for" test.

6 But Mr Kealey says, well, it would be a breach of
7 contract for insurers not to pay under one. Well, why?
8 If none of them satisfies the "but for" test, then there
9 cannot be a breach. There can only be a breach if there
10 is an obligation to indemnify because each of them is
11 a proximate cause of the loss.

12 There then becomes another difficulty with
13 Mr Kealey's attempt to extricate himself from I think
14 the decision in Orient-Express from this predicament.
15 Because you then ask yourself: well, if it is a breach
16 of contract if there are three candidates, the hotel and
17 the two clauses that apply to the wide area damage and
18 it is a breach for the insurer not to pay under one of
19 them, why should the insurer have the choice as they
20 elected to choose in Orient-Express to choose the one
21 that is cheapest for them?

22 Ordinarily, if an insured has the benefit of double
23 insurance, the insured has the discretion which to
24 choose.

25 So the answer in Orient-Express ought, on

1 Mr Kealey's analysis, to have been that the insured was
2 entitled to choose and the fact that the insurers had
3 chosen to pay out under the extensions which were more
4 favourable to them because they had a lower limit of
5 indemnity is nothing to the point, because if there is
6 a choice then it's the insured's choice. It can't be
7 the insurer's choice. That really would be heresy.

8 The only way one rationalises this -- and this is
9 why it's important, in my submission, to understand how
10 it is rational -- if you rationalise it on the basis
11 that the primary causation test on the basis that one
12 does the orthodox thing in proximate causation, which is
13 to identify whether something is the or a proximate
14 cause.

15 The other consequence that Mr Kealey failed to
16 address were the arguments we made about the claims by
17 policyholders for windfall profits, and we've set this
18 out in our case and he simply hasn't addressed it. It
19 would mean potentially, if he's right, that if the
20 hurricane or the peril that causes the loss is left in,
21 that each policyholder can claim for the windfall
22 profits of being the only hotel or the only shop in
23 town. And we gave this example in the Cockermouth
24 storms case, where the main street in Cockermouth was
25 taken out by a flood. And if each shop is entitled to

1 say, "well, the hypothesis is that we remained undamaged
2 but the flood was still there," they would be the only
3 open shop in town and, no doubt for that reason without
4 any competition from any other shop, able to charge
5 extortionate prices.

6 It's even more so in the Orient-Express case with
7 a hotel that can charge premium prices for all the
8 construction workers who are now having to come to the
9 area to repair all the damage and it's not just the
10 Orient-Express hotel, every single other hotel in the
11 region would fall to be indemnified on the windfall
12 profit basis because the hypothesis is they are the only
13 hotel left standing in a hurricane-devastated region.

14 Now, the US courts are not noted for being
15 unfavourable to policyholders, but they have balked at
16 that and they have construed trends clauses as including
17 the peril for the very reason that otherwise you get
18 this windfall profit case. As I said, Mr Kealey just
19 simply has ignored that in his submissions.

20 What we submit Mr Kealey also ignored was the
21 pre-Orient-Express consideration in the leading texts on
22 business interruption as to the origin and commercial
23 purpose of trends clauses and how they should be and had
24 in practice been applied into cases of wide area damage.
25 And they addressed both hypothetical facts and the

1 practice of insurers.

2 Now, Mr Lockey in his submissions said that there
3 was nothing which addressed wide area damage in
4 particular and he was wrong about that. If I can just
5 take you to the text on that. It is in bundle G and
6 it's at -- I take you to page 2165 {G/106/2165} and this
7 is sideways on in my hard copy so I hope it's legible
8 for you in yours and not sideways on. It's tab 106 for
9 those with a hard copy.

10 It's an extract from a 1990 book by Hickmott, who is
11 one of the leading authors on business interruption and
12 it's Interruption Insurance: Proximate Loss Issues and
13 I have a hunch that this wasn't referred to in
14 Orient-Express.

15 At the foot of page 27, the second page of the
16 double page copy, paragraph 34, this is under the
17 heading of 32 "Area damage" {G/106/2165}:

18 "... the attitude of the English Courts in insurance
19 cases has to be considered.

20 It is well known that they do not accept technical
21 frustration of policy cover by an unintended exclusion
22 especially if this is not apparent at the time the
23 contract was arranged. The principle of 'good faith'
24 applies equally to the insurers as well as to the
25 insured and this has been made clear by Castellain v

1 Preston ... and Carter v Burn.”
 2 Then he says at 35:
 3 "Appendix A case studies IV and V outlined what is
 4 considered to be the UK market intention of the cover
 5 given and which it is considered would be adopted by the
 6 Courts if it was ever submitted to them."
 7 And if we go to page 2170 {G/106/2170} you'll see
 8 the example he considers is "Hotel and Access Bridge
 9 Damaged by Storm."
 10 Below that it says:
 11 "Own Damage, Area Damage, Parallel Loss, Exclude
 12 Aggravation."
 13 And then you see a diagram which actually shows
 14 a full recovery of income during the period of damage
 15 and reduced income obviously following reopening.
 16 That's explained under (IV):
 17 "The normal case but with widespread area damage
 18 from the same insured peril.
 19 The cover under the policy provides for:
 20 The interruption flowing from the specific insured
 21 peril damage to the insured premises (including customer
 22 effect and aggravation to repair or renovation by the
 23 surrounding general circumstances) on the quantum level
 24 basis of turnover that would have applied had the area
 25 damage not taken place in an indemnity period which

