

OPUS2

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

Day 3

July 22, 2020

Opus 2 - Official Court Reporters

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1 Wednesday, 22 July 2020
 2 (9.57 am)
 3 Hearing via Skype for Business
 4 Submissions by MR EDELMAN (continued)
 5 LORD JUSTICE FLAUX: Yes, Mr Edelman, good morning.
 6 MR EDELMAN: Good morning, my Lords.
 7 I was dealing with Hiscox and I was near the end of
 8 it. I've just got a few topics still left.
 9 The counterfactual. Can I first deal with the
 10 public authority clause. Hiscox analyses this as
 11 a disease -- maybe we ought to have it up on screen; it
 12 is {B/6/42}. They analyse it as A "disease", followed
 13 by B "restrictions", followed by C "inability to use",
 14 causing D "interruption".
 15 Hiscox doesn't merely remove the interruption, the
 16 immediate cause of the loss, if one might say that, in
 17 terms of what the loss is all about, it is all about the
 18 interruption; instead, it removes B plus C plus D, but
 19 not A, the disease.
 20 In other words, it removes government actions,
 21 albeit as applied to the entire country, not merely
 22 insofar as they restrict the premises. And the
 23 skeleton, just for my Lords' reference, their skeleton
 24 at paragraph 330, {1/13/106} says the proper
 25 counterfactual is the same world as we are in, but

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1 without the government actions as are found to be
 2 qualifying restrictions.
 3 We submit that if you are taking out of account for
 4 the purposes of the counterfactual everything down to C,
 5 why aren't you taking D out as well? The only answer to
 6 that, and perhaps we should have a look at this as well,
 7 is their paragraph 346.
 8 LORD JUSTICE FLAUX: It is the other way round, isn't it,
 9 Mr Edelman? If you are taking out B, C and D, why
 10 aren't you taking out A?
 11 MR EDELMAN: Sorry, my Lord, yes. Why not A? Sorry, I got
 12 the letters muddled up in my notes. Yes, why not A?
 13 Their answer is, and this is at paragraph 346 of
 14 their skeleton, it is {1/13/110}, is that this is at the
 15 core of the insured peril. That is how they justify it.
 16 So what they are doing is trying to identify one
 17 thing which they pick on as being the core of the
 18 insured peril, and treating that as something which must
 19 be removed for the counterfactual, but the disease, they
 20 say, isn't the core of the insured peril and so it
 21 remains for the purposes of the counterfactual.
 22 We say that's its assertion, but there is no real
 23 rationale for it. One has, going back to {B/6/42}
 24 please, it is a composite peril. And the entire reason
 25 that the restrictions were imposed in fact, and the

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1 context in which the restrictions are being imposed, as
 2 contemplated by the clause, is the occurrence of the
 3 disease.

4 So why one should subtract that? I quite understand
 5 their point that the disease on its own is not covered,
 6 but neither are restrictions on their own, unless they
 7 are restrictions that follow one of the specified
 8 criteria; and neither is interruption covered unless
 9 there is an inability to use, and inability isn't
 10 covered unless it's restrictions imposed by a public
 11 authority, and the restrictions imposed by a public
 12 authority don't qualify unless they follow the outbreak
 13 of a disease. But it is all part of a package.

14 LORD JUSTICE FLAUX: Yes.

15 MR EDELMAN: Once one gets beyond what is the cause, what is
 16 the overall content of the clause, where does one stop?
 17 Why go as far as the government restrictions but no
 18 further? And if the government restrictions are to be
 19 removed for the whole country, why not the disease for
 20 the whole country?

21 LORD JUSTICE FLAUX: They may say, not in relation to this
 22 wording, but one of their wordings in the trends clause
 23 actually refers to restrictions, doesn't it? Damage or
 24 restrictions have not occurred. Doesn't that relate to
 25 the argument that you made yesterday about, well,

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1 leaving aside the point about this wording, Hiscox 1
 2 wording only refers to "insured damage", which is
 3 a defined term, and in turn "damage" is a defined term,
 4 "accidental physical loss or physical damage" and there
 5 is no hint there of non-damage related extensions. So
 6 your primary case is the trends clause just doesn't
 7 apply at all. But assuming that somehow we manipulate
 8 the wording, your point is that what you don't do is to
 9 take out that, as it were, say, well, the physical
 10 damage to the premises wouldn't have occurred, but
 11 everything else, including what caused it, is assumed to
 12 remain in place.

13 MR EDELMAN: Yes.

14 LORD JUSTICE FLAUX: Ergo, you don't get any business
 15 interruption insurance. It's the Orient-Express point.

16 MR EDELMAN: Exactly, my Lord.

17 But where the wording does refer to restrictions,
 18 there are particular submissions I would make.

19 Firstly, that the use of the word "restriction" is
 20 merely a signpost to the relevant insuring provision.
 21 Because it is rather more complex than damage, what the
 22 draftsman is doing is signposting the relevant provision
 23 and giving a shorthand for it, rather than plucking out
 24 the restriction, as Mr Kealey would want to do, as the
 25 core of the peril.

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1 LORD JUSTICE FLAUX: Is it Mr Kealey or Mr Gaisman?
 2 MR EDELMAN: Mr Gaisman, sorry. Sorry, my mistake.
 3 My second submission would be just as a reference to
 4 damage must encompass what caused the damage, so
 5 a reference to the restriction must include a reference
 6 to what caused the restriction to be imposed, as
 7 required by the clause.
 8 So if you are treating the restriction as the
 9 equivalent to damage, which is what the clauses that
 10 refer to restrictions seem to do, and if you are with me
 11 that when it refers to damage it is contemplating not
 12 just the damage but the cause of the damage, then the
 13 insured peril for the purposes of the restriction is the
 14 disease. Just as the hurricane is the insured peril for
 15 the ...
 16 LORD JUSTICE FLAUX: The insured peril; I thought your case
 17 was that the insured peril is as you put it the package.
 18 MR EDELMAN: My Lord, yes. But if you were to say that --
 19 LORD JUSTICE FLAUX: If you are right in saying, well, it is
 20 a shorthand, "restrictions" is a shorthand for the
 21 relevant public authority provision, which is where the
 22 disease has led to the imposition of restrictions, which
 23 in turn cause an interruption to the business, on your
 24 case you take out everything.
 25 MR EDELMAN: Yes, my Lord.

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1 LORD JUSTICE FLAUX: And assume a world where there isn't
 2 a disease and there isn't a restriction.
 3 MR EDELMAN: Yes. But this is the alternative argument. If
 4 one doesn't do that and says no, it is not a shorthand,
 5 it just says "restriction", and it is like using
 6 restriction like damage, it is identifying one
 7 particular thing, then if you are comparing like with
 8 like, if damage, the reference to damage encompasses
 9 what caused the damage, then you must do the same for
 10 restriction; and what caused the restriction, what was
 11 required to cause the restriction under the policy, was
 12 the occurrence of the disease. So even on that
 13 alternative base, even if it is not a shorthand for the
 14 full clause, we say the same result follows.
 15 In the trends clause, my Lords will also have seen
 16 that it refers to "special circumstances".
 17 In our submission, just as with the Orient-Express,
 18 that doesn't include the outbreak of the disease. And
 19 in relation to the clauses with a radius or a vicinity
 20 limit, it doesn't include the wider outbreak of which
 21 the qualifying outbreak formed a part because, as we
 22 have already explained earlier, that prospect is
 23 inherent in the nature of what Hiscox is covering and
 24 must be taken as having been contemplated as being
 25 associated with the insured peril.

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1 So if you are insuring a notifiable disease, you are
 2 stipulating that in order for cover that must have
 3 occurred within a particular limit from the premises.
 4 But, necessarily by insuring a notifiable human disease,
 5 you are contemplating and appreciating that amongst the
 6 possibilities may not be just a local outbreak but also
 7 it is contemplating that it could be a wider outbreak
 8 that has spread to the 1 mile radius or vicinity of the
 9 premises.
 10 That is within the contemplation of the parties and
 11 I will give you an example of that when we get to RSA,
 12 the way in which they define the notifiable disease, the
 13 date on which it becomes notifiable is particularly
 14 significant as showing what insurers would have
 15 understood this risk to involve. In other words, the
 16 potential for a new epidemic disease to emerge.
 17 LORD JUSTICE FLAUX: We were looking at the Hiscox public
 18 authority wording, which we have got on the screen at
 19 the moment and, I mean, that wording, unlike others,
 20 doesn't include any sort of radius limit. So in
 21 a sense --
 22 MR EDELMAN: That last point ...
 23 LORD JUSTICE FLAUX: Leaving aside arguments about what is
 24 meant by "inability to use the premises", what is meant
 25 by "restrictions", et cetera, it all comes down, doesn't

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1 it, to whether an occurrence of a human infectious or
 2 contagious disease, an outbreak of which must be
 3 notified, et cetera, is referring to a local occurrence
 4 or is capable of referring to a national outbreak of
 5 a disease. In other words, "occurrence", you know, as
 6 a global concept, if I can put it that way, as opposed
 7 to a local concept. That was the argument that you were
 8 running yesterday afternoon.
 9 MR EDELMAN: Yes. My Lord, that is the primary argument.
 10 But our alternative argument is that even if it is
 11 contemplating something local, that just puts it in the
 12 same argument basket --
 13 LORD JUSTICE FLAUX: Yes, I understand.
 14 MR EDELMAN: -- as all the other policies with a 1 mile or
 15 a 25-mile limit.
 16 LORD JUSTICE FLAUX: Yes.
 17 MR EDELMAN: It was that latter argument, that latter point
 18 that my argument about what this is contemplating.
 19 Sometimes one has to apply this discerning an intention.
 20 MR JUSTICE BUTCHER: Mr Edelman, I understand completely,
 21 and this is no doubt a very sort of simplistic question,
 22 but I understand completely the use of the concept of
 23 counterfactuals in the context of trends clause, of
 24 course. For my own part, at the moment I don't really
 25 find the concept of counterfactuals in application of

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1 the basic coverage provision very useful, because
2 clearly we are interested for those purposes in seeing
3 what the effect of various things is, and they may be
4 distinct and they may have different effects at
5 different stages.

6 I think your real position is that although there
7 may be effects of, let's say, restrictions imposed by
8 a government, a public authority, that you can imagine
9 that there is an effect of that. If there is then an
10 occurrence of a disease in the relevant vicinity, once
11 you have got those two matters you have an insured
12 event.

13 MR EDELMAN: Yes.

14 MR JUSTICE BUTCHER: And at that point it becomes really
15 impossible to distinguish these matters. So that even
16 if before you have got all the facets of the clause
17 there, there may have been an effect, once you have got
18 them all, then it is a sort of composite position.

19 MR EDELMAN: Yes, and might I make it quite clear that the
20 reason we are focusing on counterfactuals so much is
21 not -- I would emphasise "not" -- because we consider
22 that is the correct approach; it is the insurers' entire
23 causation case appears to be premised on
24 counterfactuals. So they take these clauses with the
25 vicinity limit, for example, and they say their

1 counterfactual is with the disease everywhere but not
2 within the radius. So it is all about counterfactuals.

3 Hiscox's answer to this clause, which has no
4 geographic restrictions so they can't argue that, apart
5 from arguing that occurrence is local, so they try and
6 get themselves into that category with that argument,
7 but their alternative argument is the counterfactual is
8 without the restrictions that applied to the business,
9 but with everything else. Therefore, with the national
10 disease. So that if occurrence does cover the national
11 outbreak, they say, well, you assume that there were the
12 restrictions but still the national outbreak.

13 That is the case the FCA is answering. That was the
14 road block, the counterfactual road block that the FCA
15 was aiming at.

16 LORD JUSTICE FLAUX: My Lord's point, I think, is that if
17 you look at the public authority clause, if what you
18 have got is the national outbreak of the disease
19 followed by restrictions imposed by the government as
20 a consequence, and that leads to an inability to use the
21 insured premises, then, leaving the trends clause out of
22 account, what the underwriters have agreed to pay is the
23 difference between the actual income that you made
24 during the relevant period, the indemnity period, and
25 what you would have earned during the indemnity period,

1 what you would have earned during that period. And what
2 you would have earned during that period must involve
3 taking everything out, mustn't it?

4 MR EDELMAN: That is our case, my Lord. That is our case.

5 LORD JUSTICE FLAUX: Because apart from the trends clause,
6 all a loss of income provision is doing is saying it's
7 the difference between what you have actually made and
8 what you would have made if none of this had happened.

9 MR EDELMAN: Exactly, my Lord. Exactly.

10 That is entirely our case. I don't want to mislead
11 the court with our focus on counterfactuals that we
12 believe that there is anything in it at all. It is just
13 simply the wrong approach. But we are referring to
14 counterfactuals because this is the battleground, the
15 real battleground that all the insurers have identified,
16 and it is what they are all relying on.

17 They are saying how important "but for" is as a test
18 of causation, importing it from other areas of the law
19 where its application is an entirely different context,
20 where it is talking about tortious conduct, for example.
21 And you get the odd cases, the opposite extremes, the
22 Baker v Willoughby, a man whose leg is injured
23 negligently and then some time later he is shot in the
24 leg and the leg is amputated, and the complex questions
25 of how "but for" applies to the first tortfeasor. Then

1 the Jobling example of the person who is injured and
2 then later develops a condition which means that they
3 would have suffered the same symptoms anyway. These are
4 complex "but for" questions that arise in other areas of
5 the law.

6 But insurance is something different. It doesn't
7 mean it has got its unique principles of law, but one is
8 just asking a different question for a different
9 purpose. It is a much simpler question and it comes
10 down to my Buncefield example. A man whose warehouse is
11 flattened by an explosion, and an explosion is something
12 that is insured by the policy as a sort of peril that
13 would cause it. He has got a business interruption
14 policy. He simply should be getting the business
15 interruption losses he has suffered by having his
16 warehouse in ruins. You compare the income from what it
17 was before the explosion to what it was in the period
18 after. It is very simple, and that is what insurance is
19 for.

20 It is rather like the classic example of the 1906
21 earthquake when I think CE Heath gave instructions to
22 loss adjustors in San Francisco to pay all losses
23 without question. People's houses and businesses had
24 been destroyed in an earthquake, and you are just paying
25 them to put them back into the position in which they

1 were before it all happened.
 2 That is why insurance, we submit, has its own
 3 causation test and they are founded in some general
 4 principles of causation but they have to be applied in
 5 the context of an insurance policy.
 6 MR JUSTICE BUTCHER: Yes of course I see that, Mr Edelman,
 7 but you could have a position where the disease has
 8 already caused a reduction in turnover before there have
 9 been any restrictions imposed by a public authority.
 10 MR EDELMAN: Quite.
 11 MR JUSTICE BUTCHER: And still more before there has been an
 12 occurrence of an infectious disease in the vicinity, if
 13 that is part of the clause.
 14 Now, as I understand it you don't, at least in this
 15 action, suggest that there can be recovery for that
 16 downturn before those matters have happened.
 17 MR EDELMAN: The answer to that is yes. But there is one
 18 further question which arises.
 19 MR JUSTICE BUTCHER: You can come back to that in a second.
 20 You say it is only once there has been the
 21 occurrence of all the features, then, you say, there is
 22 then recovery for that part of the loss, part of the
 23 interruption, which arises from that combination of
 24 matters from that date, effectively. Is that right?
 25 MR EDELMAN: Certainly you only recover your loss as from

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1 that date. So to that extent it is rather like the New
 2 World Harbourview case where, although there were losses
 3 prior to the disease becoming notifiable, because
 4 notifiability was one of the ingredients, as it is in
 5 this clause, you can't recover for any losses before the
 6 disease becomes notifiable. That is just one of the
 7 ingredients and that is just tough, that is what the
 8 policy says, that is when it kicks in. So that is
 9 a dating issue. And on the dating issue, I entirely
 10 agree they are not insuring the disease separately, only
 11 when it operates in combination with all these factors.
 12 LORD JUSTICE FLAUX: Likewise, presumably to the extent loss
 13 is suffered before the restriction is imposed.
 14 MR EDELMAN: Well, now that raises the question that I was
 15 discussing with the point in New World Harbourview.
 16 Because ordinarily one might say yes to that; you have
 17 got to take the standard turnover, and if you are in the
 18 contractual machinery, the standard turnover would take
 19 you up to and including the depression of turnover.
 20 Then would you say: well, there was already a depression
 21 of turnover because of the disease? But then you get --
 22 this is why this is a rather curious and fairly unique
 23 element in business interruption insurance extensions,
 24 because if what you are accepting is that you are taking
 25 everything out from the date that everything was

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1 satisfied, and that is on the basis that you are taking
 2 out the causes of the interruption, what do you do about
 3 one of the causes where the parties must have
 4 contemplated that it would be a developing cause?
 5 This is the issue with diseases. Because by giving
 6 this cover for disease, the parties must be
 7 contemplating, amongst the spectrum of possibilities,
 8 not the only one, because you can have just some, as
 9 I said, local outbreak of measles or mumps, but in the
 10 spectrum they will be contemplating that a disease could
 11 emerge which could become notifiable and which could --
 12 MR JUSTICE BUTCHER: Then, Mr Edelman, you are doing better,
 13 aren't you, by reference to the trends clause, than you
 14 are by reference to the primary insurance clause?
 15 Because if the disease has caused interference or
 16 interruption with the business before the restriction,
 17 for the purposes of the basic insuring clause, why do
 18 you do better under the trends clause by taking out that
 19 part of the deterioration in the business for that
 20 clause?
 21 LORD JUSTICE FLAUX: It is the same point, isn't it, as in
 22 relation -- you said it is a timing point, but I mean if
 23 we say, let's just fix for the moment and let's just say
 24 that under this wording which we are looking at, the
 25 Hiscox wording, that the restrictions imposed by

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1 a public authority, the first relevant restrictions are
 2 on 20 March. By 20 March there is already a downturn in
 3 the insured's business, but the various conditions for
 4 cover are not satisfied until 20 March. On orthodox
 5 principles I would have thought that you cannot recover
 6 under the policy for the downturn in the business before
 7 all the various components of the insurance were
 8 satisfied.
 9 MR EDELMAN: That is right. I'm not saying that you can
 10 recover from it. But when you are assessing what the
 11 loss is from 20 March -- this is the point -- when you
 12 are assessing the loss from 20 March, do you take into
 13 account as your starting point that there had been
 14 a reduction in turnover because of what I would call the
 15 lead up to that all being triggered?
 16 I fully accept --
 17 LORD JUSTICE FLAUX: It wasn't insured. Until 20 March it
 18 wasn't insured. It is a different factual scenario, but
 19 why is it different from your example of the Michelin
 20 star chef who hands in his notice three days before the
 21 relevant restriction is imposed? None of it is insured
 22 until 20 March, on this hypothesis. So don't you have
 23 to compare the position as it was immediately before,
 24 with what has happened?
 25 MR EDELMAN: That depends on what one infers as to the

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1 contractual intent when within the peril that you are
2 insuring is something like a notifiable disease.