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1 relates to the time that the insured's own damage only
 2 would have affected the trading of the business.
 3 It does not include loss from:
 4 (i) Aggravation of the 'Customer' effect from the
 5 widespread nature of the damage.
 6 (ii) aggravation of the loss beyond the indemnity
 7 period is calculated above from loss of supplies which
 8 are part of the trading activity ."
 9 And if I can skip to (v):
 10 "Aggravation of the loss by order of Public or other
 11 competent Authority beyond that relating to the time to
 12 achieve repair or replacement of Capital assets and
 13 recover trading against the specific insured damage."
 14 So he was unfortunately incorrect in predicting what
 15 the courts would do but certainly seemed to have no
 16 doubt that the intention of these clauses and how the
 17 court would be expected to apply them in accordance with
 18 the purpose of these clauses in a wide area damage case
 19 was to indemnify the hotel for its loss of income during
 20 its period of closure by reference to its normal
 21 turnover figures, but exclude any aggravating factors
 22 other than in the period of delay that the wide area
 23 damage might have in relation to the recovery of the
 24 business from its closure.
 25 What we see from the commentaries on Orient—Express

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1 which are cited in the judgment at paragraph 528 at
 2 page 178 in bundle C {C/3/178} is that part of the
 3 criticism of the Orient—Express decision was that it
 4 wasn't, in fact, in accordance with the practice of the
 5 insurers, and the example was given was how the insurers
 6 had settled the Cockermouth flood:
 7 " ... insurers did not seek to argue that none of the
 8 businesses would recover ... would have been closed and
 9 effectively a building site for approaching six months,
 10 anyway."
 11 And that was the point he made.
 12 Now, of course, subjective intentions I accept are
 13 not relevant but what we're dealing with here is the
 14 commercial purpose of trends clauses, and we submit it's
 15 quite apparent from the textbooks what the commercial
 16 purpose is and it is to deal with the extraneous things
 17 in the world that would have affected the business. The
 18 example that was given in court was the restaurant that
 19 is affected by a fire but the head chef of this
 20 Michelin—starred restaurant had given in his notice
 21 a week before or was about to give in his notice in any
 22 event and did so the week after the fire . Those sort of
 23 unrelated to the peril events. Strikes, lockouts, as it
 24 happened so frequently, fortunately now, but that sort
 25 of thing, which are extraneous to the insured peril .

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1 And that's what that textbook was talking about and
 2 that's how this all developed.
 3 So we don't shrink from saying that Orient—Express
 4 has construed and applied trends clauses without regard
 5 to their true commercial purpose and that also infected
 6 the reasoning on causation, because the judgment of my
 7 Lord, Lord Hamblen on the causation section when one
 8 goes to the reasoning on a number of occasions refers to
 9 the trends clauses as support for applying "but for"
 10 causation at the primary proximate cause stage.
 11 But, in fact, when one has concurrent causes which
 12 are associated with the same peril, the trends clause
 13 isn't dealing with that at all. That's not what it's
 14 there for, and so you can't use the trends clause as was
 15 used in the case as a rationalisation or justification
 16 for applying "but for" to proximate cause.
 17 We gave in our case an example of the Buncefield
 18 explosion — and for those of us who live on the north
 19 side of London will remember being woken up by a large
 20 bang and seeing a huge cloud of smoke — and there was
 21 in fact a warehouse about 800 metres away which was
 22 badly damaged by the explosion and the logic of the
 23 argument that insurers run now and that was adopted in
 24 Orient—Express is that there would be no or very limited
 25 indemnity for that warehouse for its loss of turnover

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1 because of the effects of the explosion on the
 2 surrounding area.
 3 Whereas, if a boiler in the warehouse had exploded
 4 causing either the destruction of the warehouse or part
 5 of it to be destroyed, it would have received a full
 6 recovery. So, in other words, the worse the explosion
 7 that affects the building, the less the cover. And that
 8 is simply not a sensible approach to that causation, and
 9 that's why we say, standing back, the sensible approach
 10 to primary causation, and this is important to insurers'
 11 attempt to introduce "but for" into the proximate cause
 12 stage for all their clauses, so it does have
 13 significance.
 14 Standing back, the correct analysis in
 15 Orient-Express would be that a proximate cause of the
 16 business interruption was the damage to the hotel.
 17 I say "a proximate cause" because it's quite obvious
 18 that there was a concurrent proximate cause of the wide
 19 area damage, but the concurrent proximate cause that is
 20 covered is sufficient to pass the primary causation test
 21 and then the trends clause isn't interested in things
 22 that are associated with the peril that has caused the
 23 damage to the hotel.
 24 Now, as that example in Hickmott explained, that
 25 doesn't mean that you are insured for all of the

1 consequences of the hurricane, and that's never been
 2 part of our case and it is frequently mischaracterised
 3 by the insurers. What we say is -- this is relevant for
 4 in particular the composite cases -- that as that
 5 textbook demonstrates, during the period that the hotel
 6 is closed, you look at what its revenue would have been
 7 in normal times had it been open and you do not take
 8 into account the fact that the wide area damage because
 9 of the hurricane would itself have reduced the
 10 customers. So you don't use the hurricane as a reducing
 11 effect on the loss that is referable to the interruption
 12 attributable to the damage.
 13 That is, we say, the correct approach as a matter of
 14 law and construction to proximate cause and the trends
 15 clauses and it's equally applicable to this case.
 16 Now that leads me on to Mr Kealey's attempt to
 17 support a "but for" test at the primary causation stage
 18 because he needs that to overcome my concurrent cause
 19 argument. He said, well, Mr Edelman's concurrent cause
 20 argument fails at the first hurdle because the first
 21 thing one asks is what would have happened but for the
 22 disease within the policy area?
 23 The authorities he refers to for that proposition,
 24 with respect, do not support it. Endurance doesn't say
 25 anything about "but for", it's merely the basic purpose

1 of an indemnity to make good the loss, but it doesn't
 2 say anything about concurrent causes of loss.
 3 The high-water mark of his submissions appeared to
 4 be was below the Blackburn Rovers case which Mr Kealey
 5 did refer to briefly in his submissions. We've dealt
 6 with it fully in our case. We have explained in our
 7 case why it doesn't support his submissions. He's not
 8 answered them and it's because there isn't an answer
 9 because the court actually did apply proximate cause and
 10 there's a fleeting reference to the "but for" concept in
 11 relation to the question posed by a particularly worded
 12 exclusion. But the court started with and returned to
 13 the proximate cause test and answered it by reference to
 14 that. But, as I say, what we've said in our case is not
 15 questioned.
 16 My Lord, Lord Hodge refers to the "but for" test in
 17 passing in the McCann case. It doesn't appear that
 18 there was any argument about the point. The case didn't
 19 turn on it and we say, with respect, it doesn't reflect
 20 the way that insurance cases deal with it.
 21 One new case Mr Kealey referred to was
 22 Reischer v Borwick, and a passage in the judgment of
 23 Lord Justice Lindley at pages 831 to 833. That case was
 24 about whether the sinking of a ship as it was being
 25 towed to dock for repairs was indemnifiable in

1 circumstances where the vessel had collided with
 2 an underwater hazard and had been temporarily repaired
 3 but that repair failed during the ordinary conditions of
 4 the journey; no perils of the sea.
 5 If you read the judgment, you'll see that
 6 Lord Justice Lindley resolved the issue purely on the
 7 basis of proximate cause holding that the original
 8 conclusion was a proximate cause of the sinking. If you
 9 read the other two judges, Lord Justice Lopes and
 10 Lord Justice Davey, they exclusively refer to proximate
 11 cause. What in reality has happened here is that
 12 Mr Kealey and his legal team have trawled through the
 13 totality of insurance cases on proximate cause looking
 14 for a fleeting reference to a judge using "but for"
 15 language and have said "This is it, this shows you that
 16 'but for' is an essential part of the causation test",
 17 but on analysis the two main cases, the Blackburn Rovers
 18 case and Reischer v Borwick simply do not support it.
 19 LORD LEGGATT: It is fair to say, would it, Mr Edelman, that
 20 the vast majority of the insurance cases the cause is
 21 going to be a "but for" cause, that's the normal
 22 situation. You're then going to be looking for, like in
 23 Reischer v Borwick, how far back can you go for the
 24 insured event still to be a proximate cause? That's
 25 a typical insurance enquiry. So one might find language

1 used that is talking about "but for" just because that
 2 is what the normal situation is and probably what the
 3 facts of any particular case are. It's quite hard to
 4 think of many concurrent cause cases in the insurance
 5 context. It doesn't mean that principle doesn't apply.
 6 MR EDELMAN: Well, certainly Mr Justice Butcher, who was the
 7 author of a chapter on causation in one of the insurance
 8 textbooks, was struggling with the concept that
 9 insurance law has a two-stage test. What we would
 10 submit is that the proximate cause test is the statutory
 11 test and it is applied in a sensible way and that may
 12 mean on the facts of a case that a cause which is not
 13 a "but for" cause fails to be a proximate cause, but the
 14 test remains: is it the, or an, effective cause of the
 15 loss?

16 One has to bear in mind what it is that the insurers
 17 are trying to do. They are trying to defeat my
 18 alternative concurrent cause case by saying that it
 19 fails because of "but for" causation. So they are
 20 trying to introduce it as, in effect, an exclusion,
 21 a sort of Wayne Tank type of exclusion, that isn't
 22 actually in the policy.

23 So that's why one has to understand that it is of
 24 critical importance to insurers' case to elevate the
 25 "but for" test to something which does have this

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1 exclusionary status where that has not been part of
 2 insurance law. Let me give you what I hope is
 3 a recognisable example.
 4 If one has an insured who is facing a number of
 5 claims and only one of those claims is insured but he
 6 incurs defence costs which are common costs in the sense
 7 of commonly incurred for the defence of all of the
 8 claims, an insurance lawyer applying the proximate cause
 9 test would say that the insured claim is a proximate
 10 cause of those costs being incurred and if the other
 11 claims are not excluded claims, you are entitled to
 12 an indemnity.

13 That is what I would call the standard application
 14 of the proximate cause test, and there are authorities
 15 to that effect. That is what happens with defence
 16 costs. It's no answer to say that the insured was also
 17 facing uninsured claims. You can't prorate the costs;
 18 it's all or nothing. But insurers would say but for
 19 the — if you assume that you haven't had the insured
 20 claim against you, you would still be incurring the
 21 costs and on that logic there is no indemnity.

22 But one may understand that that sort of principle
 23 is relevant if you are awarding damages to someone for
 24 an injury they've suffered and they would have suffered
 25 the injury anyway for some other reason, but that is why

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1 you can't import into the law of insurance principles
 2 that are recognisable and applied outside of insurance,
 3 because one is dealing with a different type of
 4 contract. It's a contract that insures against
 5 particular risks occurring and the principle on which
 6 the law has operated is if there are concurrent causes,
 7 one of which is insured and the other one is uninsured
 8 but not excluded, you're entitled to cover.

9 There's a case that we cite in Australia, the
 10 Federal Court of Australia, McCarthy, where the insured
 11 was facing 39 claims by lenders, it was one of these
 12 mortgage cases, but three of them did not involve
 13 allegations of fraud. It did not involve — were
 14 therefore covered by the policy. There's an issue about
 15 whether or not they were excluded.