3 I accept entirely my Lord's point about the chef,
4 and for most situations things that happen that affect
5 your turnover before the peril as a whole bites have to
6 be taken into account.

7 The question is: what would the parties be
8 contemplating when they are insuring this sort of peril?
9 What they would be contemplating is that diseases,
10 unlike the chef leaving, diseases are not just not there
11 one day and there the next. This is necessarily, if
12 it is contemplating potentially an epidemic, not only,
13 but potentially, that's within its purview, it is
14 necessarily contemplating that the disease itself will
15 be an emerging thing.

16 The loss isn't payable until the emerging thing
17 causes the various stipulated effects. Then it is
18 a matter really of inferred intention when one comes to
19 the settlement adjustment. Is it then intended --
20 because you have obviously got something that has become
21 so serious, either locally or nationally, so serious
22 that restrictions are being imposed which make you
23 unable to use your premises to the extent my Lords
24 decide that phrase applies.

25 So it is necessarily contemplating an emerging

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1 situation. Very unlike all the other perils, which will
2 be suddenly occurring, and you can say: well, before it
3 it was like this, and after it it is like that. That is
4 why I said this is a very different and unique sort of
5 peril. And if one says all these disease-type
6 emergency, danger, are potentially contemplating
7 something which could be an emerging problem which grows
8 and grows until it reaches a stage where it is so
9 serious that the authorities have to intervene, and
10 intervene in a way which affects your use of the
11 premises or access to your premises, then what are they
12 contemplating about the insurance cover? Because if
13 they say: ah well, yes, we appreciate that for it to
14 have got to the stage where the authorities are
15 intervening it must have got really serious, either
16 locally or nationally, but actually for your business
17 interruption, although it doesn't start until the
18 ingredients are there, we are going to take into account
19 all of the effects of this emerging problem, so you get
20 virtually nothing for your indemnity, or you get 50% of
21 your loss going forward.

22 We would say, and you know, it's a matter of
23 expressly, there is no law that one can use for it, but
24 it is really what the policy is contemplating, the sort
25 of problem, and how the business interruption

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1 calculation is supposed to apply.

2 Once you have identified that you are taking out the
3 disease, isn't the logical thing to be taking out of
4 account the effects of the disease of the same epidemic
5 prior to the date of notifiability as well? Because
6 that is something that everyone would have contemplated,
7 an emerging of --

8 MR JUSTICE BUTCHER: I see that, Mr Edelman, but this is
9 a stage further.

10 LORD JUSTICE FLAUX: Yes, I don't --

11 MR JUSTICE BUTCHER: Supposing I am prepared to go along
12 with you that we take everything out, which is the
13 insured peril, and we take it all out, this is
14 nevertheless a further argument, it's a step further.

15 MR EDELMAN: Yes, it is. Absolutely, 100% a step further.

16 LORD JUSTICE FLAUX: Therefore, two things about it. We
17 will be assisted by the Hong Kong case you referred us
18 to, will we?

19 MR EDELMAN: The point wasn't argued there. They just
20 argued about the application of the trends clause --
21 sorry, of the standard revenue. They had the standard
22 revenue and they were arguing about the date of it. So
23 they didn't get on to, the parties in that case didn't
24 actually argue: even if that is the date, you shouldn't
25 be depressing the turnover. So you won't be helped by

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1 it because the point didn't arise.

2 LORD JUSTICE FLAUX: So this is an Edelman point, as it
3 were. There is no authority to support it.

4 MR EDELMAN: No.

5 LORD JUSTICE FLAUX: The other thing, can I just say this
6 about it, obviously we will have to think about it,
7 although at the moment it seems to me to be quite
8 ambitious, if you don't mind my saying so, some of the
9 wording -- I forget whose wording it is -- in RSA one of
10 the wordings actually talks about, actually backdates
11 the notifiability point to an earlier date.

12 MR EDELMAN: Yes, it is, it is RSA3, my Lord. And the
13 important point is that is the strongest possible
14 evidence of insurers' understanding of what sort of
15 peril they are dealing with.

16 LORD JUSTICE FLAUX: It might also be said that if you are
17 right, then you are only right in a situation where the
18 parties have expressly contemplated that, as they have
19 in that wording.

20 MR EDELMAN: My Lord, what that is doing is it is backdating
21 the inception of cover.

22 LORD JUSTICE FLAUX: Yes.

23 MR EDELMAN: That is the first point.

24 LORD JUSTICE FLAUX: Yes.

25 MR EDELMAN: What that is doing is saying: although we only

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1 cover for notifiable disease having this effect, we will
 2 reverse New World Harbourview and treat the disease as
 3 being notifiable from an earlier date. So it's the
 4 trigger, it is the trigger date.
 5 LORD JUSTICE FLAUX: So if all other matters were
 6 satisfied --
 7 MR EDELMAN: RSA4, I think it is, not 3.
 8 LORD JUSTICE FLAUX: -- your point would work on the express
 9 wording of that clause.
 10 MR EDELMAN: You wouldn't need to -- because I think that is
 11 just a notifiable disease.
 12 LORD JUSTICE FLAUX: I follow the point. I follow the
 13 point.
 14 MR EDELMAN: It wouldn't matter.
 15 LORD JUSTICE FLAUX: Anyway, we have probably taken up
 16 enough time on that.
 17 MR EDELMAN: Can I just briefly finish Hiscox, because we
 18 have a lot of policies to get through today.
 19 Perhaps if I briefly say something about the NDDA
 20 clause, the counterfactual on that. The question arises
 21 again as to whether the denial or hindrance in access
 22 resulted from an incident within 1 mile of the vicinity.
 23 So the difference here is that where the occurrence of
 24 a disease refers to the disease incidence, here we have
 25 not got -- we have got an incident, and we say that

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1 either the incident is a national one, or if it is
 2 a local one the same issues apply. And we say the
 3 government orders plainly did result from the broader
 4 incident.
 5 But I think we ought to move on and I will let
 6 Ms Mulcahy take over with Arch. I think I have probably
 7 said as much as I should say about Hiscox and I will let
 8 her take over.
 9 (10.35 am)
 10 Submissions by MS MULCAHY
 11 MS MULCAHY: My Lords, I am dealing with Arch and I am going
 12 to start with a very brief preliminary matter.
 13 Paragraph 23 of Arch's skeleton, which is at
 14 {1/7/11}, if we can bring that up on the screen, says
 15 that:
 16 "It is common ground that the main BI cover does not
 17 respond because there is no relevant damage to property
 18 and that the extension for disease does not respond
 19 because it applies to a closed list ..."
 20 Et cetera. As Mr Edelman pointed out on Monday,
 21 that is not common ground. These are simply points that
 22 are not being tested or advanced in this case, and it
 23 doesn't represent any concession that such clauses do
 24 not respond to COVID losses. It will be open to
 25 policyholders to test those elsewhere.

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1 On the issues that are being tested, there is in
 2 fact quite a lot of common ground between Arch and the
 3 FCA.
 4 It is agreed that all of the actions relied on by
 5 the FCA were actions or advice of government due to an
 6 emergency which is likely to endanger life.
 7 There is no vicinity requirement in the Arch policy;
 8 it covers emergencies anywhere.
 9 There is no interruption or interference
 10 requirement, and Arch doesn't seek to imply one, unlike
 11 the property damage BI clause that we will look at in a
 12 moment.
 13 So it is insuring loss resulting from prevention of
 14 access, and there is no dispute that COVID-19 was an
 15 emergency; or as to the date from which the FCA alleges
 16 that there was an emergency, 3 March of this year, that
 17 is admitted.
 18 There is no suggestion that if a disease is not on
 19 a list in the disease clause that it is excluded from
 20 cover under that clause and under the clause relating to
 21 government action; and we will compare the arguments
 22 made by Zurich later in that regard.
 23 So there is a lot of common ground. There is
 24 a limited dispute and it relates to two matters.
 25 The first is what amounts to a prevention of access.

23

1 Arch says you can only have a prevention of access where
 2 there is full closure, and the FCA says part closure
 3 will suffice.
 4 The second issue is causation. Arch's
 5 counterfactual seems to be that it involves removing the
 6 government action causing prevention of access to all
 7 premises nationwide. So they accept there is an
 8 inextricably linked point that the national action is
 9 what should be removed, not just action as applicable to
 10 the insured premises. The FCA says the same should also
 11 apply to the emergency, that you should assume there is
 12 no emergency nationwide.
 13 With that introduction, let's look at the policies.
 14 Arch's policies relate to all categories other than
 15 category 6, so there is no holiday accommodation, but
 16 other than that it applies to all the other businesses.
 17 There are three wordings on materially the same, or
 18 similar, cover terms. There are some differences on
 19 quantum machinery and trends, but they are essentially
 20 materially the same.
 21 The lead policy is the commercial combined policy,
 22 and that is at {B/2/1} in the bundle, and the relevant
 23 section on business interruption, which is entitled
 24 "Revenue Protection Insurance" is on page {B/2/33} of
 25 that tab.

24

1 We can see at the top it is applicable only if
2 stated in the schedule.
3 The premises property damage BI cover appears on the
4 next page, {B/2/34} of this tab, and you will see under
5 "Gross Profit":
6 "In respect of each item in the schedule, we will
7 indemnify you in respect of any interruption or
8 interference with the business as a result of damage
9 occurring during the period of insurance by ..."
10 Any cause not excluded, or a defined contingency.
11 So that is the main property damage cover. There is
12 an extension, we see on the next page, towards the top
13 of the second column, for additional increased cost of
14 working.
15 Then we come to the extensions, which is again on
16 the right-hand side under "Clauses" where it is said:
17 "We will also indemnify you in respect of reduction
18 in turnover and increase in cost of working as insured
19 under this section resulting from ..."
20 Then there are a number of extensions. The
21 "turnover" definition is back on the previous page,
22 page 34, towards the top on the left:
23 "Money paid or payable to you for:
24 "(a) goods sold and delivered.
25 "(b) services provided.

25

1 "in the course of the business at the premises."
2 Both of those are defined by reference to the
3 schedule. So it is the "business" in the schedule at
4 the "premises" in the schedule.
5 So this is insurance for lost revenue of
6 a particular type of business at particular premises.
7 If we can go back to page {B/2/35}, towards the
8 bottom we will see that one of the extensions relates to
9 disease, and it includes at (3)(c):
10 "Notifiable human infectious or contagious disease
11 within a 25-mile radius."
12 If we go back to page {B/2/33} we can see there is
13 a list of a notifiable human disease on the right
14 towards the bottom, which doesn't include COVID. And
15 the FCA is not seeking to argue that that is not
16 exhaustive but, as I have said, it is open to
17 policyholders to do so.
18 If I turn now to the clause that is being tested,
19 it is clause 7, on page {B/2/36} entitled "Government or
20 Local Authority Action", at the top right.
21 We can see there, as I said the previous page made
22 it clear that it is covering loss of turnover, reduction
23 in turnover, increased costs of working, resulting from,
24 and then we have:
25 "Prevention of access to the premises due to the

26

1 actions or advice of a government or local authority due
2 to an emergency which is likely to endanger life or
3 property.
4 "We will not indemnify you in respect of:
5 "Any incident lasting less than 12 hours.
6 "Any period other than the actual period when the
7 access to the premises was prevented.
8 "A notifiable human infectious or contagious disease
9 ... occurring at the premises."
10 Then:
11 "The maximum we will pay under this clause is
12 £25,000, or the business interruption sum insured or
13 limit shown in the schedule ..."
14 So there is a sub-limit.
15 Turning to the first issue, which is prevention of
16 access, the trigger includes advice. So "prevention"
17 must take a meaning that allows for it to be satisfied
18 by advice. That is agreed.
19 The clause doesn't say whose access must be
20 prevented, so it can be anyone where it results in
21 reduction in turnover; it can be owners, it can be
22 employees or it can be customers.
23 It is, of course, prevention of access to certain
24 premises in the context of revenue protection for
25 a business carried out at the premises. So it must be

27

1 read commercially; the access has to be relevant to its
2 effects on revenue.
3 The FCA's case is the same as in relation to Hiscox.
4 It is that the stay at home requirement and the other
5 restrictions from 16 March were prevention of access for
6 all businesses. Arch disagrees with that.
7 The FCA's case is also that where businesses were
8 ordered to close or cease business, whether that was on
9 20, 21, 23, 24 or 26 March, including the regulations,
10 the 21 and 26 March regulations, we say that that
11 counts, and there is some limited agreement in relation
12 to this.
13 So looking at Arch's position, it makes a number of
14 very sensible concessions. If we can start with
15 paragraph 38 of its skeleton, it is {1/7/15}. Arch, at
16 paragraph 38, accepts that prevention of access does not
17 literally require that access is prevented, in the sense
18 of being physically impossible or obstructed. It's
19 accepted that it rather relates to whether it stops
20 access to the premises for the purposes of carrying on
21 the business.
22 Arch also accepts that being ordered to cease
23 business amounts to prevention of access, even though
24 the premises are not literally closed. We can see that
25 from paragraph 67 on page {1/7/22} of this document. So

28

1 for example, they accept that with category 2 cinemas,
2 theatres, et cetera, the 20 March instructions, the 21
3 and 26 March regulations amounted to a prevention of
4 access because it is ordered to cease carrying on
5 business.

6 It is also accepted that category 4 shops, those are
7 non-essential shops offering goods for sale or hire, and
8 category 7, places of worship, have access prevented by
9 the 23 March instructions. That is their skeleton at
10 paragraph 66, and it is also set out in annex A in
11 relations to categories 4 and 7.

12 They also accept that there is prevention of access
13 for category 1 businesses, these are the restaurants,
14 pubs, et cetera, where they did not previously carry out
15 a take-away business and when they were ordered to close
16 on 20 March or in the two sets of regulations, it is
17 accepted that that is prevention of access.

18 Where the parties differ, and Arch says there is no
19 prevention, is where a business continued a pre-existing
20 take-away or it had a pre-existing take-away business.
21 We see that from Arch's skeleton at paragraph 68, which
22 is on the screen {1/7/22}, or where a category 4
23 business continued a mail order business, even if it was
24 only part of their business.

25 It is also said if a business was permitted to stay

29

1 open despite the stay at home orders prohibiting
2 customers from attending, and the other social
3 distancing requirements, for categories 3 and 5 it says
4 there was no prevention of access.

5 Again, in relation to school, it says if they were
6 teaching critical workers' children or vulnerable
7 children there was no prevention of access, and it says
8 that in relation to annex A, category 7.

9 Mr Edelman has addressed this already in relation to
10 Hiscox, and we say that position is entirely
11 unrealistic. For example with category 1, Arch is
12 saying no prevention if a restaurant continued an
13 existing take-away business, because what is said is
14 that the policyholder, this is paragraph 64 {1/7/21}
15 because the policyholder could continue part of the
16 insured business from the premises, and access to the
17 premises was not prevented. But if you had a bar which
18 would sell the occasional sandwich to customers, and
19 they decided not to stay open in order to sell those
20 occasional sandwiches to customers, then there is
21 a prevention of access to the premises. So we say that
22 there is still a prevention of access, notwithstanding
23 that there may have been a part of the business which
24 does take-away.

25 In relation to category 2, Arch accepts there is

30

1 a prevention of access by the 20 March instruction and
2 by the regulations. What the 26 March regulations did,
3 and they did it for the first time and following the
4 instruction and following 21 March regulations, was they
5 introduced an exception. They introduced an exception
6 for broadcasting to viewers outside the premises and for
7 hosting blood donations.

8 So if we assume that a small part of the
9 pre-existing business included broadcasting outside the
10 premises, what is Arch saying, that there was only
11 recovery for five or six days from 20 March until
12 26 March, when that part of the business is allowed to
13 be resurrected? We would say, why should a small
14 sideline of that kind lose the insured all cover? Its
15 core business of being a theatre, having customers come
16 and watch events, is over.

17 So far as category 4, non-essential shops, is
18 concerned, it is the same principle. The 23 March
19 announcement said that they must close and that was
20 unqualified. The qualification permitting mail order
21 was then introduced in the 26 March regulations, and
22 Arch says that the shops which already had a mail order
23 business have suffered no prevention. That is in
24 annex A, category 4.

25 So if we posit an independent bookshop in a village,

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1 which may have no website but has a telephone and
2 receives a couple of telephone orders a year from an
3 elderly man who cannot easily leave his home, then it is
4 being said, in effect, that the 26 March regulations
5 allow access to the shop, because of those two telephone
6 orders a year, whereas if there had been no orders,
7 access would have been prevented. And query whether
8 a willingness to take telephone orders means there is
9 a continuing part of the business even if it had no
10 orders in fact.

11 It may be said this is de minimis, and try to apply
12 some sort of line of that kind, but we say it is the
13 same principle; whether the telephone orders were 20% or
14 50% or 70% of the business, there was still a prevention
15 of access to the premises for a part of its business.
16 The percentage merely affects the degree of loss.

17 Similarly in relation to places of worship, there
18 was an exclusion and exemption for funerals. Arch isn't
19 taking that point, but its logic would say that there is
20 no prevention of access because you could still access
21 for the purposes of conducting funerals.

22 Schools. Mr Edelman has covered this point already.
23 It was announced that schools would close other than for
24 teachers, key workers' children and vulnerable children
25 for the purposes of teaching those pupils. But the

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1 schools closed to the vast majority of pupils. If
 2 a school is, in this context, unlucky enough to have to
 3 teach a key worker's child or vulnerable child, then
 4 they have no prevention of access. If they don't have
 5 to do so, there is prevention of access.

6 Arch says full versus partial closure is a clear
 7 line in the sand. They say this in annex C, page 3 in
 8 the bottom line. But we would say that is absurdly
 9 formalistic, especially when Arch sensibly accepts that
 10 prevention of access doesn't mean physical impossibility
 11 for all purposes.

12 Another difficult aspect to understand is why it is
 13 being said that it is only if category 1 or category 4
 14 businesses previously provided take-away or mail order
 15 services that its business is prevented. That is said
 16 in paragraph 63 of Arch's skeleton.

17 If a business, and it has a duty to mitigate its
 18 loss, we can see that from condition 1(a) on page
 19 {B/2/38}, it is obliged to take any action reasonably
 20 practicable to minimise any interruption of or
 21 interference with the business or to avoid or diminish
 22 its loss, so if it introduces a take-away or a mail
 23 order business to mitigate its loss in order to try and
 24 maintain some revenue, on the logic of the rest of
 25 Arch's case that has ended its prevention of access.

1 It should be noted, if we go back to the insuring
 2 clause on page 36, exclusion 2 excludes indemnity for
 3 any period other than the actual period when the access
 4 to the premises was prevented.

5 So we say it is illogical. This is not a clear
 6 dividing line, it is illogical. Why, on Arch's case, is
 7 a business starting take-away or mail order to mitigate
 8 its loss not also losing its prevention of access by
 9 virtue of doing that? It doesn't make sense.