16 But the insured was entitled to an indemnity for all
 17 of the common costs on the basis that three of them were
 18 insured. And there's nothing unorthodox or surprising
 19 about that, and that of itself demonstrates that
 20 "but for" causation isn't a basic hurdle that an insured
 21 has to cross. You needn't enter into the debate about
 22 whether it is or isn't in the common law for breaches of
 23 tortious or contractual duties, there are arguments
 24 about that and we've cited some authorities which say
 25 that this is all the creation of academics and the

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1 courts don't actually operate that way, but certain —
 2 yes.
 3 LORD HAMBLEN: So the challenge laid down by Mr Kealey for
 4 you, Mr Edelman, was whether there is an example of
 5 a case in the English authorities where proximate cause
 6 is found but "but for" causation could not be satisfied.

7 MR EDELMAN: Well, all the defence costs cases.

8 LORD HAMBLEN: Right.

9 MR EDELMAN: All the common costs, defence costs cases,
 10 because in all of those cases, the costs would have been
 11 incurred but for the insured element of the claim.

12 LORD HAMBLEN: Is there a decision that you can show us to
 13 that effect?

14 MR EDELMAN: I don't think they're in the bundle, but most
 15 recently it was considered by this court in Zurich v IEG
 16 where Zurich was held liable for all of the costs of the
 17 defence of the claim even though on the hypothesis —
 18 this was on the hypothesis it was a Guernsey claim and
 19 so it was only liable for the exposures — it was only
 20 liable to indemnify for the contribution to risk during
 21 its period of insurance.

22 The insured was facing claims for a whole range
 23 of — well, I think it was 27 years of exposure, only
 24 six of which were insured by Zurich. Zurich would have
 25 been entitled to say: well, if but for those six years

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1 when we were on risk having been included in the claim,
2 you would still have incurred these defence costs. So
3 the defence of the claim in respect of those six years
4 was not a "but for" cause of the defence costs.

5 I was thinking of the New Zealand Forest Products
6 case where there were six directors who were being sued,
7 only one of them was insured. I think that may be
8 a different point, I think that was a question of
9 whether it was for the benefit — the insurer had to pay
10 the indemnity even though the costs were also for the
11 benefit of the other directors, but certainly that's
12 been the principle.

13 If the Federal Court applied English law for the
14 purposes of this and it's in the authorities, I'll give
15 you the reference in a moment, but it was applying
16 English proximate cause law to it and it would be
17 startling if the example I gave of six claims — let's
18 say six claims only — one insured, five uninsured, and
19 the insurer to be entitled to say: well, but for the
20 insured claim, you would still have faced the uninsured
21 ones. Because that would be introducing into the policy
22 an exclusion that isn't there. It would be Wayne Tank
23 by the back door.

24 Now, the case I was referring to, the Australian
25 case, was a case called McCarthy.

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1 LORD REED: Lord Briggs has a question for you.
2 LORD BRIGGS: Can you hear me all right?
3 MR EDELMAN: Yes, I can.
4 LORD BRIGGS: Is this possibly an illustration of a wider
5 point about legal tests, such as "but for" causation,
6 that they are good servants but occasionally poor
7 masters?
8 I have in mind that we all used to think that you
9 applied for the purposes of quantifying damage, in
10 contractual cases anyway, a breach date principle but
11 then we all discovered in the SAAMCO case that actually
12 that was a good servant, but there were occasions when
13 it didn't produce the right result because it didn't
14 conform with the underlying principle pursuant to which
15 the compensation was to be awarded, and I'm just looking
16 at "but for" in this insurance context.
17 If the underlying statutory principle is proximate,
18 or whatever you want to call it, effective cause, which
19 admits cover where there is a parallel interdependent or
20 independent, we haven't got there yet, but where there
21 are multiple proximate causes, then in that particular
22 perhaps unusual context, the "but for" test, as a tool
23 in the process of quantification in the trends clause
24 may be a poor master.
25 MR EDELMAN: Well, my Lord, I would submit that

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1 an alternative approach — and there's certainly some
2 support for this from the High Court of Australia and
3 adopted here in the appeal case of Galoo, which we cite
4 in our cases, which is to say that each area of law has
5 its specified causation test and in insurance it's the
6 proximate cause test. It may be very similar in most
7 areas of law, but in insurance it's statutorily codified
8 as the proximate cause test and one has to apply those
9 causation tests sensibly.

10 Applying them sensibly may on occasion involve the
11 application of "but for", but that would be because it
12 was the sensible thing to do in that case. The problem
13 becomes if one had — that's why I accept what my Lord
14 said — the problem arises if one treats the way in
15 which one answers causation questions as involving
16 a series of exam questions, a series of hurdles that
17 have to be overcome, that then leads you into error
18 because you start approaching something which should be
19 a standing back and making an assessment of the facts —
20 has A caused B or was A a cause of B? It stops you
21 doing that and starts you on a series of multiple choice
22 questions, which may not lead you to the correct answer.

23 The reason why we submit that "but for" hasn't
24 featured — it may be there are not many cases on
25 concurrent cause, but even then it hasn't featured as

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1 an element of insurance jurisprudence, is simply because
2 the courts have been able to say well, this is what
3 a proximate cause is and we recognise one when we see it
4 because it will always be a question of fact in each
5 case whether something is sufficient to be a proximate
6 cause. We know what we're looking for, we're looking
7 for something which is the or an effective or dominant
8 cause, it may not be dominant, but can be an effective
9 cause if there's more than one cause. We know what
10 we're looking for and it's just a matter of finding it.

11 It's a case that we submit has rather more
12 significance than the courts gave it and more
13 significance than insurers give it, which is the
14 Silversea decision, sometimes referred to as
15 The Silver Cloud, but I think actually, because it
16 wasn't about a vessel, it should be referred to as the
17 Silversea. That case, as you may have seen from our
18 case, involves the 9/11 terrorist attacks and that is
19 then followed by government warnings and I think at this
20 stage it's important for the court to see the clause
21 that was being applied, so if we could go to that at
22 bundle {E/18/397}.

23 We see that the cover under A(ii) was for:
24 "Loss of anticipated income and extraordinary
25 expenditure incurred ...

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1 "To cover the ascertained net loss result from
 2 a State Department Advisory or similar warning by a
 3 competent authority regarding acts of ... terrorist
 4 activities , whether actual or threatened ... "
 5 So the trigger was "State Department Advisory or
 6 warning", but the context was a warning reacting to
 7 certain things, which included actual terrorist
 8 activities , which obviously 9/11 was.
 9 There were, in fact, a series of warnings and it's
 10 right that of course each warning was dependent on the
 11 occurrence of the terrorist attacks, but the terrorist
 12 attacks necessarily came first and their effect was not
 13 specifically -- was not the final element of the
 14 trigger. It was part of the causal chain, but it wasn't
 15 the final element in the equation.
 16 The attacks themselves would necessarily have had
 17 some effect on the willingness of people to go on
 18 cruises, even if the government hadn't issued warnings
 19 and this has echoes of insurers' "but for" test.
 20 But you can see this being dealt with in the
 21 judgment at page 420, going forward to there {E/18/420}.
 22 Paragraph 67:
 23 "[Insurers'] pleaded case was that any diminution in
 24 business after the 11 September attacks was attributable
 25 either wholly or in overwhelming part to reaction to the

1 attacks themselves, rather than to any official warnings
 2 issued in their aftermath."
 3 Exactly the case that insurers are putting here.
 4 Saying, well, what we insured was the warnings, but the
 5 customers would have stayed away anyway because of the
 6 attacks:
 7 "In support of this case [they] relied on the expert
 8 opinion of Mr Brian Gibbs ..."
 9 You'll see at the end of the paragraph, he said:
 10 "... deterioration and demand... was caused
 11 primarily, as to 80-90 per cent by the terrorist attacks
 12 themselves and only to a much lesser degree, 10-20 per
 13 cent by the State Department Advisories and similar
 14 warnings."
 15 The judge says, Mr Justice Tomlinson:
 16 "From the outset this approach stuck me as
 17 unreal ..."
 18 If we go to the next sentence:
 19 "It is simply impossible ... "
 20 This is where the judge or court below gets it:
 21 "It is simply impossible to divorce anxiety derived
 22 from the attacks themselves from anxiety derived from
 23 the stark warnings issued in the immediate aftermath
 24 thereof. In relative terms very few people will have
 25 had any knowledge of the attacks apart from what they

1 learned of them from the media reporting."
 2 Then it talks about how images of aircraft had
 3 a profound impact:
 4 "... but few people will have watched coverage of
 5 that sort without also being exposed to the warnings and
 6 the media exposition of the warnings which swiftly
 7 followed. Part of the media coverage of the
 8 11 September was the dissemination to the American
 9 public of warnings from the United States Government and
 10 other responsible authorities."
 11 He then continues at the foot of the page in
 12 relation to Mr Gibbs:
 13 "He accepted that it would have been a difficult
 14 assignment to consider 9/11 divorced from the media
 15 coverage of 9/11 ... "
 16 Top of the column:
 17 "However, I think that the logic of that compelled
 18 that conclusion similarly compels the conclusion that it
 19 is impossible to divorce the effect of the warnings from
 20 the effect of the events which they so swiftly
 21 followed."
 22 So impossibility of dividing things up is something
 23 that was taken into account and it was properly taken
 24 into account. He then goes on to say, a few lines down:
 25 "Dr Gibbs acknowledged that there was undoubtedly

1 an interactive effect between, on the one hand, the
 2 attacks and on the other hand, the warnings.
 3 Notwithstanding that interaction he thought it possible
 4 to separate out the different factors and to assign to
 5 them a different weight in terms of their impact on
 6 decision making."
 7 This is an exercise that insurers are suggesting in
 8 this case that loss adjusters would be doing:
 9 "Dr Reddy ... thought that this was not possible and
 10 with genuine respect for his training and experience
 11 I do not consider that I really needed his careful
 12 evidence to lead me to the same conclusion. I am also I
 13 am afraid unable to regard attribution of relative
 14 causal effect in percentage terms as anything other than
 15 arbitrary. Dr Reddy could not understand how those
 16 percentages could be derived and nor can I."
 17 Then he goes on at 69:
 18 "I also note in passing that since, as I find, and
 19 as was common ground between the two experts, the events
 20 of 11 September and the warnings were concurrent causes
 21 of the downturn in bookings, including cancellations
 22 thereof, and since the consequences of the events of
 23 11 September ... are not for the purposes of section
 24 A.ii excluded from the ambit of the cover, as opposed to
 25 being simply not covered, a claim under the policy must

1 lie .”
 2 So what we have here is he’s treated what I would
 3 call the originating concurrent cause, because these are
 4 actually successive concurrent causes. We have the
 5 attack which prompts the warnings, he says the original
 6 attack and the warnings are concurrent causes and
 7 because the attack is not excluded, there is cover. It
 8 does not say, “but I have to apply a ‘but for’ test even
 9 though it’s not excluded and say what would the loss
 10 have been but for the warnings?” Which also supports
 11 our approach on the composite policies.
 12 Now, let’s imagine that there had been a trends
 13 clause in Silversea , as there doesn’t appear to have
 14 been one. Is it really going to be said that the
 15 decision that the court reached on causation is then
 16 undone by the trends clause? That the purpose of the
 17 trends clause is to revisit causation questions that
 18 have already been answered at the primary causation
 19 stage.
 20 We would say self—evidently that is not the purpose
 21 of the trends clause, and that a trends clause would
 22 have made no difference here and the history of trends
 23 clauses and their genesis and the reason for their
 24 introduction makes that plain and also you’ve been shown
 25 some of the trends clauses and you can see that they are