10 Categories 3 and 5 Mr Edelman has dealt with, and
 11 the same point arises. Customers could only make
 12 essential trips to hardware stores, et cetera. So you
 13 might be able to go in and buy a light bulb or
 14 a battery, but you couldn't go and just buy DIY products
 15 unless they were essential. So there would have been
 16 a reduction in trade.

17 Similarly, for the service industries, you couldn't
 18 travel or have contact unless it was essential. And
 19 query how often a visit to a financial adviser or an
 20 accountant at that point in time was likely to be
 21 essential.

22 So we say that the prevention of access was caused
 23 by the advice of the 16 March, repeated subsequently and
 24 leading to regulation 6 on 26 March in the regulations
 25 to avoid non-essential travel and contact. We say there

1 just is no line in the sand. Partial prevention of
 2 access is prevention of access to the premises for the
 3 purposes of carrying on the business at the premises;
 4 and, as Arch accepts, it doesn't have to be the case
 5 that access is physically impossible, it is about
 6 whether the premises could not carry on the business,
 7 and we say that is the normal business of the premises.
 8 If it is able to carry on in part, that goes to reduce
 9 loss as a matter of quantification, but there is still
 10 cover.

11 The only other issue on prevention of access is the
 12 date, where we say 16 March was when everybody was told
 13 to stop non-essential contact and stop all unnecessary
 14 travel and to avoid going to pubs, clubs and theatres;
 15 and the purpose of that was to prevent people from going
 16 to pubs, clubs and theatres and not to travel.

17 So we say the government took action, or at least it
 18 was advice, by instructing them not to do so, and the
 19 public followed that advice and that prevented access.
 20 This is not wordplay, it is the ordinary meaning of the
 21 words. Prevention wasn't a mere by-product of the
 22 government action, it was the whole point. And if a pub
 23 was empty by 17 March, that was because its customers
 24 had been prevented from accessing it. And since Arch
 25 accepts that even a recommendation counts as

1 a prevention, we say there was a prevention of access
 2 from 16 March.

3 I turn now to the final issue, which is causation.
 4 Arch accepts that where premises were required to be
 5 closed, which, as I have said, it accepts occurred for
 6 at least category 2, the cover is engaged save for
 7 causation of loss.

8 So it accepts that for some businesses there was
 9 prevention of access to the premises due to actions or
 10 advice of a government due to an emergency anywhere or
 11 everywhere which is likely to endanger life. So no
 12 vicinity requirement in relation to where the emergency
 13 must occur. So it is effectively accepting that the
 14 policy responds to the national emergency, to the
 15 national pandemic.

16 It doesn't dispute that the prevention was due to
 17 actions or advice, or that actions or advice were due to
 18 the emergency. But what they say you do is you remove
 19 the insured peril of the government action preventing
 20 access, but not the emergency or its other consequences.

21 We can see that most closely in its defence at
 22 paragraph 7.12 to 7.13, it is at {A/7/5}. They make it
 23 clear there:

24 "The burden of proving a right to an indemnity is on
 25 the policyholder. On the proper construction of Arch 1

1 and on established principles of causation, where
 2 a policyholder has shown the government ... action
 3 clause has been triggered by reason of a qualifying
 4 prevention of access, the policyholder must then
 5 establish on the balance of probabilities that the
 6 prevention of access (the insured peril) [it says] has
 7 caused business interruption loss ... At a minimum, the
 8 policyholder must show the prevention of access to the
 9 premises is a 'but for' cause of loss.

10 "For these purposes, the appropriate counterfactual
 11 scenario is where there was no insured peril ..."

12 Then it says:

13 "... ie no government or local authority action or
 14 advice preventing access to the premises, but where all
 15 other factors remain unchanged."

16 Then it sets out a list, including that COVID-19
 17 existed in all parts or most parts of the UK; various
 18 other control measures remained in force, including
 19 advice on social distancing, the lockdown,
 20 self-isolation requirements; and then the control
 21 measures affecting employment, consumer behaviour,
 22 economic activity, confidence, et cetera.

23 So they are saying all of that public authority
 24 action falling short of prevention means, for the
 25 purposes of the counterfactual, it is all still there.

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1 Then it is alleged that the loss would have been
 2 suffered anyway. We see that in Arch's skeleton at
 3 paragraphs 127 to 131, which is at {1/7/36}. We have
 4 addressed this before, so I am going to take this very
 5 briefly.

6 LORD JUSTICE FLAUX: This is essentially the same argument
 7 as is being run by all the insurers, isn't it?

8 MS MULCAHY: It is exactly the same. A different clause,
 9 but the same argument.

10 LORD JUSTICE FLAUX: There is a trends clause, is there?

11 MS MULCAHY: There is a basis of settlement clause which we
 12 accept applies, despite referring to damage.

13 LORD JUSTICE FLAUX: Where is that?

14 MS MULCAHY: That is --

15 LORD JUSTICE FLAUX: Page 34, I think.

16 MS MULCAHY: Yes, that is right. That is right. And we
 17 have the insurance on gross profits is limited to loss
 18 due to reduction in turnover and increase in cost of
 19 working. Then it explains what it will pay. And it has
 20 the words "which but for such additional expense would
 21 have taken place due to the damage". So ...

22 MR JUSTICE BUTCHER: Your basic point here is that once you
 23 have got the restriction of access it becomes really
 24 impossible to distinguish between these things, and
 25 indeed it is not really the fault of the insured that

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1 they can't distinguish between these things because it
 2 is a government regulation in the first place.

3 MS MULCAHY: Yes, what we say is there are three elements
 4 here. We have the prevention of access, element 1; due
 5 to actions of advice or government, element 2; due to an
 6 emergency likely to endanger life, element 3. They have
 7 said if you want to be formalistic about it, the peril
 8 is the prevention of access. So they say, fine, you
 9 have stripped that out.

10 They then go on and remove element 2 as well, they
 11 take out the government action or advice; but not just
 12 the government action and advice affecting the insured
 13 premises, they also take out all government action
 14 nationwide as it applies to all premises.

15 We say you must also remove element 3, the emergency
 16 likely to endanger life; it is a further requirement for
 17 cover, it is the underlying cause which forms part of
 18 the trigger chain, and it results in the government
 19 action which then results in the prevention of access.

20 So we say it is not the case that you leave that in,
 21 you remove that too; you don't set it up as a rival
 22 competing cause for what is being said to be the insured
 23 peril.

24 Just going back to Mr Edelman's lorry spill example,
 25 we say a clause like this should be read as providing

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1 cover where the emergency is of sufficient seriousness
 2 as to cause there to be action by the authorities, and
 3 if that then has the specified effect on the insured
 4 it is covered; and any counterfactual that then seeks to
 5 treat only the action by the authorities as insured is
 6 wholly artificial, and it would render cover illusory
 7 for the sorts of serious emergencies that the cover is
 8 clearly contemplating. So we say the emergency is an
 9 integral part of the cover. It is contemplated. It may
 10 not be sufficient in itself to trigger indemnity,
 11 because you need all three elements. But just as action
 12 by the police or authorities having the specified effect
 13 wouldn't be sufficient in itself, without something that
 14 could be properly classified as an emergency. So you
 15 take them altogether.

16 LORD JUSTICE FLAUX: The prevention of access in the
 17 abstract is meaningless, isn't it?

18 MS MULCAHY: No doubt that is why they have married elements
 19 1 and 2 and then subtracted those. But as I said, in
 20 relation to element 2 they haven't just said it is
 21 action or advice affecting the premises, they have said
 22 it is nationwide action or advice. And we apply the
 23 same logic to element 3 and say it must be the
 24 nationwide emergency.

25 One other factor, it is said by Arch to be

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1 irrelevant , but we say, you know, this cover has
2 a €25,000 limit and you have to bear that in mind as
3 well when you get into looking at what their case
4 entails . Effectively , you are having to model a world
5 with the emergency still in it but without the
6 government action affecting access to the premises, and
7 how that would or would not have economically affected
8 the insured .

9 Arch shy away from addressing that by saying it
10 can't be resolved in the test case . If you look at
11 paragraph 135, I think it starts at page 38 and goes
12 across to page 39 of the skeleton in the document that
13 we are in {1/7/38}, it makes it clear that our case on
14 burden of proof is also incorrect , the policyholder
15 bears the legal burden:

16 "There is nothing in the Arch policies to suggest
17 the burden of proof is reversed."

18 I hope I have explained our case on that:

19 "How, in a particular case [if we could go over to
20 the next page] the policyholder may discharge its
21 burden, and how (as a matter of practice) Arch may seek
22 to show how the economic effects of the pandemic, the
23 economic downturn, et cetera , would have affected the
24 policyholder 's business even if it had not been required
25 to close the premises, are not matters that can sensibly

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1 be resolved in the test case ..."

2 But that is where the analysis of the insurers
3 leads, the necessity for that type of economic
4 modelling.

5 LORD JUSTICE FLAUX: If they are right as a matter of
6 principle , then that would follow, wouldn't it? But you
7 say it 's for us to decide in the test case whether they
8 are right or wrong as a matter of principle . If you are
9 right that the three elements you have identified all
10 have to be excised in order to do the counterfactual
11 exercise , then that is the conclusion that we will
12 reach, and what the effects of that conclusion are in
13 any individual case is, of course, not for this test
14 case.

15 MS MULCAHY: My Lord, exactly. The point I am making is
16 that for cover of €25,000 is it really contemplated that
17 one would have the sort of economic modelling evidence
18 that appears to be being suggested here.

19 LORD JUSTICE FLAUX: Yes, I understand.

20 MS MULCAHY: We would say deploy the low limit in aid of
21 that construction , is that really what is being
22 contemplated by the clause?

23 In practice , Arch says it is offering 35% to reflect
24 a guess, it seems, that 65% of the loss is caused by
25 what it says are uninsured concurrent causes . We see

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1 that at paragraph 14 of its skeleton on page 8, and it
2 says that is a fair and reasonable gesture , in annex C
3 at row 463. But we can see it says it is paying 35%.
4 No basis is given for that figure , nor can insureds
5 dispute it .

6 Our response to that is that it is wrong as a matter
7 of principle . The emergency should be treated as part
8 of the insured peril for this purpose; alternatively ,
9 not excised from the counterfactual because it is
10 contemplated by the insuring clause , and loss adjustment
11 is not supposed to be merely a discretion for an
12 insurer .

13 My Lords, those are my submissions in relation to
14 Arch, and I will hand back now to Mr Edelman, who
15 I think is dealing with QBE.

16 (11.06 am)

Submissions by MR EDELMAN

18 MR EDELMAN: My Lords, that is correct, if I can now start
19 dealing with QBE.

20 We have got three versions of policies for QBE. The
21 first is QBE1, at {B/13/31} for the relevant clause , is
22 7.3.9:

23 " Interruption of or interference with the business
24 arising from any human infectious or human contagious
25 disease [excluding certain diseases], an outbreak of

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1 which local authority stipulated shall be notified to
2 them manifested by any person whilst in the premises or
3 within a 25-mile radius of it."

4 QBE2 is at {B/14/29}, and it is similar language:

5 "Loss resulting from interruption of or interference
6 with the business in consequence of any of the following
7 events ... any occurrence of a notifiable disease within
8 a radius of 25 miles."

9 Then QBE3 at page 22, that is {B/15/22}, and that
10 lower part of the page:

11 "Loss resulting from interruption or interference to
12 the business as covered by this section ..."

13 Then (c):

14 "An occurrence of a notifiable disease within
15 a radius of 1 mile of the premises."

16 You may recollect my referring to that distinction
17 and the fact that QBE's written submissions focus on
18 1 mile, without focusing on the 25-mile clauses .

19 The QBE defence is in fact principally one of
20 causation and there is only a little bit more that
21 I want to say about that.

22 There are no coverage points of substance aside from
23 a proof of occurrence, and I have dealt with that under
24 prevalence . There is a pollution and micro-organism
25 exclusion in the policy , but QBE doesn't rely on that .

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1 They accept that there is an occurrence of COVID-19
2 when a person contracts the disease and it was
3 diagnosable; they accept that point. If you want it,
4 that is paragraphs 201 and 202 of their skeleton.

5 We understand them to accept that there is no
6 difference in principle between "occurrence" and
7 "manifestation" -- slightly different wordings, as you
8 saw -- provided that an inference can be drawn from the
9 available evidence that there were COVID-19 cases,
10 whether diagnosed or otherwise, within the relevant
11 area.

12 But their particular point on causation is they say
13 it's difficult to see how there could be a business
14 interruption loss to an insured caused by an occurrence,
15 in circumstances where the insured and its customers
16 have no knowledge of the fact that, for example, someone
17 with COVID had been at the premises or within the policy
18 area.

19 We say knowledge isn't required. If, as a matter of
20 fact, the government has acted in part in response to
21 the presence of cases within the requisite area, whether
22 inferred or actually identified, then the resulting
23 disruption is caused by the presence of the disease
24 whether the policyholder or its customers know about it
25 or not. This is the causation issue.

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1 Can I move on then to the particular terms of the
2 clauses. If we go back to QBE1, which is {B/13/31}.
3 It is important, we say, to analyse what this clause is
4 about. It is setting a requirement for the disease to
5 occur within the requisite area, and it is identifying
6 that, we submit, as a qualifying condition for cover.
7 So it is arising from any disease as long as it is
8 manifested by a person within 25 miles.

9 We are not arguing, as QBE suggests we are, that the
10 effect of this is to provide cover for an occurrence of
11 disease beyond the 25-mile radius zone. We recognise
12 and accept that there is a qualifying condition that the
13 disease must have manifested itself within the 25-mile
14 radius. Where the disease outside that radius comes in
15 is the circumstances in which the occurrence of what has
16 occurred within the 25 miles can be regarded as being
17 properly regarded as causative of the government's
18 response to the outbreak and the ensuing loss to the
19 insured's business within that zone.

20 Before I turn to that, though, can I just deal with
21 interruption or interference, which appears at the
22 beginning of these clauses.

23 QBE accepts that social distancing measures, closure
24 measures and other human action could in principle cause
25 interference with the business. So that appears to be

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1 common ground.

2 QBE accepts that an insured premises does not have
3 to be forced to cease all of its operations in order to
4 satisfy the interference test. What they say, the
5 reference is at {I/17/68}, what is required is an
6 intermeddling with the business such that it cannot be
7 operated by the insured as they had originally intended.
8 We agree with that. So we don't have to get into
9 a debate about what "interruption" means, because they
10 have accepted, realistically and sensibly, what
11 "interference" means. They don't advance any positive
12 case on that aspect, therefore, to contradict our
13 argument, but obviously that is all subject to their
14 causation case.

15 So can I now turn to the causation issue on QBE,
16 much of which has been covered, there is only a little
17 amount that I want to add.

18 The starting point, and perhaps we can look at their
19 skeleton for this, it is {I/17/13} -- no, it should be
20 the next page then {I/17/14}, another page change with
21 the references being added. It's paragraph 24. Sorry,
22 the previous page. That was right. Paragraph 24, page
23 14, please. It says:

24 "In terms of the sort of circumstances that might be
25 covered by the 'relevant policy area' aspect of the QBE

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1 disease clauses, the range of potential cases (generally
2 but also in the particular context of COVID-19 crisis)
3 are myriad. A localised outbreak of a notifiable
4 disease, including COVID-19, might lead to a particular
5 street or square mile (et cetera) being locked down,
6 even though the rest of the country remains 'open for
7 business'."

8 That is what they say is the scope of operation of
9 their policy. Their causation case appears to be built
10 on this edifice, that that is what this policy is
11 insuring.

12 LORD JUSTICE FLAUX: That can't be right in relation to the
13 25 miles though, can it?

14 MR EDELMAN: No. That is "localised" is a bit of an odd
15 word to use for an area which covers nearly 2,000 square
16 miles. But let's deal with this even in relation to the
17 1 mile policy, where it might make a little bit more
18 sense.

19 It has at the heart of it an important premise which
20 needs to be analysed, because what it appears to be
21 accepting, and is necessarily assuming, is that the
22 disease will not be the direct cause, in the sense of
23 the immediate cause, of any interruption or interference
24 with the insured's business and that, with respect, is
25 obvious.

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1 What these clauses are all contemplating, as
2 Mr Howard seems to accept in paragraph 24, is that the
3 authorities will be doing something about it. That is
4 the critical point, because any interruption or
5 interference will be caused by virtue of the response of
6 the authorities to the outbreak, not by the outbreak
7 itself.

8 One can analyse this, and then one then asks
9 oneself: if one is talking about these clauses
10 contemplating that actually what will cause the
11 interruption or interference is the reaction of the
12 authorities to the disease, what is the function of the
13 25-mile or 1 mile restriction? Is it imposing
14 a locality limit or is it merely imposing a qualifying
15 condition, saying that if there is authority reaction to
16 an outbreak of a disease, and that authority action
17 impacts on you, you only have cover if that disease,
18 whether it is elsewhere or not, is present within the
19 defined radius from your premises?

20 That means, let's take Salisbury, I think I may have
21 given this example before, someone who is on the
22 outskirts, who is more than 1 mile from the centre of
23 Salisbury and let's say, you know, I know it is not
24 really a disease case but let's treat it as an outbreak
25 of a disease: there is an outbreak of a disease in the

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1 centre of Salisbury, and the authorities think they've
2 caught it quickly and there is only a handful of cases
3 in the centre of Salisbury, but to be on the safe side
4 they shut down Salisbury and its environs, and
5 a business is caught up which is more than 1 mile from
6 the centre of Salisbury, it is affected by the
7 government action, but the qualifying condition, that
8 the disease has occurred within 1 mile of the premises,
9 is not satisfied.

10 One can look at this in another way with the
11 notifiability requirement.

12 The notifiability requirement is another qualifying
13 condition. One doesn't construct a counterfactual for
14 the purposes of this clause, even if one was assuming
15 Mr Howard's approach of local outbreak, one doesn't say:
16 ah well, what if a government had not classified the
17 disease as being notifiable until 21 days after the
18 local authority acted? The local authority was quicker
19 off the mark in acting than the government. Or assume
20 that they would have been, as a counterfactual; assume
21 the local authority had acted before the government made
22 it notifiable. One doesn't use that as
23 a counterfactual, it would be nonsense, because
24 notifiability is just a qualifying condition. So ...

25 LORD JUSTICE FLAUX: Is that a convenient moment?

50

1 MR EDELMAN: Yes. My Lord, I have got very little to say
2 about QBE, so if I could possibly, my Lord, just finish
3 this topic.

4 LORD JUSTICE FLAUX: Yes.

5 MR EDELMAN: Actually that would be more even in the halves,
6 we would have an hour and 25 minutes for the shorthand
7 writers on both sessions.

8 LORD JUSTICE FLAUX: That is fine.

9 MR EDELMAN: When QBE in the policy -- let's go back to
10 {B/13/31} -- when they use "arising from", let's put to
11 one side causal rules and so on, we know that what it is
12 actually contemplating is the disease outbreak being
13 causally associated with some response from the
14 authorities, and that response being actually what
15 causes the interruption or interference.

16 What we then have as the analysis is that the public
17 authority response, which causes the interruption or
18 interference in fact, is covered by the policy as long
19 as the disease to which the government is reacting is
20 one that is notifiable and it has manifested itself
21 within the 25-mile radius.

22 Now, QBE's entire causation case is in essence
23 premised on the edifice that the entirety of the
24 government action can be put into the counterfactual,
25 despite the prompting role for that action that

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1 outbreaks all over the country, including in QBE's
2 relevant policy areas, actually had.

3 We say, as we have said before and I say this in
4 a sentence, the government was responding to one
5 indivisible occurrence or multiple occurrences which are
6 aggregated as part of a national occurrence to become
7 one combined cause. In reality, if all areas had not
8 been affected to a greater or lesser extent, one can
9 imagine that there wouldn't have been a national
10 lockdown. It was the national picture of all these
11 local outbreaks which caused the lockdown. And when the
12 court considers what caused the application of the
13 government's lockdown measures in any particular
14 locality, the causal effect of local prevalence of the
15 disease is part of that overall indivisible cause or
16 viewed individually by virtue of its contribution to the
17 overall picture, and is an effective cause of the
18 government action.

19 My Lords, I am looking through my notes, and if you
20 could bear with me for another two or three minutes
21 I will be finished QBE entirely.

22 LORD JUSTICE FLAUX: Right.

23 MR EDELMAN: Because I just wanted to say a little bit about
24 the quantification machinery and trends clauses. We
25 have made our submissions as to the application of the

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1 adjustment machinery in writing, you have our
2 submissions on Orient-Express. I don't intend to add
3 anything to that. So although we have made submissions
4 about whether they apply, even if they do apply we
5 submit that they are not relevant to this case at all.
6 My Lord, those are my submissions on QBE.

7 LORD JUSTICE FLAUX: Okay, we will have a break for ten
8 minutes, until 11:35am.
9 (11.25 pm)

10 (Short break)

11 (11.35 am)

12 LORD JUSTICE FLAUX: Are you ready?

13 MR EDELMAN: Yes, my Lord.

14 I usually try to avoid coming back to points that
15 I have argued earlier, but can I just add one further
16 illustration to try and persuade my Lord of the Edelman
17 point on prior downturn by giving you an example. And
18 I hope the fact that it is a Mr Edelman point doesn't
19 make it all the worse in your eyes.

20 Let's assume for the poor owner and, if my Lords
21 decide, the hard done by owner of the hotel in the
22 Orient-Express case, that prior to the arrival of the
23 hurricane there had been hurricane warnings, and guests
24 who were due to stay at the hotel prior to the arrival
25 of the hurricane cancelled their bookings, and let's say

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1 that, contrary to the result in the case, there was
2 actually to be a calculation of the loss of turnover of
3 that hotel, and for that purpose you needed to work out
4 what its turnover had been prior to the occurrence of
5 the damage.

6 Of course, although hurricane would, under that
7 policy, have been an insured peril in the sense that it
8 wasn't excluded, the policy is not triggered until it
9 causes damage to the hotel. But the hurricane is
10 trundling along through the Gulf of Mexico on its way
11 towards the hotel and that causes people to either leave
12 the hotel or not pursue their bookings for periods prior
13 to the damage.

14 When the loss assessor is calculating his starting
15 turnover to use as a comparison to the turnover
16 following the damage, does he take into account when he
17 does the 12-month period, it may only be a modest
18 difference but does he take into account the fall in
19 turnover that was in those last few days, or does he
20 say: well, it would be a nonsense to take into account
21 those few days, so I am going to treat those few days as
22 if they were standard turnover, because obviously that
23 was affected by the imminence of the arrival of the
24 hurricane.

25 If we --

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1 MR JUSTICE BUTCHER: I agree with you, Mr Edelman, that
2 highlights the question. I'm not sure it answers it,
3 but it does --

4 LORD JUSTICE FLAUX: I agree.

5 MR JUSTICE BUTCHER: Does Riley deal with this at all or
6 not?

7 MR EDELMAN: My Lords, I don't think so, because most things
8 that happen to buildings are pretty instantaneous; they
9 are fires, floods, they are things like that, that is
10 the everyday occurrence, certainly in this country.
11 Even when we have a storm, a terrible storm, I think we
12 were told there's nothing to worry about and everything
13 is going to be all right; the 1987 storm.

14 So it is a very unusual situation. But I drew that
15 analogy because, really, if that is the right answer for
16 the hurricane case, then that is my analogy to this
17 case.

18 LORD JUSTICE FLAUX: I understand your point. I'm not sure
19 I accept it. Speaking for myself, my reaction is it
20 wasn't insured. But I follow the point. I follow the
21 point.

22 MR EDELMAN: No, don't get me wrong, I am not saying that
23 the loss of turnover in those two or three days before
24 the hurricane causes damage is insured.

25 LORD JUSTICE FLAUX: No, but --

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1 MR EDELMAN: That loss and turnover has to be borne by the
2 insured uninsured. It is the question of when you are
3 calculating the standard turnover or adjusting the
4 standard turnover under these clauses, what would be the
5 parties' intention? That is the question. How is this
6 intended to operate?

7 LORD JUSTICE FLAUX: But the effect of calculating it in the
8 way in which you suggested it should be calculated is
9 that the insured does recover for something he wouldn't
10 otherwise have recovered for, does he?

11 MR EDELMAN: No, no, he never recovers for the lost turnover
12 in that --

13 LORD JUSTICE FLAUX: Because you say you ignore the fact
14 that there has been a reduction in bookings as
15 a consequence of the imminence of the hurricane in
16 assessing what the turnover was. So let's say for the
17 sake of argument up to that point it is \$1,000,000, and
18 after the hurricane comes it is zero, so he gets
19 a million dollars.

20 But if in fact, as a result of the cancellations of
21 bookings in the two weeks before the hurricane hit,
22 it is only \$900,000, and that has to be taken into
23 account and at the end of the day it is zero, then he
24 gets \$900,000. So it does affect the amount of the
25 indemnity.

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1 MR EDELMAN: Of course it affects the amount of the
2 indemnity but he is not getting the 100,000 loss.
3 LORD JUSTICE FLAUX: That is debatable, I think, on your
4 argument.
5 MR EDELMAN: What he is getting, my Lord, is he is getting
6 the indemnity for, let's say the ordinary day-to-day
7 turnover would have been a million, and from day one of
8 the damage he is getting loss based on that 1 million
9 not loss based on the 900,000 which was only
10 artificially reduced immediately prior to the damage by
11 the impact of the very thing that caused the loss. Or
12 in our case combined to cause the loss.
13 In a sense, the emergence of this disease is like an
14 approaching hurricane, because it is something that was
15 building up to a crescendo until it reached such a level
16 that the government had to act, and what the insurers
17 are saying is: well, you assume all of the impact of the
18 impending hurricane, and you take that into account when
19 you are assessing what the combined effect of the
20 hurricane and everything else caused; and we say that is
21 nonsense.
22 I had better move on. All I can do is leave the
23 points with my Lords and ask you to reflect on it.
24 LORD JUSTICE FLAUX: We will think about it, don't you
25 worry.

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1 MR EDELMAN: Yes, my Lord. I hope you accept that even if
2 it is an Edelman point, it is quite a serious one.
3 LORD JUSTICE FLAUX: I agree with you, Mr Edelman, it is
4 a serious point, and I see entirely the force of the
5 point, I really do. But I am not convinced that it is
6 necessarily right. But we will think about it.
7 MR EDELMAN: Yes.
8 My Lords, RSA. This is going to be a bit longer
9 than the other policies because there is quite a few
10 variants, not, I would emphasise, because we see there
11 as being any complexity.
12 RSA1 and RSA3 both contain only disease clauses, so
13 I will deal with those policies in full and address
14 those issues before I turn to RSA2.1, 2.2 and then RSA4.
15 So can I start with RSA1, and you will see it at
16 {B/16/1}, which is Cottagesure. It is aimed and
17 directed at holiday cottage owners who rent out their
18 property.
19 The disease clause we are interested in is on page
20 16 on this tab {B/16/16}, and extensions to cover, it is
21 item 2A:
22 "Loss as a result of:
23 "closure or restrictions placed on the premises as
24 a result of a notifiable human disease manifesting
25 itself at the premises or within a radius of 25 miles of

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1 the premises."
2 There are some elements to the clause my Lords can
3 see: closure or restrictions placed on the premises, as
4 a result of a notifiable disease manifesting itself
5 within 25 miles, and it has to result in loss.
6 This one doesn't actually specify, probably because
7 of the nature of the business, that there has to be an
8 interruption or interference; it is just talking about
9 loss.
10 Most of this we have already debated, but just some
11 points that particularly arise on this. My Lords will
12 note that there is a maximum amount of £250,000 on this
13 cover, you will see immediately to the right of the
14 clause. The only words that are really new are "closure
15 or restrictions placed on", but otherwise, as I say, it
16 is very similar. So can I have a look at those words.
17 It is common ground that "closure or restrictions
18 placed on the premises" were satisfied with effect from
19 1.00 pm on 26 March by regulation 5(3) of the 26 March
20 regulations. The references for that is the
21 regulations, we don't need to look at them so please
22 don't turn them up, {J/16/3} and the RSA skeleton,
23 appendix 1, page 5, paragraph 16.
24 So the only issue between the parties is whether
25 this was satisfied before then. RSA is effectively

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1 taking the same line on this as Hiscox, albeit not the
2 same line as Arch or Ecclesiastical, arguing that
3 closure or restrictions needed to have legal force to
4 apply.
5 So the first question is whether the word "placed"
6 applies to the word "closure". We say, you won't be
7 surprised to hear, that it doesn't. The word "placed"
8 is looking at closure. But in any event -- sorry, is
9 looking at --
10 MR JUSTICE BUTCHER: Sorry?
11 MR EDELMAN: The word "placed" is looking at restrictions.
12 I misspoke. But in any event, we say that doesn't
13 really matter.
14 LORD JUSTICE FLAUX: Grammatically it doesn't make sense,
15 because it would be "closure of or restrictions placed
16 on".
17 MR EDELMAN: Yes, maybe the word "of" is missing. But
18 "closure on" also doesn't make sense.
19 LORD JUSTICE FLAUX: "Closure is placed on the premises" I
20 suppose is a rather clunky way of saying it, but it
21 probably doesn't matter, does it?
22 MR EDELMAN: No, it doesn't. Because what I am saying is
23 "placed on", whether it applies to them or not, is even
24 weaker than "imposed". Do you remember we discussed
25 "imposed" in the context of Hiscox? And we submit that

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1 what the government did, and you have heard all about
 2 that, is sufficient to satisfy the words "placed on".
 3 LORD JUSTICE FLAUX: From when?
 4 MR EDELMAN: From 16 March is our date.
 5 LORD JUSTICE FLAUX: That is the Prime Minister's
 6 announcement or statement: stay at home, don't go away
 7 on holiday.
 8 MR EDELMAN: Exactly.
 9 MR JUSTICE BUTCHER: But the issue here is whether it is
 10 placed on the premises, isn't it?
 11 MR EDELMAN: Yes, and my Lord, effectively we say that one
 12 is looking at the practical impact of this. Is there
 13 a restriction or closure placed on the premises when you
 14 tell people not to go there? You are restricting the
 15 free travel.
 16 What RSA says is that the 16 March announcement did
 17 not restrict free travel in the UK. But what the
 18 Prime Minister in fact said, as my Lord has just said,
 19 "Now is the time for everyone to stop essential contact
 20 with others, avoid unnecessary contact of all kinds".
 21 And we submit that you do place restrictions on the
 22 premises if you place restrictions on the customers
 23 going to the premises. That's what they were doing.
 24 They were telling people, as my Lord just said, "Do not
 25 travel to holiday accommodation". That, we say, is

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1 placing a restriction on the premises, even if it is not
 2 directly identifying the premises as such. That is
 3 essentially our submission.
 4 Then RSA also say that the social distancing
 5 measures in regulation 6 are not relevant restrictions.
 6 Therefore, and this is its causation case, even though
 7 they accept regulation 5(3) on 26 March is a closure,
 8 they say, well, it didn't cause any loss, because
 9 regulation 6 prohibited all customers from travelling,
 10 and that is not a restriction placed on the premises.
 11 That demonstrates, even if we put to one side the
 12 16 March government statement and announcement, it shows
 13 you now how artificially they are approaching this
 14 clause, that you are not placing a restriction on the
 15 premises if you tell people not to go there.
 16 That then becomes their counterfactual, that even if
 17 the government hadn't closed you, hadn't included you in
 18 the regulations on the businesses that were required to
 19 close, you've still got the regulations preventing
 20 people from going to you, so you would have suffered
 21 your loss anyway.
 22 The answer to that is, looked at realistically, the
 23 restrictions were imposed on the premises, were placed
 24 on the premises.
 25 LORD JUSTICE FLAUX: I suppose you might test it in this

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1 way, because it covers notifiable disease manifesting
 2 itself at the premises: so if there is a particular
 3 complex of holiday cottages, if you like, where there is
 4 an outbreak of Legionnaires' disease, and the government
 5 asks the owner to identify who is going to be going
 6 there in the next 3 weeks, and the government says to
 7 each of the people who is going there, "Don't go there
 8 because there is an outbreak of Legionnaires' disease",
 9 you would say that is a restriction placed on the
 10 premises.
 11 MR EDELMAN: Absolutely. They are telling them -- they
 12 don't list every single holiday cottage you can't go to,
 13 they are telling them: don't go to any. In my Lord's
 14 example they were, but in case they were saying: don't
 15 go to any of them.
 16 LORD JUSTICE FLAUX: No, I follow. Yes.
 17 MR EDELMAN: Anyway, that's a short point but that is our
 18 point on that.
 19 LORD JUSTICE FLAUX: In the context of holiday cottages it
 20 might be said either you close them or the restrictions
 21 that are being referred to have to be something else,
 22 other than physical closure or physical prevention, as
 23 it were, from getting into the premises, because
 24 otherwise why have you got restrictions there at all?
 25 And you would say the obvious restriction placed on the

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1 premises is telling people: you can't go there.
 2 MR EDELMAN: Exactly, or how many people can go there.
 3 LORD JUSTICE FLAUX: Yes, okay.
 4 MR EDELMAN: Then the clause requires it to be as a result,
 5 loss as a result of the closure and -- sorry, the
 6 closure or restrictions to be as a result of notifiable
 7 human disease, which we have dealt with, that's the
 8 prevalence point, within the 25 miles.
 9 But there is one point on the "as a result of"
 10 notifiable human disease within a radius of 25 miles.
 11 This has been debated in the skeleton, and it is
 12 Mr Harrison's idea, example, the Chesil Beach example
 13 which we give in our skeleton, which quite nicely
 14 illustrates the point that RSA and other insurers are
 15 taking.
 16 My Lords, it arises in particular on this one,
 17 because if you go to the next page, we don't have to
 18 worry about the precise terms, but on page {B/16/17}
 19 there is in fact a pollution of beach cover, and it is
 20 pollution of the beach within a 10 mile radius. I am
 21 not going to get into the solely attributable, sudden or
 22 accidental stuff, but just so you know this is not an
 23 outlandish example, this is actually based on
 24 a provision in the policy referring to a 10-mile radius
 25 of pollution.

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1 So let's forget about the particular language of it
 2 and just imagine that there is a clause which is like
 3 this, which is loss as a result of pollution of a beach
 4 within 10 miles, and there is an oil spill on
 5 Chesil Beach which pollutes the entire beach. Three
 6 miles of Chesil Beach is within a 10-mile radius of the
 7 holiday cottage.

8 On insurers' counterfactual, there would be no
 9 indemnity payable for any loss of business, because if
 10 somehow, miraculously, that 3-mile stretch of Chesil
 11 Beach escaped any pollution -- this is their
 12 counterfactual -- the beach would still have been closed
 13 because of the pollution elsewhere; and the customers
 14 still wouldn't have come, because the whole of the rest
 15 of the beach was polluted.

16 It rather shows how artificial the counterfactual
 17 is. We submit that they really don't have an answer to
 18 this. The event is you have suffered a loss, and in
 19 that case because a beach within a beach within a
 20 certain radius was polluted. It was. And talking
 21 about, "Well, if that bit hadn't been polluted and only
 22 another bit had", it is just as unrealistic, in our
 23 submission, as the toxic lorry spill case. You are
 24 contemplating a combination of events and that is
 25 sufficient.

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1 One other point on this. RSA say that the lockdown
 2 measures, on the "as a result of", they say the lockdown
 3 measures weren't as a result of an incidence of COVID-19
 4 but were preventative or pre-emptive. But that doesn't
 5 accord with the facts on incidence and on the government
 6 action, as we express them.

7 What we know is that the government was responding
 8 to not just the known but also the known unknowns, and
 9 I have dealt with that before. But I just thought
 10 I would mention that that is a particular point that RSA
 11 are taking.

12 Can I then move on to causation. In a sense we come
 13 back to the Chesil Beach example again and think about
 14 that, because the peril there, the pollution, is of
 15 itself of a nature which is capable of affecting a wide
 16 area, just as a notifiable disease is.

17 Just as there the section within the 10 miles would
 18 clearly be part of the overall picture in the mind of
 19 a holiday-maker deciding whether or not to book or
 20 cancel a holiday at the guest house, so the outbreak
 21 within the 25 miles is part of the overall picture that
 22 the government has when it is deciding to make the
 23 decision to impose restrictions on businesses and the
 24 public.

25 But let's have a look at some of the particular ways

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1 in which RSA operates the counterfactual, because what
 2 they do is they subtract the whole of the clause; they
 3 subtract the closure, the restrictions and the disease
 4 manifesting within 25 miles. So they don't make the
 5 mistake we say that other insurers make, of arbitrarily
 6 declaring that only the closure or restrictions are the
 7 peril and not the disease, and they also don't seek to
 8 remove only the restrictions placed on the premises,
 9 they accept one must remove the nationwide restriction;
 10 but their case is, and as I think I have already
 11 foreshadowed, that the government restriction on travel
 12 was a separate "but for" cause and is not excised.

13 We say there are a number of flaws. I have already
 14 referred to the first flaw, but that is not treating
 15 that restriction as a relevant restriction and that is
 16 wrong. But secondly, it is an unrealistic and, we would
 17 say, atomistic view of the regulations, where some of
 18 the regulations are removed for the purposes of the
 19 counterfactual and some are left in. We say they are
 20 a package, and they either all stay in or they all need
 21 to be excised.