1 all about mathematical calculation.
 2 They’re to help with the precise calculation of the
 3 amount of the loss and to find in clauses which are
 4 looking for calculations of standard revenues, standard
 5 gross profit and so on, defined — and making tweaks to
 6 those figures so they reflect what the reality would
 7 have been. Because that’s what these various clauses
 8 are doing, they’re trying to say what we are trying to
 9 do is recreate the real—world — real, normal world
 10 situation — and that mathematical exercise that those
 11 clauses are focusing on somehow revisits and
 12 reintroduces the causation test. We say it’s just
 13 fundamentally wrong.
 14 We also say that that Silversea is a good example of
 15 causes only — the second cause was dependent on the
 16 first , but they weren’t interdependent. The first cause
 17 was not dependent on the second. That’s why we say
 18 well, actually, it’s not just interdependent, as in
 19 Miss Jay Jay where two causes have together combined to
 20 cause a loss, we have here two interlinked concurrent
 21 causes. It was said in submission that I have no cases
 22 on interlinked concurrent causes. These are interlinked
 23 concurrent causes.
 24 As I say, although one is dependent on the other,
 25 the reverse is not true. The attacks could have caused

1 and were alleged by insurers to have caused significant
 2 losses by themselves, but the court decided they were
 3 interlinked . Their effects were impossible to separate.
 4 They are concurrent causes. The attacks are not
 5 excluded and they are contemplated by the clause.
 6 That’s what takes them outside the trends clause
 7 because, whether you define it as insured peril or not,
 8 semantics, it doesn’t actually matter, it’s the precise
 9 thing that the clause contemplated would be the trigger
 10 for something else to happen and cause loss. It’s the
 11 unusual thing. The out of the ordinary thing. It can
 12 be a 9/11 attack, it can be an emergency, it can be
 13 an outbreak of disease. That is what the clause
 14 contemplates as being the exceptional unusual thing that
 15 will happen that will set in motion a chain of events.
 16 Trends clauses are looking for things that are
 17 normal world things, like the chef leaving, like
 18 a strike somewhere, because they are trying to recreate
 19 the normal rule.
 20 LORD HAMBLEN: So I have an argument, Mr Edelman, can you
 21 give us an example of how you put it on construction
 22 wording?
 23 MR EDELMAN: Yes. Can I give you that? I was going to do
 24 it probably best for — I will take the wording that
 25 Hiscox relies on because it uses the word “restriction”.

1 I’m not going to do what insurers do and take the one
 2 that is easiest for me, as Hiscox and other insurers
 3 tried to do.
 4 So I hope this is going to be a good example. If we
 5 go to Hiscox 1 at — it’s bundle {C/6/380}, which is the
 6 definitions , and the correct page — I just want to show
 7 you where we were in the policy, that’s property
 8 definitions .
 9 If we go to 381 {C/6/381} the gross profit. Gross
 10 profit is:
 11 “The difference between the sum of your income,
 12 closing stock and work in progress and the sum of your
 13 opening stock, work in progress and uninsured working
 14 expenses.”
 15 The definition of insured damage:
 16 “Damage, other than failure... during the period of
 17 insurance provided:
 18 The damage is not otherwise excluded by the
 19 buildings, contents and other property section of this
 20 policy.”
 21 Then we’ve got on the next page {C/6/382} “Uninsured
 22 working expenses.”
 23 Then on the following page {C/6/383} we’ve got the
 24 insurance cover. 383, sorry. We’ve got:
 25 “We will insure you against damage occurring during

1 the period of insurance ..."
 2 We know this is an all—risks cover.
 3 Then we go to page {C/6/399} for the
 4 business interruption cover.
 5 We've got "Additional increased costs of working" to
 6 minimise loss of income. We've got "Increased costs of
 7 working" further down the page.
 8 Then we've got the rate of gross profit on page 400
 9 {C/6/400}. Just showing you the calculations, some of
 10 the calculation methods, to show you what it's about.
 11 What is covered:
 12 "We will insure you for your financial losses ...
 13 [for an interruption] caused by ..."
 14 Number 1 is:
 15 "Insured damage to property."
 16 This is page 400 {C/6/400}. So, as I indicated, the
 17 business interruption is only for insured damage to
 18 property.
 19 Then, if we go forward to page 403 {C/6/403}:
 20 "How much we will pay"
 21 "Loss of income"
 22 "The difference between your actual income during
 23 the indemnity period and the income it is estimated you
 24 would have [received] during that period or, if this is
 25 your first trading year, the difference between your

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1 income during your indemnity period and during the
 2 period immediately prior to the loss, less any savings
 3 resulting from reduced costs ..."
 4 Et cetera. And:
 5 "Loss of gross profit"
 6 "The sum produced by applying the rate of gross
 7 profit to any reduction in income... plus increased
 8 costs of working."
 9 Then at the foot of the page:
 10 "Business trends"
 11 "Provided that you advise us of your estimated
 12 annual income, or estimated annual gross [profit] if
 13 applicable, at the beginning of each period of
 14 insurance, the amount insured will automatically be
 15 increased to reflect any special circumstances or trends
 16 affecting your activities, either before or after the
 17 loss. The amount that we will pay will reflect as near
 18 as possible the result that would have been achieved if
 19 the insured damage had not occurred."
 20 Now, I should say I took you to that because
 21 I forgot that it was one that didn't have restriction.
 22 If we go to 432 {C/7/432}. No, I didn't do that
 23 deliberately, I just miscollected that Hiscox I didn't
 24 have that wording. You'll see the trends clause is:
 25 "... insured damage or restriction had not