22 Let's see what --

23 MR JUSTICE BUTCHER: That really ties in very much with your
 24 first way of putting it, doesn't it?

25 MR EDELMAN: Yes.

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1 MR JUSTICE BUTCHER: If you are wrong about that, then the
 2 second argument has more force.

3 MR EDELMAN: Although where one gets to is that if all the
 4 other regulations are said to still be in force, one
 5 still has everything else open that was permitted,
 6 everything else, everything open within the same
 7 category as the premises, as the holiday accommodation,
 8 everything else closed, and then you have this
 9 disease-free halo of 2,000 square miles in which you
 10 then have a guest house with a total monopoly of
 11 business. It's just fanciful and unrealistic.

12 And so we would say this is, I'm afraid, lawyers'
 13 counterfactual and it is not the real world; it's not
 14 the real world of this policy and what this policy is
 15 aimed to achieve.

16 Now there is one point on the machinery. We have
 17 made our submissions as to whether the machinery applies
 18 or not, but at {B/16/73} under "Loss of Gross Revenue"
 19 there is a point about what "solely" means and the
 20 effect of it:

21 "Loss of Gross Revenue.

22 "The actual amount of the reduction in the gross
 23 revenue received by you ... solely as a result of damage
 24 to buildings."

25 And assume that we are manipulating that. But then

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1 if my Lords can remember that, it's the problem of
2 looking at electronic copies, and if we look back to the
3 clause itself now, on page 16 {B/16/16}, which is on the
4 screen, we would then be reading into that clause,
5 "Solely as a result of closure or restrictions placed on
6 the premises as a result of human notifiable disease"
7 et cetera, et cetera et cetera. It is the entire
8 package.

9 LORD JUSTICE FLAUX: Yes.

10 MR EDELMAN: And it would not be operating, you can't say
11 it's solely within a radius of 25 miles. That would be
12 to insert "solely" at each stage of the causal link.

13 LORD JUSTICE FLAUX: Your primary case is that the "loss of
14 gross revenue" definition doesn't apply because there
15 wasn't damage to buildings.

16 MR EDELMAN: Exactly, my Lord, yes. We have put that in
17 writing and there is limited time, and it is one of
18 those arguments that there's not much orally that one
19 can add to it, it is what it is. We say it is a good
20 argument. But we would be putting the "solely" at the
21 beginning -- if it was to be manipulated, what I think
22 Mr Turner is trying to do is then put "solely" so that
23 it operates "solely within a radius of 25 miles", so he
24 is inserting it at each bit of the clause. Whereas all
25 it means is that the loss must solely be as a result of

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1 the combination of these ingredients. And that still
2 leaves open the question, the more general causation
3 question, and doesn't affect that.

4 My Lords, that is RSA1. Can I move on to RSA3.
5 I will come back to RSA2.

6 RSA3 is {B/19/38}. This is a commercial combined
7 policy, you can see from the top of the page. Again,
8 this one is, as we saw with QBE, a very simple disease
9 clause, just two elements to cover, interruption or
10 interference, and then following an occurrence.

11 The key issues here are firstly what is meant by
12 "following", and then there is also, on page {B/19/93}
13 a rather convoluted exclusion. It is a contamination or
14 pollution clause, at L, and:

15 "The insurance by this policy does not cover any
16 loss or damage due to [amongst other things, second line
17 in the middle] epidemic and disease ..."

18 Then it says in the second (a), it has two lots of
19 (a) and (b):

20 "If a peril not excluded from this policy arises
21 directly from pollution and/or contamination any loss or
22 damage arising directly from that peril shall be
23 covered.

24 "(b) All other terms and conditions of this policy
25 shall be unaltered and especially the exclusions shall

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1 not be superseded by this clause."

2 Bear in mind I will come back to that exclusion, but
3 I just wanted to show you what we are going to have to
4 be addressing. Go back to the clause now at page
5 {B/19/38}, "interruption or interference", nothing much
6 to be added to that. Then we have got the word
7 "following" at the end of the first line. We have made
8 our submissions in Hiscox on the meaning of the word
9 "following" as a causal connector, and we say only
10 a loose causal connection is envisaged. No need to
11 establish "but for" causation; it is enough that the
12 disease is part of the causal background, which a
13 disease within the relevant 25-mile radius plainly is.
14 Ms Mulcahy will also be addressing this further in
15 relation to the Zurich policy.

16 RSA suggest that other terms in the extension
17 indicate that a proximate cause test is intended by the
18 word "following", relying on references to "affected in
19 consequence of", "directly affected", words like that in
20 the policy. But in our submission, if the draftsman had
21 meant "directly affected" and he has used it elsewhere
22 in the policy, that is what he would have said.

23 It may be the point is academic because our case is
24 fine whether "following" is proximate cause or not,
25 something stronger or not, but it may have been

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1 selected, and we say probably was selected, by the
2 draftsman as a more appropriate term in recognition of
3 a point I have made before, that the interruption or
4 interference was likely to be caused by health
5 protection measures following an outbreak of a disease.
6 So it is an implicit recognition that there will be
7 something intermediate happening to cause the
8 interruption or the disease.

9 One sees the word "following" in the context of
10 these disease clauses used quite frequently. And just
11 putting to one side its causal connotations, it does
12 have that important recognition that it is recognising
13 that unlike other sorts of perils, this one will not be
14 having a direct effect of its own on the business, it
15 will be causing something else to happen which will have
16 an effect on the business. And that rather explains the
17 looser use of the word "following".

18 It also, we submit, undermines the insurers'
19 approach to this counterfactual.

20 There is one other provision that I should have
21 highlighted for you but I forgot, and I should have done
22 so. There is on page {B/19/39} at item 4, there is this
23 exclusion, right at the end of the clause above
24 "Professional Accountants":

25 "We shall only be liable for the loss arising at

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1 those premises which are directly affected by the
 2 occurrence discovery or accident [and it says] maximum
 3 indemnity period shall mean three months."
 4 So it is premises directly affected. There is
 5 a similar clause in Arch and in Amlin 1 and 2.
 6 In a rare moment of accord, Amlin actually agree
 7 with our analysis of this clause, which is that it is
 8 actually there to prevent the loss, including what
 9 I would call the knock-on effect loss at another set of
 10 premises owned by the insured which are not impacted.
 11 So, for example, if there's an outbreak of disease,
 12 let's say there is in a locality, and the local
 13 authority says that anyone who has worked at that
 14 locality cannot work, cannot go and work anywhere else,
 15 they have got to be quarantined, and the people who work
 16 at that may be, for example, some cleaning staff who
 17 clean all that insured's holiday cottages, and another
 18 holiday cottage is outside the 25-mile radius and cannot
 19 be cleaned. The loss from that holiday cottage can't be
 20 included; it is not the premises directly affected.
 21 That is what this is aimed at.
 22 But RSA take a rather more dramatic view of this,
 23 because they say that this actually prevents people --
 24 this applies so that it has to be something directly on
 25 the premises. They say that this clause requires the

1 staff at the premises to be infected or the premises to
 2 require a deep clean because of the disease or its
 3 effect.
 4 So it is looking at making sure the premises are
 5 directly affected, as opposed to the, those premises
 6 which are directly affected, which we say is far too
 7 restrictive. It is effectively removing the 25-mile
 8 cover and supplanting this with a cover that only
 9 operates when there is a disease on the premises. So we
 10 say that is just simply a misreading of the exclusion.
 11 Now if I can move on to the pollution and
 12 contamination exclusion, which is this tab, page 93.
 13 {B/19/93}. Just putting "epidemic" to one side for
 14 a moment, and we say "epidemic" and "disease" is
 15 obviously within the ambit of the disease clause,
 16 because that is what some notifiable diseases are
 17 capable of being and that is what notifiable disease
 18 encompasses. But even putting to one side the epidemic
 19 point it is obvious, we submit, that the word "disease"
 20 in that clause cannot have been intended to take away
 21 the cover given by the infectious diseases extension.
 22 And one then asks oneself: if that is the answer, how
 23 does one get there?
 24 There are two ways of doing that. Under (a), the
 25 second (a):

1 "If the peril not excluded from this policy arises
 2 directly from pollution and/or contamination any loss or
 3 damage arising directly from that peril shall be
 4 covered."
 5 Then one has to treat pollution and/or
 6 contamination, although they are in bold they are
 7 undefined, as having been intended to be a reflection of
 8 the title to this clause, "Contamination or Pollution".
 9 It would have been easier if there had been a definition
 10 which defined it in accordance with subparagraph (a),
 11 but there isn't, so one has to make sense of it and that
 12 would make perfect sense.
 13 The other way is to say at (b):
 14 "All other terms ..."
 15 MR JUSTICE BUTCHER: Sorry, I don't understand quite how
 16 that works, Mr Edelman. Could you just explain it.
 17 MR EDELMAN: Yes.
 18 MR JUSTICE BUTCHER: The second (a):
 19 "If a peril not excluded from this policy arises
 20 directly ..."
 21 MR EDELMAN: From epidemic or disease.
 22 MR JUSTICE BUTCHER: So you then look to see whether the
 23 infectious disease cover arises directly from epidemic
 24 or disease.
 25 MR EDELMAN: Yes.

1 MR JUSTICE BUTCHER: Yes.
 2 MR EDELMAN: There is an obvious intent here. I mean, they
 3 are obviously not intending by this exclusion at the end
 4 to override an express grant of cover, so one has to
 5 read this sensibly.
 6 The other way through to it is:
 7 "All other terms and conditions of this policy shall
 8 be unaltered and [in brackets] (especially the
 9 exclusions) shall not be superseded by this clause."
 10 The words "shall not be superseded by this clause"
 11 must be intended to indicate the terms and conditions
 12 shall be unaltered, to indicate that if there is an
 13 express grant of cover in relation to any of these
 14 topics, this exclusion is not negating an express grant
 15 of cover.
 16 What it is doing, essentially, is making sure that
 17 perils that don't specifically state what they are going
 18 to be caused by aren't caught up with this.
 19 LORD JUSTICE FLAUX: I mean, you could look at it, if you go
 20 back to the insuring extension at page {B/19/38}:
 21 "We shall indemnify you in respect of interruption
 22 or interference with the business following any
 23 occurrence ..."
 24 And then "attributable to food or drink supplied
 25 from the premises". So that would seem to be covering

1 food poisoning.
 2 MR EDELMAN: Yes.
 3 LORD JUSTICE FLAUX: If you go to the exclusion, it talks
 4 about it doesn't cover any loss or damage due to
 5 poisoning.
 6 MR EDELMAN: Yes.
 7 LORD JUSTICE FLAUX: It's a circular point, isn't it?
 8 MR EDELMAN: Yes.
 9 LORD JUSTICE FLAUX: Your point about (b) is probably the
 10 answer really. (a) is a bit impenetrable.
 11 MR EDELMAN: Yes, it is. It is all a bit impenetrable. But
 12 I think when one looks at this as a whole, and one gets
 13 this with insurance policies, sometimes one has to
 14 actually work out what the draftsman is getting at.
 15 LORD JUSTICE FLAUX: Yes.
 16 MR EDELMAN: And what he must be getting at is: there is
 17 this general exclusion but I am not intending to
 18 override any express grant of cover, it's just if there
 19 isn't something express for these topics.
 20 LORD JUSTICE FLAUX: They are extensions, aren't they?
 21 MR EDELMAN: Yes. And it is fine, it works as it stands.
 22 But then "epidemic" and "disease" go together, because
 23 a notifiable disease is something which has the capacity
 24 to be an epidemic.
 25 I think what Mr Turner wants to do is to carve out

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1 "epidemic" and say: ah, this is an epidemic exclusion.
 2 But that is inconsistent with the nature of the peril,
 3 and, you know, it says "all other terms and conditions
 4 ... shall be unaltered". So it goes back to the policy.
 5 And if, as a matter of construction, by covering
 6 a notifiable disease it covers something which is
 7 capable of being an epidemic and develops into one, then
 8 the exclusion doesn't apply. Just as with my Lord's
 9 example of food poisoning. You have the exclusion, but
 10 if you look at the clause and on true construction of
 11 the clause that falls within the ambit, it's not
 12 excluded.
 13 My Lord, RSA3, there is nothing more for me to add
 14 on causation and counterfactual or on the trends clause,
 15 so unless there is anything more on that policy I was
 16 going to move on to RSA2, and there are two forms of
 17 that.
 18 The first one is {B/17/1}. I will just show you
 19 what that is, it is a restaurant, wine bars and pubs
 20 policy. Then {B/18/1}, a shops policy. These are the
 21 lead policies, but they just show you essentially what
 22 these are about.
 23 Let's go to the key element of cover. Let's take
 24 that at {B/17/36}.
 25 LORD JUSTICE FLAUX: This is RSA2, is it?

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1 MR EDELMAN: Yes, this is 2.1, there is RSA2.1, which is
 2 this one, the restaurants, wine bars and public houses;
 3 and RSA2.2, which is the shops policy, that is the one
 4 at tab 18.
 5 MR JUSTICE BUTCHER: They have the same prevention of access
 6 cover.
 7 MR EDELMAN: Yes. That is why they have been grouped
 8 together.
 9 LORD JUSTICE FLAUX: So we only need to look at one, do we?
 10 Page {B/17/36}.
 11 MR EDELMAN: Yes. It's "Prevention of Access -- Public
 12 Emergency":
 13 "The actions or advice of a competent Public
 14 Authority due to an emergency likely to endanger life or
 15 property in the vicinity of the Premises which prevents
 16 or hinders the use or access to the premises."
 17 Again, similar to clauses you have seen before.
 18 There is an issue in relation to 2.2, where there is
 19 a different exclusion, so there is one difference.
 20 There is no difference in the cover clause, but there is
 21 a difference in the exclusion.
 22 The exclusion to 2.1 is as a result of diseases
 23 specified in extension A(a) "Diseases". We needn't turn
 24 it up, but it is a list of diseases and obviously this
 25 one isn't there. Then there is below it "Any amount in

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1 excess of €10,000".
 2 Then if we go to the clause in 2.2 at {B/18/51} one
 3 can see that there is a different exclusion and it
 4 reads, and it reads perfectly naturally:
 5 "As a result of infectious or contagious diseases
 6 any amount in excess of 10,000."
 7 So this has got a different disease exclusion.
 8 Instead of excluding only specified diseases, it
 9 excludes all of them, and the words "any amount in
 10 excess of 10,000" are printed as part of that exclusion.
 11 In other words, capping any indemnity under this public
 12 emergency clause to €10,000. We don't dispute that that
 13 is so capped.
 14 But, as you have seen, RSA's submission is that
 15 there is an obvious error on page {B/18/51}, and the
 16 obvious error and the obvious correction to it is to
 17 remove the words "any amount in excess of 10,000" and
 18 place them as though they apply to all the cover under
 19 this clause.
 20 One can see that is what the draftsman did on 2.1,
 21 but that would not be obvious to the reasonable reader
 22 as a mistake on this clause. There is nothing wrong
 23 with it at all. Perhaps I will deal with this point
 24 while we have got the page open.
 25 One can see that the clause above has no sub-limit

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1 at all. The one below does have an overall sub-limit.
 2 And as one goes through the clauses one sees a mixed bag
 3 on it. If one goes to the previous page {B/18/50} the
 4 first one has no sub-limit, the second one does have
 5 a sub-limit, and the third one (c) does have
 6 a sub-limit. But as I have shown you, and it goes over
 7 the page, the fourth one, "failure to supply" doesn't.
 8 It is a mixed bag. It is not an obvious error.
 9 One can well imagine why diseases might be singled
 10 out for a sub-limit of 10,000. That makes perfect
 11 sense. Whereas what Mr Turner wants you to do is to
 12 read this as though there is an absolute exclusion of
 13 all infectious diseases from the clause, and we submit
 14 that simply is not tenable. It's not obvious that there
 15 is an error, and the moving of the words "any amount" to
 16 give them a false, to give them a capital A, and the new
 17 line is not an obvious correction.
 18 I think Mr Turner, he will forgive me if I have made
 19 a mistake about this, I am trying to recollect
 20 submissions, I think he made some point about there
 21 being no comma after the word "diseases". If you look
 22 carefully through the policy, the use of a comma does
 23 not seem to have occurred to the draftsman in any
 24 clauses at all. It's not a form of punctuation that --
 25 LORD JUSTICE FLAUX: No.

1 MR TURNER: I'm not sure that's a point we have taken.
 2 MR EDELMAN: Then I apologise for that. But if a point was
 3 to be taken, that one would expect a comma if I was
 4 right, there aren't any commas anywhere.
 5 While we are on the subject of exclusions, there is
 6 one other exclusion that I should deal with. Let's go
 7 back to page {B/17/36}, and there is an exclusion (b):
 8 "During any period other than the actual period when
 9 access to the premises was prevented."
 10 This seems to be relied on to argue that only
 11 prevention of access is covered. So one ignores the
 12 words "prevents or hinders the use or access to the
 13 premises" in the insuring clause. So you give with one
 14 hand and you take away with the other.
 15 Of course exclusions can cut down the scope of
 16 cover, but it would be remarkable if the intention of
 17 the draftsman when this exclusion was inserted, having
 18 conferred cover for prevention or hindrance of use or
 19 access, was, by an exclusion, then to cut it down to
 20 prevention of access only.
 21 If that is what was intended, he would have simply
 22 said "which prevents access to the premises" in the
 23 insuring clause. What this is obviously intended to do
 24 by a shorthand is to say that you cannot have indemnity
 25 for the after-effects of a prevention or hindrance of

1 access.
 2 What you get is when there was prevention or
 3 hindrance of use or access, when that was actually
 4 operating you can get your loss; but the minute that
 5 stops, that is when your indemnity period stops, and you
 6 can't say: well, because of that it took me a while to
 7 recover my business. That is the simple explanation for
 8 that, and the draftsman has simply used a shorthand,
 9 "prevention of access", to encompass all the concepts
 10 that he has put in the insuring clause.
 11 If one goes back now, having dealt with the
 12 exclusions, to the clause itself, their preamble
 13 I should have shown you at page 35 {B/17/35}:
 14 "Cover provided by this subsection is extended to
 15 include interruption or interference with the business."
 16 Then page {B/17/36}, interruption and interference
 17 has been addressed, it doesn't seem to be disputed this
 18 will be satisfied.
 19 We have "actions or advice of a competent public
 20 authority"; there is little debate, little if any debate
 21 here. It is important to recognise, though, that RSA
 22 acknowledges that advice from the government can be
 23 coercive in its effect.
 24 That is an important contextual point, if people
 25 say, "Well, none of this could have been anticipated,

1 and it is hard luck on the insured if the government
 2 didn't impose things in a legally binding way, instead
 3 of just imposing them by guidance", but this policy
 4 actually contemplates that there will be, amongst other
 5 things, a prevention of use or access resulting from
 6 advice of government.
 7 Obviously whether that has happened and is causally
 8 linked will be a question of fact in different types of
 9 case, but it shows a recognition that governments and
 10 authorities sometimes act in an advisory way which
 11 really is coercive, even if not legally coercive.
 12 Directly legally coercive, I should say.
 13 On the "emergency likely to endanger life", we have
 14 covered that before, but RSA, unsurprisingly, accepts
 15 that the COVID-19 epidemic was a general public health
 16 emergency. Ms Mulcahy has addressed that on Arch 1.
 17 Then "in the vicinity", we have addressed that as
 18 well under Arch. Arch have a vicinity limit, I correct
 19 myself. The emergency occurred in all areas, and
 20 therefore will have occurred, we submit, in the vicinity
 21 of the premises. The epidemic, and in this case in the
 22 context of an emergency it's not just the actual cases,
 23 but the emergency is the serious risk of its further
 24 spread and development throughout the population, is of
 25 itself an emergency, and that was a nationwide emergency

1 and therefore necessarily occurred in the vicinity . And
 2 the clause doesn't say that the emergency has to be only
 3 in the vicinity of the premises. All it needs to do is
 4 to be an emergency which is likely to endanger life in
 5 the vicinity of the premises, and it was. The COVID
 6 emergency was likely to endanger life in the vicinity of
 7 everywhere in the country. So we say that's satisfied .