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1 occurred."
 2 Now, we say that "insured damage" in that clause is
 3 referable to the definition which you saw (inaudible)
 4 which is, as its word describes, referring to damage to
 5 property which is caused by an insured peril.
 6 So in the Hiscox wording, the need for the peril is
 7 actually introduced into it and where the language
 8 includes also "restriction", the court rightly held that
 9 that was a shorthand for a general reference to all of
 10 the ingredients of the peril and Mr Gaisman has not
 11 developed any submissions to the contrary about that.
 12 You'll have seen that what the court says and what
 13 we have said about that and although his submissions
 14 effectively admit that it can't be just the restriction
 15 itself because he accepts that it's the restriction and
 16 the disease insofar as it caused the restriction.
 17 What we see here is a trends clause which is purely
 18 a quantification exercise and insofar as damage, it's
 19 perfectly clear that our policies refer to "damage" but
 20 it's got to be covered damage, but it's contemplating
 21 the damage that is insured in the sense of caused by
 22 an insured peril. We say that one construes that
 23 policy — that clause — bearing in mind what it's there
 24 to do.
 25 What is it trying to do? Is it reopening — let's

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1 go back to the trends clause. One can see that it is
 2 actually described at the foot of page 403 {C/6/403} as
 3 "Business trends". You know, Mr Gaisman was very keen
 4 on his public authority description. Well, what's sauce
 5 for the goose is sauce for the gander, but I don't need
 6 that because that's what this is doing.
 7 Yes, it referred to special circumstances or trends,
 8 but are special circumstances part of the insured event,
 9 I'm using that as a loose word, the insured contingency,
 10 the insured risk? Is the insured risk a special
 11 circumstance, the occurrence of an element of the
 12 insured risk, or is that looking for something that's
 13 special that's out of the ordinary in the normal world
 14 that would falsify the picture given by the previous
 15 year's figures?
 16 LORD LEGGATT: One possible way of looking at it,
 17 Mr Edelman, that when you're asking what would have been
 18 achieved if the insured damage hadn't occurred, you've
 19 got on a reasonable construction, you say not just to
 20 take out a very narrow view of the insured damage, but
 21 to take out, as it were, what wouldn't have happened if
 22 you hadn't had the insured damage, so to speak. The
 23 inextricably surrounding circumstances.
 24 MR EDELMAN: It's my Buncefield — putting it more
 25 locally — it's the Buncefield explosion point. Do you

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1 just take out the fact that the factory has been
 2 demolished and leave in the explosion, which is utterly
 3 unreal? A warehouse 800 yards away from an exploding
 4 oil refinery — this is what we talk about unrealistic
 5 hypotheses — is somehow miraculously left standing?
 6 LORD LEGGATT: The fact it's unreal isn't in itself a bar.
 7 MR EDELMAN: No.
 8 LORD LEGGATT: The point really is, isn't it, that you want
 9 to put an interpretation on the trends clause that
 10 aligns it with the effects of the insuring clause in the
 11 policy, including the causation element?
 12 MR EDELMAN: That's right. We're trying to make
 13 a coherent framework. We're trying to understand what
 14 this is getting at in that consistently with the
 15 insurance, as what the insurance is aimed at, and so as
 16 to make it a sensible construction. And that involves
 17 certainly — and we've never shied away from this —
 18 a "but for" element, but it's always a question of: but
 19 for what? And is it but for something that is either
 20 the peril that's caused the damage or, in our composite
 21 peril cases, part of the required sequence of things
 22 that must happen? You must have an emergency which must
 23 prompt government action which must prevent access.
 24 The starting point of all that is that you've got
 25 something unusual or exceptional that's happened. It's

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1 the equivalent of a storm, really. A storm can pass you
 2 by without causing damage yet it may cause you damage.
 3 Here you've got an emergency which is such a serious
 4 emergency that it has caused government action which has
 5 prevented access.
 6 Now, when you do have such an emergency that has
 7 created that situation, is the trends clause really
 8 about revisiting any causation test you've done at the
 9 primary stage and say "Oh, now, we didn't — the
 10 causation test was satisfied at that stage, but now
 11 we're going to revisit that and start taking out on
 12 a but-for causation basis bits of the very exceptional
 13 event, the sequence of events that the policy
 14 contemplated"? That doesn't fit with the purpose and
 15 the structure of the policy.
 16 It's not a forced approach to the trends clause,
 17 because it sits very consistently with where the trends
 18 clause sits. It sits in the midst of the accounting
 19 provisions — and I don't want to demean what loss
 20 adjusters would do, but it is the bean counting end of
 21 it (inaudible) where what one is trying to do is to
 22 create a realistic figure for what the business would
 23 have earned. That's what the trends clause is trying to
 24 do, it's just trying to get a realistic figure for what
 25 the business would have earned. But in what

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1 circumstances? We say in the normal world, taking into
 2 account the ordinary vicissitudes of business life that
 3 your key employee might walk out the next day, that
 4 a competitor might open up next door.

5 You may have a fire at a premises and a competitor
 6 had just opened up opposite the week before. Well,
 7 obviously a loss adjuster is going to say "Well, it's
 8 a special circumstance here. Your revenue from last
 9 year is not going to be a reliable indication of what
 10 your revenue would have been in the post-fire period
 11 because you're not comparing like with like, you're
 12 comparing the period without competition to one where
 13 you have competition on the other side of the road".
 14 And that's what the trends clause is doing.

15 To ask it to do more than that is —

16 LORD BRIGGS: Mr Edelman, can I just test your analysis
 17 against a concrete example? I'm assuming you're
 18 applying it to prevention of access clauses as well as
 19 to just plain disease clauses, am I —

20 MR EDELMAN: Yes, indeed.

21 LORD BRIGGS: Well, you must be, I think. Take a travel
 22 agency which sells holidays which are rendered
 23 impossible by government action, but which is then also
 24 closed down by government action in circumstances where
 25 it could probably carry on its business equally well by

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1 its employees all working from home. It's a fairly
 2 extreme case designed to illustrate where, what you call
 3 the originating unusual event, here the epidemic, causes
 4 a business interruption, not because of anything do with
 5 the closure of the premises, but because effectively of
 6 the destruction of the market for the services which
 7 it's in business to sell.