8 But even if the emergency has to be in the vicinity ,
 9 for the reasons I have given that is also satisfied .

10 We understand that RSA's case is that the emergency
 11 wasn't in the vicinity , but that, for reasons I have
 12 given, ought to be rejected . It presupposes that the
 13 emergency contemplated can only be local . That is not
 14 what the policy says. Really what RSA is doing is
 15 inserting the word "only" in the clause to: an emergency
 16 likely to endanger life only in the vicinity of the
 17 premises. And that is not a permissible approach to
 18 construction .

19 The authority action was due to the emergency.
 20 We have dealt with the causal relationship between the
 21 actions or advice of the competent authority and the
 22 emergency.

23 We then have prevention and hindrance of use. We
 24 have RSA again on this policy drawing a distinction
 25 between what they term "closure measures" and "social

1 distancing measures". So the distinction is based on
 2 the content of the measures, rather than their legal
 3 force. They accept that the closure measures did
 4 prevent use of all premises to which they apply, but
 5 they deny that the social distancing measures caused any
 6 kind of prevention or hindrances of access.

7 You have our case on this. Preventing customers
 8 from accessing premises is, we submit, prevention of
 9 access; and, similarly, the social distancing measures
 10 also amounted to hindrance of access.

11 We then have the counterfactual, and I think we have
 12 really dealt with this but just so you are aware of it,
 13 RSA's primary case is that you only subtract the
 14 endangerment in the vicinity. Here the Scilly Isles is
 15 used as the knight in shining armour by the RSA, an
 16 island of disease-free safety, still subject to the
 17 restrictions, and they say that the counterfactual
 18 requires you to imagine that each holiday cottage
 19 enjoyed that same immunity. You have our submissions.

20 LORD JUSTICE FLAUX: This is restaurants or pubs, isn't it?

21 MR EDELMAN: Yes.

22 LORD JUSTICE FLAUX: Hotels, restaurants, pubs.

23 MR EDELMAN: Yes. It is just utterly fanciful, in our
 24 submission. It doesn't tie in with the clause, but
 25 it is utterly fanciful.

1 Then you have got our case on the trends clause, our
 2 case on the trends clause is in writing.

3 I need to press on, so if my Lords are content
 4 I will move to RSA4, which is at {B/20/1}.

5 You can see it is a Marsh form, but there is
 6 a clause in it which says it to be treated as RSA's
 7 form. Three clauses to consider: a notifiable disease
 8 clause, an enforced closure cause and a prevention of
 9 access clause.

10 Page {B/20/6} is the material damage insuring
 11 clause. That is just to show you where that is. Then
 12 clause 2.3 on {B/20/7} is the business interruption
 13 clause:

14 "In the event of interruption or interference to the
 15 insured's business as a result of ...

16 "(viii) Notifiable diseases and other incidents:

17 "(a) discovered at an insured location."

18 Not relevant for us, obviously. But:

19 "(d) occurring within the vicinity of an insured
 20 location,

21 "during the period of insurance."

22 We also have prevention of access at (xii):

23 "Prevention of access - Non-damage"

24 At the end:

25 "Within the territorial limits, the insurer agrees

1 to pay the insured the resulting business interruption
 2 loss."

3 You will find those definitions firstly at page 23,
 4 for business interruption loss, which is, the top
 5 left-hand corner, reduction in turnover.

6 Then you have notifiable disease on page {B/20/29}.
 7 This is quite an important one. This is RSA4, which had
 8 the backdating one. (ii):

9 "Any additional diseases notifiable under the Health
 10 Protection Regulations (2010), where a disease occurs
 11 and is subsequently classified under the ... regulations
 12 such disease will be deemed to be notifiable from its
 13 initial outbreak."

14 As I mentioned before, there are two points about
 15 this clause. Firstly, it overrides the New World
 16 Harbourview point about when you get indemnity if there
 17 is a delay in it being made notifiable. But secondly,
 18 and we say more significantly and of general
 19 significance to all these policies, is it is expressly
 20 contemplating, it must be, it is said by RSA to have
 21 been intended to override the New World Harbourview
 22 decision, which was a case about a newly emerging
 23 disease, SARS in the Far East, and this, if nothing
 24 else, demonstrates that within the ambit of these
 25 notifiable disease risks, insurers must be taken to know

1 that they are at risk of providing indemnity in respect
 2 of losses arising from newly emerging diseases which
 3 become notifiable .
 4 Those newly emerging diseases could be anything, but
 5 we all know which are the ones in recent times have
 6 caused a degree of panic, things like SARS and Ebola.
 7 Whether they go anywhere or not, or how far they go,
 8 depends on the nature of the disease .
 9 But anyway, you will see that part of the definition
 10 of " notifiable diseases " is any additional diseases
 11 notifiable under ... and it has a list of any additional
 12 diseases , so that is not an exclusive list . Then (v):
 13 "... any other enforced closure of an insured
 14 location ..."
 15 So under the " Notifiable Diseases and Other
 16 Incidents " cover, going back to page 7, one has those
 17 two ingredients , {B/20/7}, an additional disease
 18 occurring within the vicinity , or any other enforced
 19 closure of an insured location by any government
 20 authority .
 21 Then we have, going on to the definitions at page
 22 {B/20/30}, the "Prevention of Access - Non-Damage"
 23 clause. Actions or advice, governmental authority or
 24 agency in the vicinity of the insured locations -- this
 25 is 87 on the right-hand side, just below the middle --

1 which prevents or hinders use or access of the insured
 2 locations .
 3 For reasons which we explain in our skeleton , we
 4 accept that the claim, the trends mechanism and all that
 5 applies to this policy , so I needn't go into that .
 6 There is also one other definition I need to take
 7 you to, because it is significant . {B/20/35}
 8 " Vicinity ". We say this is a good working definition of
 9 what " vicinity " should mean.
 10 "... an area surrounding or adjacent to an insured
 11 location in which events that occur within such area
 12 would be reasonably expected to have an impact on an
 13 insured or the insured 's business ."
 14 Then one has to consider the nature of the event,
 15 and whether or not it is in the vicinity .
 16 Our submissions on that is " vicinity " is a flexible
 17 concept and, if necessary, the country could be in the
 18 vicinity of the premises for the purposes of an
 19 epidemic. But we don't need to go that far , because we
 20 have got our causation arguments about outbreaks of
 21 disease in a vicinity . And in the particular context of
 22 COVID, the causal role that occurrences of the disease
 23 in any relevant policy area, whether it is a vicinity or
 24 a mileage limit , has. But you have our submissions on
 25 that .

1 No further points additional to other insurers arise
 2 on the first head of cover, going back to page
 3 {B/20/29}, that is diseases in the vicinity , that is the
 4 same arguments as before.
 5 We then have, under 5, enforced closure . There is
 6 just a couple of points here. RSA admits in its defence
 7 that if and to the extent that premises insured under
 8 this policy were ordered to close in full or in part,
 9 that amounted to enforced closure . The reference for
 10 that is their amended defence at paragraph 50,
 11 subparagraph (d). That includes orders , and not only
 12 legislation . But also the government announcements on
 13 20, 23 and 24 March. So it accepts that a partial
 14 enforced closure applies and is covered by the clause .
 15 LORD JUSTICE FLAUX: Presumably that is because the actual
 16 insuring clause begins with the words:
 17 "In the event of interruption or interference to the
 18 insured 's business ..."
 19 MR EDELMAN: Yes, but they are not seeking to argue that
 20 enforced closure requires closure of the whole lot .
 21 LORD JUSTICE FLAUX: Enforced closure of the whole lot is
 22 inconsistent with interference . That's the point .
 23 MR EDELMAN: Exactly, yes.
 24 Having said that, if we can now go to {1/18/77}.
 25 I think I have got the right reference . It is 24(a) of

1 their skeleton argument. Because they have then got
 2 a rather convoluted example that they give . A
 3 restaurant has space for 10 diners, predominantly used
 4 as a take-away. Other than at weekends, the seats are
 5 solely used by take-away/collection customers to wait
 6 for their food. The 21 and 26 March regulations
 7 required the dining/waiting area to be shut. The
 8 customers could enter the premises one-by-one to collect
 9 their take-aways. The 21 and 26 March regulations
 10 permitted chefs to continue cooking food in the kitchen
 11 as before.
 12 The next page {1/18/78}, (iii):
 13 "Even if the FCA were to maintain that there is some
 14 form of 'enforced closure' in relation to premises which
 15 were palpably not closed, the fact that chefs can work
 16 in the kitchen and the public can come into the same
 17 (closed) dining area to pick up their food, contradicts
 18 the possibility that it could be for 'health reasons or
 19 concerns'."
 20 Let's go back to the clause again, {B/20/29}. This
 21 is the for "health reasons or concerns". I have to
 22 confess that we really do not understand that
 23 submission. Everything that happened to that restaurant
 24 was due to the COVID outbreak, everything that he is
 25 describing , and that is --

1 LORD JUSTICE FLAUX: But if one of the health concerns of
 2 the government is if people get within less than
 3 2 metres of each other they might contract COVID, and if
 4 that is what has led to the partial enforced closure and
 5 it is accepted, then, as you say, the example would seem
 6 to be fairly and squarely within the terms of the
 7 policy, wouldn't it?
 8 MR EDELMAN: My Lord, yes. And there is a partial closure,
 9 because the dining area is closed for dining. The fact
 10 that people may be allowed to enter one-by-one to
 11 collect their take-aways does not cause the restaurant
 12 area to cease to be closed as a restaurant area.
 13 LORD JUSTICE FLAUX: No.
 14 MR EDELMAN: The other points that are made in relation to
 15 this policy, I think I have already dealt with.
 16 We then come to the final clause, which is the
 17 non-damage denial of -- the "Prevention of Access --
 18 Non-Damage", and that is at page 30. If we can move
 19 forward to page 30 {B/20/30}.
 20 The only apparent dispute is whether the coming into
 21 force of the Act and the designations made on 4 April
 22 were "actions" or "advice", perhaps we will wait to see
 23 what Mr Turner says about that in his submissions, but
 24 the fact that advice is there recognises that advice can
 25 be coercive, even if not carrying a legal obligation.

1 Then we have again got in this clause "in the
 2 vicinity of the insured locations". But we have dealt
 3 with that. There is an issue again as to whether the
 4 government's social distancing measures prevents or
 5 hinders use or access to premises, but I have dealt with
 6 that in relation to Hiscox and you have our submissions
 7 on that.
 8 Then finally, counterfactuals. Our case is the same
 9 as it is in other cases. What RSA say is that you only
 10 remove the regulations as are applicable to the premises
 11 but keep the same regulations nationally. So it is as
 12 if the regulations apply to these premises and no one
 13 else. They also say, so you have got all the other
 14 closure measures and the social distancing measures
 15 remaining in place. That is their counterfactual.
 16 We say that is ridiculous. You can't cherry-pick
 17 like that. It is either government action or advice or
 18 not. You can't start salami slicing it into these
 19 ingredients, and they are not relevant salami slicings
 20 for the purpose of the clause.
 21 That is all I want to say about RSA. Unless my
 22 Lords want to break for lunch now, I think Ms Mulcahy
 23 was going to make a start on Zurich.
 24 LORD JUSTICE FLAUX: We have eight minutes, so perhaps it
 25 would be sensible if she made a start on Zurich.

1 (12.52 pm)
 2 Submissions by MS MULCAHY
 3 MS MULCAHY: I will take it as far as I can, my Lord.
 4 LORD JUSTICE FLAUX: Yes.
 5 MS MULCAHY: As we will see, Zurich is something of an
 6 extremist compared to the other insurers, and has taken
 7 a number of points that have not been taken by other
 8 insurers. So I am going to try and focus on those
 9 points and avoid repetition, where possible, of matters
 10 we have covered already.
 11 Just to introduce the policies, Zurich has two
 12 types, we have labelled them type 1 and type 2. We
 13 don't need to look at it, but the representative sample
 14 document shows that the two types have materially the
 15 same wording. Zurich 2 has five non-lead wordings. We
 16 now know that between the wordings all seven categories
 17 were covered, but there is a heavy leaning towards
 18 category 5, so those are the service businesses but also
 19 would encompass manufacturing.
 20 I think I have lost my Lord, Lord Justice Flaux at
 21 the moment.
 22 LORD JUSTICE FLAUX: Only because I'm getting the Zurich
 23 policy file.
 24 MS MULCAHY: The Zurich 1, if we go to it, the Zurich 1
 25 policy, it is in the main bundle at {B/21/1}.

1 If we go to just look briefly at the property damage
 2 BI, that is at page 14 of that document {B/21/14} and we
 3 have "Business Interruption 'All Risks', section B1, and
 4 section B2.
 5 There is then a schedule, which appears at page 41
 6 {B/21/41} of the same document, "Combined All Risks
 7 Policy Schedule". If we go forward to {B/21/43}, we can
 8 see there, it is redacted but there is a summary of
 9 cover, and we can see that it shows BI is included for
 10 this insured at B1 and B2, and the business is blacked
 11 out but you can see that the business would be
 12 identified by name towards the top.
 13 The "Extensions" cover clause starts on page
 14 {B/21/50}, if we go forward to that, and explains:
 15 "Section B1.
 16 "The business interruption cover is subject to the
 17 extensions shown below:
 18 "Any loss as insured by this section resulting from
 19 interruption of or interference with the business in
 20 consequence of accidental loss destruction or damage at
 21 the undernoted situations or to property as undernoted
 22 shall be deemed to be an incident, provided that, after
 23 the application of all other terms and conditions of the
 24 policy the liability under the extension(s) in respect
 25 of any one occurrence shall not exceed ..."

1 Then we have a percentage limit .
 2 So that wording is drafted with property damage in
 3 mind. But if we go forward to the next page, we see the
 4 relevant extension at the top of {B/21/51} which is
 5 entitled "Action of Competent Authorities". It has been
 6 referred to as the AOCA clause by Zurich. That covers:
 7 "Action by the police or other competent local,
 8 civil or military authority following a danger or
 9 disturbance in the vicinity of the premises whereby
 10 access thereto shall be prevented provided there shall
 11 be no liability under this section of this extension for
 12 loss resulting from interruption of the business during
 13 the first six hours of the indemnity period."
 14 In Zurich 2 that is provided for three hours, so
 15 it is slightly different :
 16 "For the purposes of this extension :
 17 "a) the limit is 4.8%.
 18 "b) the maximum indemnity period is 3 months."
 19 In Zurich 2 it is 12 months, so there is again
 20 a slight difference there .
 21 The wording here is very similar to the MSAm1
 22 denial of access clause , which we will be coming on to
 23 after Zurich, just to note the similarity .
 24 The first issue I need to deal with relates to
 25 action by a civil authority . As I mentioned on Monday,

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1 unlike Amlin, Zurich denies that "competent local, civil
 2 or military authority" includes the government. It is
 3 the only insurer to deny that the government falls
 4 within its wording. What it argues is it is not
 5 national government, it is the
 6 Health & Safety Executive, it is the CAA, the Fire
 7 Service, but it is bodies that fall below the level of
 8 national government. They say that that is supported by
 9 the local nature of danger or disturbance in the
 10 vicinity and the exclusion for the first few hours of
 11 the interruption .
 12 Now, given my Lord Lord Justice Flaux's indication
 13 on Monday I am going to leave this point for a reply if
 14 it is pursued. I think you have the gist of our point
 15 on this . We say "civil" is broad generally , it is
 16 contrasted with the military authority .
 17 LORD JUSTICE FLAUX: It would mean that, for example, if the
 18 relevant action was an action by Public Health England
 19 it was covered, if it was an action by the Minister of
 20 Health it wasn't, or the Secretary of State for Health
 21 it wasn't, which is surprising .
 22 MS MULCAHY: Yes. We say "civil" is broad generally,
 23 government naturally falls within it, as well as
 24 government executive organs like the HSE.
 25 LORD JUSTICE FLAUX: Yes.

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1 MS MULCAHY: So that is civil authority.
 2 As to "action", Zurich pleads that action does not
 3 include advice or guidance. We can see that from its
 4 defence at paragraph 39.2(b) but also its skeleton at
 5 paragraph 80. Perhaps if we can go to the latter , it is
 6 {I/19/37}. It sets out there a case that action must be
 7 more affirmative than advice, referring to mandatory
 8 actions taken or orders issued , which will invariably
 9 have the force of law .
 10 Indeed, at paragraph 85, which is on page {I/19/38}
 11 over the page, it says:
 12 "Only the 21 and 26 March regulations were action ."
 13 So that is its position .
 14 MR JUSTICE BUTCHER: That is also quite difficult, isn't it ?
 15 Action by the police ; if the police officers , after the
 16 disturbance in the locality , were saying, "I advise you
 17 not to go down that street ", that is not action
 18 apparently , on this .
 19 MS MULCAHY: Apparently so.
 20 LORD JUSTICE FLAUX: Or if there is a danger or disturbance,
 21 as a result of which the police put one of their blue
 22 lines across, that is not actually -- as I understand
 23 it, it is not legally enforceable, but to say that
 24 wasn't action by police would be rather surprising .
 25 MS MULCAHY: Yes. I can only endorse that, my Lord. We

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1 would take the same position and say that "action" is
 2 much broader than that, and includes, particularly in
 3 the context of a public authority, pronouncements and
 4 guidance where they -- much public authority action is
 5 done through announcements and pronouncements.
 6 LORD JUSTICE FLAUX: You say that the Prime Minister's
 7 statement on 16 March was clearly action by a civil
 8 authority .
 9 MS MULCAHY: Indeed.
 10 LORD JUSTICE FLAUX: Is that a convenient moment to break?
 11 MS MULCAHY: It is, exactly. I was just going to say it is
 12 1 o'clock .
 13 LORD JUSTICE FLAUX: 2 o'clock.
 14 MS MULCAHY: Thank you, my Lord.
 15 (1.00 pm)
 16 (The short adjournment)
 17 (1.58 pm)
 18 LORD JUSTICE FLAUX: It's just before 2 o'clock, Ms Mulcahy,
 19 but if you are ready to go, why don't we?
 20 MS MULCAHY: I am ready to go.
 21 I just want to finish this point on action, briefly .
 22 If I go to the Oxford English Dictionary definition put
 23 in by the defendants, it is at {K/222.1/2}.
 24 It may be that we haven't got the person operating
 25 the RingCentral system yet .

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1 LORD JUSTICE FLAUX: No, here we are.
 2 MS MULCAHY: Here we are. The definition of "action" which
 3 is set out there is:
 4 "The process or condition of acting or doing in its
 5 wider sense; the exertion of energy or influence."
 6 And we would say that acting or doing, in its wider
 7 sense, and the exertion of influence would encompass
 8 government advice, government pronouncements of the kind
 9 here.
 10 There is a policy point I would like to make as
 11 well, which is to have a look and contrast the way in
 12 which this is dealt with in the disease clause, which is
 13 a page {B/21/52}, with the extension we are looking at.
 14 If you look at the disease clause, which insures
 15 loss resulting from interruption of or interference with
 16 the business carried on by the insured at the premises
 17 in consequence of any occurrence of notifiable disease
 18 at the premises, and then if we go down to under 3:
 19 "which causes restrictions on the use of the
 20 premises on the order or advice of the competent local
 21 authority."
 22 Now, "action" which we have in the relevant
 23 extension on page {B/21/51} is naturally broader and can
 24 include, as we say, speech acts such as instructions and
 25 orders being given, even if they are not legally backed,

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1 and rules, and it is deliberately, we would say,
 2 intended to be broader than "order".
 3 But this is important, because Zurich's proposed
 4 meaning, "mandatory action with the force of law" is
 5 almost synonymous with "order", but that word wasn't
 6 chosen for the extension that we are looking at. We
 7 would say that therefore it is broader and it
 8 encompasses all acts of government, including those done
 9 by announcement.
 10 We saw on Monday that the government language mixed
 11 "requests" with "orders", but they were all to be taken
 12 as authoritative and as amounting to government action.
 13 So we say the short of it is the government was
 14 acting; it had an action plan on 3 March. And on
 15 16 March, when it told people to stop inessential
 16 contact of all kinds, and to stop all unnecessary
 17 travel, and to work from home wherever possible, the
 18 Prime Minister said that it was necessary to take
 19 drastic action. And on 20 March the Chancellor
 20 explained its actions, saying it had taken steps to
 21 close schools. Now, that wasn't backed by legislation
 22 other than to give a power to close schools, but they
 23 were saying "We have closed schools and these steps are
 24 necessary to save lives".
 25 So by all these things, by its statements up to and

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1 including 20 March, the first regulations happen the
 2 next day, we say this was all action.
 3 Moving on to the second topic, "prevention of
 4 access", Zurich's case on prevention of access to the
 5 premises is that one needs physical obstruction or
 6 physical impossibility or, alternatively, a complete
 7 cessation of the business. We can see that from
 8 paragraph 95 of its skeleton, at {1/19/44}, where it
 9 sets out that case.
 10 It takes the extreme position that there is no
 11 prevention of access even by the 21 March and 26 March
 12 regulations. We can see that from paragraph 116 of its
 13 skeleton, on {1/19/51} of the same document, where it
 14 says:
 15 "As to [both sets of] regulations:
 16 "(1) They do not on their face prevent access to
 17 premises; and
 18 "(2) They do not have the effect of preventing
 19 access to premises."
 20 "Both of these points are unsurprising because the
 21 regulation were not aimed at preventing access; rather
 22 they were designed to reduce the degree to which people
 23 gathered and mixed, particularly indoors."
 24 Now, we say that that is a complete misreading of
 25 the regulations. Even for category 2 businesses, and

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1 even where they have been ordered to cease operations
 2 entirely in the 26 March regulations, which we can see
 3 if we go to them, it is {J/16/3}, and it is regulation
 4 4(4) towards the top, that:
 5 "A person responsible for carrying on a business ...
 6 in part 2 of schedule 2 must cease to carry on that
 7 business or to provide that service during the emergency
 8 period."
 9 They say that that was not ordered to cease
 10 operations entirely, and they rely on regulation 4(5)
 11 and the fact that paragraph 4 doesn't prevent the use of
 12 premises used for the purpose of broadcasting
 13 a performance to people outside the premises. They say
 14 that is sufficient, there is no prevention of access,
 15 there is no complete closure.
 16 Now, as I have already made clear with Arch, that is
 17 not a point that Arch is taking, but Zurich takes that
 18 case; that is its primary case, that there was no
 19 closure even for category 2. And it is said in relation
 20 to, for example, a retail business, a non-essential
 21 retail business, category 4, that regulation 5(1), which
 22 as you can see provides that:
 23 "A person responsible for carrying on a business
 24 [must] cease to carry on that business [and] close
 25 any premises [and] cease to admit any person to its

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1 premises ..."
 2 But even there they say that that is not prevention
 3 of access, because an employee can attend the business
 4 for the purposes of meeting any mail order business.
 5 Its case in that regard is set out in
 6 paragraph 120(2) and (3) of its skeleton, that is
 7 {1/19/53}.
 8 It says at paragraph 83, which is on page {1/19/38}
 9 that this is the true battleground between the parties,
 10 and it spends 12 pages of its skeleton on this point.
 11 Now, I have already discussed these issues in
 12 relation to Arch and we would say the same points apply,
 13 and they are a response to Zurich's 12 pages in relation
 14 to this.
 15 Zurich are seeking to rely on what US courts have
 16 held in some six US decisions, applying US policies with
 17 different language, for example "prohibition", and the
 18 they are applied to a particular US situation, different
 19 from here, in relation to restricted vehicular access
 20 and closed bridges and so on.
 21 Now, we will deal with those in reply, having heard
 22 what Zurich say about it, but we say they don't change
 23 the position here. And, as with Arch, our case is that
 24 all the actions relied upon in substance prevented
 25 access to the premises.

1 The third issue I am going to come to now is "danger
 2 or disturbance in the vicinity of the premises", and
 3 these are issues specific to Zurich, so I will address
 4 them.
 5 Zurich has three main points here. The first point
 6 is that "danger" cannot be disease, because there is
 7 a separate clause relating to disease. Its second point
 8 is that "vicinity" does not mean locality, it means
 9 "immediate locality". And its third point is that to be
 10 a danger in the vicinity the danger has to be only in
 11 the vicinity.
 12 To take the first point first, we would say that
 13 what they are saying is that danger from disease cannot
 14 have been intended to fall within the government action
 15 clause.
 16 We would say there is no presumption against
 17 overlap. The starting point, as Zurich itself accepts
 18 is its natural meaning if one looks at its skeleton at
 19 paragraph 129, on page 57 of {1/19/57}, is that disease
 20 is plainly a danger. That is accepted as part of its
 21 natural meaning. It is also accepted, if we go to
 22 paragraph 73 of the skeleton on {1/19/35}, it is
 23 accepted that the extensions are not mutually exclusive
 24 they can potentially overlap. That is accepted by
 25 Zurich.

1 We can see if we look at the clauses, if we go back
 2 to the disease clause at {B/21/52}, they are triggered
 3 in different circumstances. So apart from the fact that
 4 this is responding to a notifiable disease at the
 5 premises, we can see it is about causing restrictions on
 6 the use of the premises on the order or advice of the
 7 competent local authority. So it is restrictions on
 8 use, but in the AOCA clause it is prevention of access.
 9 The clauses may have greater or smaller lengths of
 10 indemnity, of sub-limits and different premia, according
 11 to the schedule in any particular case and according to
 12 how those risks are perceived.
 13 Zurich relies in its skeleton, it is paragraph 132,
 14 on an Irish case called Welch v Bowmaker. It is an
 15 Irish case about a debenture -- sorry, I should have
 16 given the reference, but I think it has been brought up
 17 on the screen anyway. Yes. It is paragraph 132 at the
 18 top {1/19/58}, and they say:
 19 "... it is unlikely, as a matter of common sense [in
 20 circumstances where the policies contain a notifiable
 21 diseases extension] that the reference to 'danger' in
 22 the AOCA extensions is intended to encompass an outbreak
 23 of disease, let alone an outbreak of a notifiable
 24 disease."
 25 Then we have a quote from Welch v Bowmaker:

1 "When you find a particular situation dealt with in
 2 special terms, and later in the same document you find
 3 general words used which can be said to encompass and
 4 deal differently with that particular situation, the
 5 general words will not, in the absence of an indication
 6 of a definitive intention to do so, be held to undermine
 7 or abrogate the effect of the special words which were
 8 used to deal with the particular situation."
 9 The quotation relied on continues, and I will give
 10 you the reference but I won't go to it, I will just read
 11 you the one sentence that follows on, it is at {K/66/5}
 12 it says:
 13 "This is but a common sense way of giving effect to
 14 the true or primary intention of the draftsman, for the
 15 general words will usually have been used in
 16 inadvertence of the fact that the particular situation
 17 has already been specifically dealt with."
 18 We would say that colours the context in which the
 19 part quoted at paragraph 132 is to be read. Plainly it
 20 cannot be suggested that Zurich had forgotten about one
 21 extension, when drafting another one page later.
 22 So we say the fact that there is a disease clause
 23 does not mean that there is no cover for disease, if
 24 it is a danger under the AOCA clause.
 25 I turn now to the second point, which is that it is

1 said that "vicinity" does not mean locality but
 2 "immediate locality". We would say that the implication
 3 of the word "immediate", which is what Zurich is seeking
 4 to imply here, is impermissible.
 5 Elsewhere in the wordings the exact phrase
 6 "immediate vicinity" is used, but it is not used in the
 7 AOCA clause. We can see that at {B/21/31}. It is
 8 condition 1(1) and we see the words:
 9 "The area in the immediate vicinity of the work ..."
 10 Zurich say that is a different context, but
 11 nonetheless one would expect that if it was intended
 12 that "vicinity" mean "immediate vicinity", that those
 13 words would have been used in the AOCA clause as well.
 14 Our case is that "vicinity" is such area as would
 15 reasonably be expected to affect the insured's business
 16 in relation to a particular danger or disturbance. That
 17 could be a whole city or a whole country, if the danger
 18 is an infectious disease.
 19 MR JUSTICE BUTCHER: There, Ms Mulcahy, you are getting
 20 a long way away from the ordinary meaning of the word
 21 "vicinity", aren't you? "Vicinity" means a close area.
 22 MS MULCAHY: We say it is a flexible concept. As Mr Edelman
 23 showed you with RSA4 and the definition of "vicinity"
 24 there, we say that is a sensible, workable definition;
 25 it is one that takes account of whether a danger

1 somewhere could be reasonably expected to impact on the
 2 premises in question.
 3 In some ways Zurich accepts that it may not be just
 4 at the premises, because they note, if one looks at
 5 footnote 128 on {I/19/61}, they accept that for some
 6 premises "vicinity" might be 10 miles away, because
 7 a rural business can be affected by danger at that
 8 distance.
 9 But in any event, COVID-19 was a nationwide danger,
 10 as Arch accepts, in terms of it being a nationwide
 11 emergency from 3 March. And as I told you on Monday, by
 12 for example -- I mean, danger is all about risk, but by
 13 16 March almost every local authority had actual cases.
 14 317 local authorities, all but 19 of them had reported
 15 cases, and you have seen the SAGE minutes leading up to
 16 the announcement on 16 March about the concern as to the
 17 true number.
 18 So even if "vicinity" is more local, it is more of
 19 a fixed distance, query what that is, but even if it is
 20 more local to the premises we would say here it is
 21 satisfied, there is a danger within the vicinity.
 22 Then the third point that Zurich make, which is that
 23 to be a danger in the vicinity the danger has to be only
 24 in the vicinity; they say even if there was COVID at the
 25 premises and all the neighbouring premises, there was no

1 danger in the vicinity because there must be a specific
 2 local danger. It is in their skeleton at paragraphs 135
 3 to 136, at {I/19/58} to page 59.
 4 This is similar but slightly different to Hiscox's
 5 implication that a case would have to be preponderantly
 6 within the vicinity, and we would say, for similar
 7 reasons, that's not so.
 8 Zurich acknowledges as a matter of ordinary natural
 9 meaning and logic "within the vicinity" does not prevent
 10 the danger from also being outside it. If we go forward
 11 to paragraph 138 of its skeleton, we can see that there
 12 {I/19/59} that it can arise in relation to inside and
 13 outside such vicinity as is specified.
 14 We would say the required nexus is supplied by the
 15 wording; it must prevent access, it must follow the
 16 danger and it must be present in the vicinity. And
 17 there is no room, therefore, for the further implication
 18 of a specific local danger only, ie effectively of an
 19 epidemic exclusion, if one is talking in relation to
 20 disease.
 21 That was what I wanted to say about the issue of
 22 danger or disturbance in the vicinity of the premises.
 23 The last issue is causation. This is the first case
 24 I think we have had where the word "following" is
 25 disputed in terms of its meaning. As you have seen, the

1 civil authority action has to be following the danger in
 2 the vicinity.
 3 Zurich's argument in relation to that is in its
 4 skeleton at paragraph 9 on page {I/19/5} of this
 5 document, but also at 75 to 76 at page {I/19/36}.
 6 Obviously for this issue to arise, it must have been
 7 found that COVID-19 was a danger in the vicinity. And
 8 Mr Edelman has addressed Hiscox 4, where the question of
 9 restrictions following occurrence of a disease within
 10 1 mile arose.
 11 Now Hiscox, and we would say rightly, accepts that
 12 "following" is a looser causal connection, although it
 13 requires more than simply a temporal successiveness or
 14 a temporal connection.
 15 Zurich disagrees. Zurich argues "following" means
 16 proximate cause, in the same manner as "resulting from".
 17 We see that in its skeleton at paragraph 147 on
 18 {I/19/62}.
 19 In any case, they say that the government response
 20 did not follow any danger in the vicinity because it was
 21 a nationwide response. They say that at paragraph 148
 22 {I/19/63}. We have already addressed the latter
 23 argument in relation to Hiscox and the jigsaw argument
 24 and I am not going to repeat that, and we have dealt
 25 with it in our skeleton in relation to Zurich. But as

1 to the former point, the point about whether "following"
 2 is a strong causal connection, ie a proximate causal
 3 connection, we would say that it isn't. It is a looser
 4 connection, that is obvious given its primary natural
 5 meaning. We don't need to turn it up but the dictionary
 6 definition at {K/222/1} is "to come after, or to
 7 succeed". And yes, in this context it imports a causal
 8 connection, but not one that requires a direct and "but
 9 for" link, rather it is more of a causal contribution.

10 The fact that, I mean, Zurich clearly doesn't like
 11 this word "following", instead 14 times in its skeleton
 12 it replaces it with its own, and we would say not
 13 synonymous, term "in response to", which it prefers,
 14 because it suggests more of a nexus with the part of the
 15 danger that is in the vicinity. But we say that is
 16 rewriting the clause. It refers to "following" and that
 17 is looser in its natural language and its effect.

18 The other thing that we rely upon is the fact that
 19 the clause anticipates military or government action,
 20 which may well be reacting to wide area events. So it
 21 is contemplating exactly the situation arising here.
 22 If, contrary to our case, "vicinity" means in this
 23 context a small area, we are still talking about
 24 authorities where there is potential for the area to be
 25 much broader.

1 The other main argument is on the "but for" link
 2 between prevention and loss. Zurich adopts the points
 3 in the joint causation skeleton, but then itself, it's
 4 page 34 to 35 of this document {I/19/34}, in three pages
 5 it goes on and deals with these points.

6 These have already been addressed by Mr Edelman and
 7 they have been addressed in relation to Hiscox, where
 8 although there was "solely and directly" wording,
 9 including in relation to a vicinity clause, and I have
 10 addressed them in relation to Arch where there wasn't
 11 a vicinity requirement.

12 What Zurich is saying is that most or all of the
 13 loss is irrecoverable because it is caused by wider
 14 disease-related effects, including other government
 15 measures.

16 We see this in Zurich's skeleton at paragraph 165 on
 17 page {I/19/67}. If we can go over the page {I/19/68},
 18 these are the list of other factors, the wider
 19 circumstances. I took you to this when I was dealing
 20 with concurrent causes yesterday, and you can see the
 21 list there: nationwide pandemic, which resulted in
 22 individuals contracting COVID self-isolating, shielding;
 23 and/or the response of the public to COVID; and the
 24 adverse impact of the above matters on economic
 25 activity; and then government measures responding to

1 COVID other than those that the court might find
 2 prevented access to the premises.

3 Then if we go to 166, it is said:

4 "Each of the above matters was and is an independent
 5 cause of policyholders' losses ..."

6 A cursory glance at the list of causes there
 7 identifies that effectively they are all simply
 8 COVID-19, or intermediate direct effects of COVID-19,
 9 the public and government behaviour in response to it.
 10 They are not independent of each other or the insured
 11 peril, in the ordinary sense of the words; they are all
 12 interlinked. Indeed, if one looks at (3), it is "The
 13 adverse impact of the above matters", so they are
 14 clearly interlinked with each other.

15 What Zurich is saying must be removed for the
 16 purposes of the counterfactual is the national
 17 government action which prevented the access, so they
 18 are saying the regulations which are found to prevent
 19 access. And it is said, for example, footnote 149
 20 probably makes this clearest on page {I/19/74}, where it
 21 is said we had misunderstood Zurich's case, and it says:

22 "On Zurich's case, it is the nationwide application
 23 of the regulations which prevent access which falls to
 24 be removed. However, it is only the danger in the
 25 vicinity which, on Zurich's alternative case, falls to

1 be removed from the counterfactual, not danger outside
 2 the vicinity."

3 So it is essentially seeking, and similarly in its
 4 skeleton at paragraph 200, to reverse such regulations
 5 as might be found to prevent access to the premises, and
 6 it says that that is the insured peril, paragraph 197.
 7 On its alternative case it would also remove danger in
 8 the vicinity {I/19/86}.

9 We have addressed this already, so I am going to
 10 take this very briefly, but essentially by accepting
 11 that the national action is to be removed, Zurich is
 12 accepting that one does not just look to the narrow
 13 insured peril approach, and that some things, national
 14 government action, are inextricably linked or
 15 indivisible. And once you accept that, you move past
 16 interruption. Once you accept, you move past
 17 interruption to action of the civil authority, why do
 18 you not also include the danger that is part of the
 19 chain in the clause?

20 The reason Zurich doesn't remove the danger is
 21 because you would then have to accept to remove the
 22 national danger, not merely the part within the
 23 vicinity. Because like the national civil action, the
 24 thing as a whole would need to be removed, not merely
 25 the part that causes interruption.