8 Now, how does your analysis, that you had to remove
 9 the whole of the epidemic from the counterfactual
 10 because it's an originating cause of the prohibition of
 11 access that can't be separated from it, work in that
 12 situation where I think a reasonable man would say,
 13 "Well, the cover wasn't intended to cover us from that
 14 kind of market loss"?

15 MR EDELMAN: My Lord, we did deal with this in our case with
 16 a similar analogy when we dealt with the loss of
 17 donation to the church. People might donate by coming
 18 to the church and putting money in the collection box or
 19 there was this other case of someone giving quarterly
 20 donations without coming to the church. And we accepted
 21 that the loss of donations in the person not coming to
 22 the church, because his restaurant had to close down
 23 because of COVID, was not, as it were, access-related.
 24 It's not an access-related loss.

25 Our intention on this counterfactual is to defeat

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1 the case where what insurers are saying is even if your
2 travel agency hadn't been closed, people still wouldn't
3 have come to you because of their fear of COVID.

4 Now, that's the access-related issue and with
5 a travel agency, it may be that they are going to
6 struggle. With other businesses, it's more significant.
7 Anybody selling something, a bookshop, when people can't
8 come to the bookshop and buy books because the bookshop
9 is closed, insurers want to put into the counterfactual
10 that people would not have come to the bookshop anyway
11 because of the epidemic, restrictions in movement on
12 them, or their social distance, whatever. They say the
13 epidemic would have caused those people not to come
14 anyway. That's what we want to exclude from the
15 counterfactual.

16 It is a mischaracterisation of the submissions to
17 say that we want everything in, because the first thing
18 the insured has to do is to prove what it's
19 access-related losses were and what insurers are trying
20 to do is to say, "Well, these may be your access-related
21 losses, but you'd have had those losses anyway, because
22 of the epidemic, people wouldn't have wanted to come to
23 your shop," which is a different question to the one my
24 Lord asked.

25 So I'll stand to be corrected by those instructing

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1 me, but if there was a loss of holidays anyway and
2 that's not access-related, then that will be difficult
3 to see how that is anything to do with prevention of
4 access.

5 LORD BRIGGS: Thank you.

6 MR EDELMAN: But what the insurers try to do, they say ah,
7 Mr Edelman is wanting us to give indemnity for all COVID
8 losses. That's not what I'm submitting. I'm saying
9 when you've got your prevention of access losses, you
10 don't reintroduce the effect that COVID would have had
11 on those access-related losses. It then just becomes
12 a concurrent cause of those insured access-related
13 losses and the trends — because it's the contingency
14 that the policy was contemplating, it doesn't fall to be
15 excluded.

16 My Lord, I think that was what I wanted to say about
17 causation. I have five minutes left, if you're content
18 for me — unless you'd have any more questions about
19 causation. Although I've taken a long time on it, in
20 a sense it answers quite a lot of the hybrid policy and
21 composite peril policy questions, but I'll revert to
22 those if necessary.

23 Just if I can use my last few minutes on saying
24 a few words about infectious diseases. If you're
25 dealing with outbreaks of infectious or contagious

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1 disease, one has to ask: what is one insuring against?

2 Firstly, if you're dealing with something occurring
3 not at the premises but at some distance from the
4 premises, whether it's 1 mile or 25 miles, you are not
5 necessarily addressing something that would have itself
6 directly affected the premises. Rather, you must be
7 contemplating something else happening which affects
8 a wide area and has an effect on the business, in
9 a sense indirectly, most obviously through the reaction
10 of the authorities, but it could also be the reaction of
11 the public. I say "indirectly" because it's not the
12 disease itself that affects you. If something happens
13 in the middle, it's public reaction, authority reaction
14 to the disease that then affects your business. So
15 we're talking about contemplation of indirect effects of
16 the outbreak to its effects on the authorities or third
17 parties.

18 Furthermore, none of the policies that you have seen
19 impose any restriction on the geographical scope of any
20 such reaction, for example, by the authorities. There's
21 nothing that requires or contemplates the reaction to be
22 confined in its effect only to the relevant policy area
23 and it must be contemplating, at least potentially,
24 a wider scope. Now, the critical point for coverage
25 purposes is whether that affects the insured in the way

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1 required by the policy.

2 And, secondly, I think I can just squeeze this point
3 in, part of it anyway: the character of the disease
4 risk. The policies that address the disease risk are
5 confined to notifiable diseases and we've looked at the
6 definition of that. These are diseases that are singled
7 out for special treatment in the public health
8 legislation and in the policies because of the health
9 risks they pose, and because action by the authorities
10 which could impact the business may be necessary to deal
11 with the impact of the disease and prevent or minimise
12 its further spread.

13 At the forefront of these health risks is, of
14 course, the risk of the disease being an epidemic, and
15 I say "at the forefront" because that obviously is the
16 most catastrophic form of the outbreak of the disease
17 that can occur, but that is within the range of the
18 peril that is contemplated by the policies that refer to
19 a notifiable disease.

20 It will be 4 o'clock in about 10 or 15 seconds and
21 I won't have time, I think, for another point, so, my
22 Lords, if that's a convenient moment. It's the end of
23 that sub-point.

24 LORD REED: Yes, certainly. That is a convenient moment.
25 Well, we'll look forward, then, to hearing you further

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1 tomorrow morning at 10.30 am and in the meantime we'll
 2 adjourn.
 3 (4.00 pm)
 4 (The court adjourned until 10.30 am
 5 on Wednesday, 18 November 2020)
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