1 And Zurich accepts the absurd windfall result of its
2 construction, that there is no danger in the vicinity
3 but there is a danger everywhere else. If we look at
4 paragraph 214 on page {1/19/91} it says that that is
5 apparently fine. It says:

6 "In principle, there may be scope for recovery of
7 such 'windfall' profits ..."

8 It goes on to say they are "unlikely to arise".

9 We would say that is not the result, that's not the
10 answer. It shows the construction is not what is in
11 fact intended. And on the facts Zurich suggests, well,
12 nobody would have flocked to a danger-free or
13 restriction-free area. But we would say that is simply
14 contrary to common sense, and such profits are likely to
15 arise in relation to that scenario.

16 The other thing they seek to do is whilst it is
17 accepted that the national actions that prevented access
18 should be removed from the counterfactual, they don't
19 accept the full scope.

20 So the 26 March regulations, we would say were an
21 indivisible action that must be assumed not to have
22 occurred. But what Zurich seeks to do is to redraft
23 them or to redact part of them and leave the rest in for
24 the purposes of the counterfactual, redacting only the
25 parts that are found to have prevented access, on its

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1 case. We say that that is just inappropriate.

2 Then I am not going to address it substantively but
3 just to tell you where it is, the trends clause is on
4 {B/21/55}, it is next to "Rate of gross profit" and
5 "Standard turnover" on the right-hand side, and you will
6 see there:

7 "To which such adjustments shall be made as may be
8 necessary to provide for the trend of the business and
9 for variations in or other circumstances affecting the
10 business either before or after the incident or which
11 would have affected the business had the incident not
12 occurred ..."

13 Then there is the adjustment which but for the
14 incident would have been obtained.

15 We accept the machinery applies. There is a debate
16 about what "had the incident not occurred" means, and
17 that is dealt with in our skeleton at paragraphs 694 to
18 709, and we say that it wasn't intended to modify the
19 result absent the clause. But insofar as "incident" is
20 concerned, we say it means "but for the interruption"
21 and that is the incident that is being referred to here.

22 My Lords, those are my submissions on Zurich and
23 I am going to hand back now to Mr Edelman to turn to
24 Amlin.

25 (2.26 pm)

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1 Submissions by MR EDELMAN

2 MR EDELMAN: My Lords, Amlin policies come in three types.

3 Firstly we have Amlin 1 {B/10/1}, called the policy,
4 commercial combined policy. There are two clauses of
5 interest. Page {B/10/65} which is a competent authority
6 clause:

7 "Loss resulting from interruption or interference
8 with the business following action by the police or
9 other competent local, civil or military authority
10 following a danger or disturbance in the vicinity of the
11 premises."

12 Familiar territory again, and I am not going to
13 repeat all the submissions that have been made about
14 that form of clause.

15 You will see it is a €50,000 limit of cover.

16 Then the next page, {B/10/67}, again a fairly
17 familiar type of clause:

18 "Consequential loss as a result of interruption of
19 or interference with the business carried on by you at
20 the premises following ..."

21 Then (iii):

22 "Any notifiable disease within a radius of 25 miles
23 of the premises."

24 There is a limit of indemnity here of €100,000.

25 The consequential loss, you will see that is at

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1 page {B/10/11} the top of the page.

2 "Loss resulting from interruption of or interference
3 with the business carried on by you at the premises in
4 consequence of damage to property ..."

5 My Lord --

6 MR JUSTICE BUTCHER: That is effectively exactly the same as
7 QBE2, isn't it?

8 MR EDELMAN: Yes.

9 Then Amlin 2, {B/11/1}, it is a retail policy. Then
10 you will see the clauses: at page 47, consequential
11 loss, notifiable disease; and at 48, the prevention,
12 1 mile radius. Again, you have seen clauses like that.
13 Denial or hindrance of access.

14 Finally, Amlin 3, tab 12, page 1, {B/12/1} it is for
15 forges. There are apparently no claims under this one,
16 but there may be policies like it in these words, so it
17 is worthwhile looking at it. Page 50 I think it is now.
18 {B/12/50}. There you have it, it just has the
19 prevention of access clause. Threat or risk in slightly
20 different language:

21 "Following threat or risk of damage or injury in the
22 vicinity of the premises."

23 But you will see that that they contemplate disease
24 by a limited disease exclusion at the bottom of the
25 page.

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1 So, as you have seen, the prevention of access
2 clause, particularly in Amlin 2, is materially the same
3 as Hiscox's clause, and Amlin have adopted Hiscox's
4 submissions on that, so I will say no more about that at
5 all.

6 Amlin 1, we have got the definition of "notifiable
7 disease" on page 58 of tab 10. {B/10/58}. It is.

8 "Illness sustained by any person resulting from any
9 infectious or contagious disease, an outbreak of which
10 the competent local authority stipulate shall be
11 notified to them."

12 Now let's go back to the clause itself, which is at
13 page {B/10/66}. In fact I should say there is
14 a pollution and contamination exclusion, which is not
15 relied on by Amlin. So we have got the elements of the
16 clause, which you will be familiar with, and we have got
17 the concessions -- sorry, I should take the prevention
18 of access clause first. {B/10/65}.

19 Amlin concedes that the UK Government and Parliament
20 is an authority for this clause. There was a previous
21 caveat, but that has now been jettisoned. Full
22 concession that government is covered by the reference
23 to "public authority". They also concede that "action"
24 covers any acts or things done by the government, thus
25 including advice and guidance, as well as regulations,

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1 the whole gamut. That is their skeleton at 135.1 and 2
2 for those two concessions I have referred to. Four
3 issues: what government action led to prevention of
4 access; the meaning of danger in the vicinity; whether
5 the government action was following a danger or
6 disturbance in the vicinity; and potentially
7 interruption or interference.

8 Firstly, prevention of access. You have had
9 argument on this before, but just so you know what
10 Amlin's position is, as I understand it they say it
11 depends on the premise that "prevent" requires
12 a technical legal prohibition.

13 We say that simply is not right. It is wrong to
14 suggest that we only have a prevention of access where,
15 as Amlin contends, see paragraph 154.3, it is physically
16 or legally impossible.

17 Then if we can go to what they say about this, in
18 {1/12/94}, paragraph 160, or it must be the next page
19 I think. {1/12/97}, they say:

20 "The FCA's fallacy is to equate access with use and
21 to equate prevention with hindrance. If you can gain
22 access to premises, even if not all parts of the
23 premises are accessible, that is not a prevention of
24 access but it may be a prevention (or hindrance) of
25 use."

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1 This is the example of a professional I gave
2 earlier; as long as you can gain access to the premises,
3 it is not prevented. That is a lawyer's answer to
4 a question which is a practical one which is posed by
5 this policy.

6 I will come back to one point. I have just had
7 a message to correct something.

8 We say this puts the test far too high. It will
9 almost never be physically or legally impossible to
10 access any part of a premises for any purpose at all.

11 What Amlin are saying is the fact that theoretically
12 someone could have had a reasonable excuse for entering
13 premises, a barrister to go and collect some papers,
14 means that they are not prevented access for the
15 purposes of this clause.

16 That is obviously not what this is about. If what
17 they are saying is yes, you might be able to go in and
18 get some papers you can't work without, but you can't
19 actually sit at your desk and work if you can take those
20 papers home and work on them, which these days we all
21 can, either with the assistance of a vehicle or we can
22 use the documents electronically.

23 Their own case is somewhat incoherent about this.
24 If we look at 162 on that page {1/12/97} they say:

25 "Any kind of local emergency involving a cordon or

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1 blocked access roads or similar would trigger the cover
2 and those are precisely the types of situation that the
3 clause was designed to meet."

4 My Lord Justice Flaux referred earlier to the
5 status of a cordon anyway, but cordons are -- there is
6 no policeman there to turn you back, you can go under or
7 over if you choose.

8 Is Mr Kealey saying: well, unless it is an actual
9 physical barrier that you physically can't get past,
10 there is no prevention of access? This is entirely
11 unreal.

12 MR JUSTICE BUTCHER: I mean, this is probably not very -- he
13 says a legal prevention would be sufficient, doesn't he?

14 MR EDELMAN: Yes. So if you can physically get there but
15 you are breaking some rule by going there. Well --

16 MR JUSTICE BUTCHER: It may in fact be the case, I don't
17 know, but it may be the fact that it is actually illegal
18 to cross a police cordon, for want of a way to put it.
19 But it probably doesn't matter.

20 MR EDELMAN: No, it doesn't, because we say this is just
21 wholly unreal. He gets this idea from some authorities
22 that he cites at 155.5, which I think is probably two
23 pages back, on 95, I hope. One more page back,
24 {1/12/94}, he says:

25 "The ordinary, natural meaning ... not matters of

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1 legal authority. However, it is notable that a range of
2 authorities also refer to access in its ordinary way and
3 natural sense ..."

4 Let's look at the cases he cites on the next page.
5 The next page, please. There we are, got it {1/12/95}.

6 There's a crowd assembling outside the defendant's
7 theatre; that's an example of physical access. A case
8 relating to a house owner's right of physical access
9 from the house to the adjoining highway. And public
10 nuisance, where the access is obstructed.

11 Now, yes, of course those are all cases in tort, on
12 what constitutes a tort or a breach of a right of
13 access. We are dealing with an insurance policy which
14 is covering something which relates to a business and
15 business activities. It is an entirely different
16 context and these cases simply don't assist. If he is
17 trying to draw an analogy with these cases, it is
18 a false starting point.

19 They have an alternative case on access, which is
20 buried away at page 192, I hope this is the correct
21 reference, in an appendix. {1/12/192}. It is
22 paragraph A2.17:

23 "Without prejudice to [their] primary case [at the
24 bottom], this section ... addresses the extent (if any)
25 to which there was ever any legal prevention of access

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1 in respect of different types of business."

2 The next page, this is on the premise that it could
3 be prevented by legal impediment; then they go on to say
4 that they admit that only category 2 businesses forced
5 to close by the 21 and 26 March regulations suffered
6 a prevention of access.

7 They deny that pubs, cafes, bars and restaurants
8 suffered a denial of access -- I think that is probably
9 on the next page -- because they could theoretically
10 have turned themselves into take-aways. It is (iii)
11 {1/12/194}. So because you could go to the property and
12 run a take-away, then you have not prevented access.

13 We have dealt with it in other contexts, but these
14 submissions, we submit, are unreal as when one is
15 looking at the business that is insured. And being
16 prevented customers, we would submit, included being
17 prevented from accessing the premises for the purposes
18 of the business.

19 Can I move on to the next ingredient, danger or
20 disturbance in the vicinity. Amlin accept that there
21 was --

22 LORD JUSTICE FLAUX: Just before you do, Mr Edelman, do you
23 say there is any significance at all in the use of the
24 future tense in "will be prevented", rather than "is
25 prevented"?

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1 MR EDELMAN: Well, my Lord, I have to confess that it's one
2 of the difficulties. There are so many points, you miss
3 points sometimes.

4 That is obviously of significance, because my Lord
5 is right, I think, that that is looking to the
6 prospective effect.

7 LORD JUSTICE FLAUX: It is looking at the prospective effect
8 of the ...

9 MR EDELMAN: Of the prohibition of the --

10 LORD JUSTICE FLAUX: Of the action.

11 MR EDELMAN: Yes, so there doesn't actually have to be, and
12 it is just when your business is interrupted or
13 interfered with. And it again comes back to the point
14 my Lord was making about the fact that you have got
15 "interference" encompassed here. Because if you can't
16 get to your premises at all, for any purpose at all, how
17 is your business going to be interfered with? It is
18 impossible.

19 LORD JUSTICE FLAUX: Yes. Yes.

20 MR EDELMAN: It is giving with one hand and taking away with
21 the other.

22 Danger or disturbance. Amlin accept that there was
23 a danger from 12 March, but they say that it is
24 a question of fact as to whether that existed anywhere
25 in particular.

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1 We say that the danger is everywhere in the country
2 and therefore, necessarily, in the vicinity of the
3 premises. That is not taking the point that the country
4 is the vicinity, although we argue that; it is saying
5 that if it is everywhere, it is necessarily in the
6 vicinity of each set of premises.

7 Amlin, they characterise our case as saying that if
8 one person with COVID is in Trafalgar Square that means
9 there is a danger in the vicinity of most of London,
10 which is an unreal comment, because one proved case in
11 the vicinity, as we all learned to our cost, will
12 rapidly spread to others, and did rapidly spread. There
13 is certainly a danger of it spreading to others. And
14 given the evidence of prevalence and the rate of
15 transmission, the chance of being one isolated case in
16 a vicinity becomes vanishingly small.

17 Interestingly, one can say that the whole global
18 pandemic started probably from one infected person. Or
19 may have started from one infected person. But anyway,
20 it doesn't detract from the danger.

21 MR JUSTICE BUTCHER: Yes, because you say "danger" doesn't
22 here necessarily mean an occurrence of someone with
23 COVID --

24 MR EDELMAN: Exactly.

25 MR JUSTICE BUTCHER: -- but the potential for someone. And

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1 if that exists, then that is the danger. That is what
 2 you say for this purpose.

3 MR EDELMAN: Yes, absolutely. So there is not a prevalence
 4 occurrence issue here, unless they can show that you are
 5 in -- maybe the Scilly Isles, I don't know, but I am not
 6 going to make any concession in relation to the Scilly
 7 Isles because I am sure people would have said "It might
 8 not have any at the moment but there is a real danger
 9 that it will spread to the Scilly Isles unless we do
 10 something". But you would have to have maybe some
 11 remote Scottish island which has only a monthly ferry
 12 service and nobody can get to or from the island,
 13 I don't know whether such an island exists any more,
 14 then one might say there wasn't a danger on that island.
 15 But otherwise there is a danger everywhere.

16 LORD JUSTICE FLAUX: Ironically, the more remote Scottish
 17 islands did in fact have occurrences of COVID. The
 18 Scilly Isles must have been lucky, given that there is
 19 a regular ferry, at least I hope there is, there
 20 certainly used to be a regular ferry from the mainland.
 21 And if you are looking at it in terms of danger, you
 22 would say there was clearly a danger in the Scilly Isles
 23 because it would only take one infected person to go
 24 across on the ferry, certainly in March, for there to be
 25 more people infected.

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1 MR EDELMAN: Yes, exactly, my Lord. Exactly.

2 So all these danger clauses, and it is accepted that
 3 this is a danger, or an emergency for the other clauses,
 4 it is all over the place. It is everywhere.

5 So, you know, you find someone in Trafalgar Square
 6 and you think to yourself: where did they get it from,
 7 who did they catch it from, where have they been? And
 8 actually, in March, that probably was a bit of a panic.
 9 But in fact there would have been probably quite a few
 10 people in Trafalgar Square with COVID in March,
 11 unfortunately.

12 The other element of this clause is we have got
 13 "following", following a danger, and the attempt was
 14 made by Amlin to substitute "following" with the words
 15 "results from". The high point of their case is that
 16 "following" and "resulting from" are used
 17 interchangeably on one occasion in a 97-page policy.

18 The example that Mr Kealey or one of his juniors or
 19 solicitors has come up with is that we have it here on
 20 {1/12/186}, paragraph A2.6. On the "welcome" page, that
 21 is page 4, the coverage was summarised as follows:
 22 "In return for the payment of premium shown in the
 23 schedule, we agree to insure you against ..."
 24 If we could have the next page, {1/12/187}:
 25 "loss resulting from interruption or interference

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1 with the business following damage."

2 By contrast, the business interruption clause at the
 3 start of section 6 promised to pay 'any interruption or
 4 interference with the business resulting from damage to
 5 property ..."

6 That, in a 97-page policy, is the edifice on which
 7 the argument is built that "following" has some stronger
 8 meaning.

9 Of course, one bears in mind, going back one page to
 10 {1/12/186}, that the passage they refer to is a general
 11 "welcome" page and actually the more detailed provisions
 12 are set out in the policy. We have counted up
 13 "following" is used 76 times in the policy, "resulting
 14 from" is used 14 times, they are often used in the same
 15 clause, like the cover clause we are concerned with, and
 16 they have identified one occasion, and we say what about
 17 the other 75 times that "following" is used? There is
 18 no basis for saying that they are interchangeable based
 19 on one instance alone.

20 MR JUSTICE BUTCHER: This isn't going to matter very much.
 21 If you are right about everything up to this point, that
 22 it is a danger in the vicinity --

23 MR EDELMAN: Yes.

24 MR JUSTICE BUTCHER: -- then the action will have been taken
 25 as a result of the danger in the vicinity.

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1 MR EDELMAN: Yes. But obviously Mr Kealey thinks it is an
 2 important point, because he spends quite a chunk of his
 3 skeleton discussing the meaning of the word "following".

4 LORD JUSTICE FLAUX: A fortiori, if danger, as my Lord said
 5 a little while ago, imports the potential for
 6 occurrences as opposed to actual occurrences, then --

7 MR EDELMAN: Even less significant.

8 LORD JUSTICE FLAUX: -- it is even less significant.

9 MR EDELMAN: Yes. I think I said that at the beginning, not
 10 of this section but I think I have said it, whether it
 11 was Monday or Tuesday, that actually there is a debate,
 12 a hot debate that some of the insurers have raised about
 13 the meaning of "following", but it doesn't really
 14 matter.

15 Interruption or interference, there is no issue
 16 about that.

17 So that is the prevention of access clause, but
 18 I will move forward to the disease clause. That is
 19 page 59, if we are still in the same tab. No, that is
 20 the definition. Sorry, it is page {B/10/66}.

21 Most of this we have already dealt with before.
 22 I have shown you, we have been through various of the
 23 requirements and I have shown you the meaning of
 24 "consequential loss". On proof of the disease Amlin are
 25 adopting Hiscox's case, and I don't need to say anything

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1 more about that. As to proof of restrictions, the
2 government restrictions followed the notifiable disease;
3 again, we have addressed that already. As far as
4 I know, there is no other issue in relation to a direct
5 effect.

6 There is a point on Amlin which they dealt with at
7 {1/12/114}, which is at paragraph 219. This is dealing
8 with a provision that requires the disease to be
9 excluding indirect loss of other premises. They
10 essentially agree with our analysis of that clause, as
11 I gave it to you, but what they say is it is all
12 a question of fact. Well, we agree it is unnecessary to
13 debate about factual scenarios, but it is important --
14 the point arises on RSA3 -- for the court to rule as to
15 the impact of provisions like that.

16 If I can now move on, my Lord, to paragraph 219
17 {1/12/114}. I have already got that on the screen. At
18 223, where they give their summary -- perhaps on the
19 next page {1/12/115} -- and they have the five country
20 house hotels example, a policy for each of the hotels:

21 "Does the loss of income in respect of each hotel
22 flow from proved cases of COVID-19 within a 25-mile
23 radius ... The answer is no. All the loss was caused by
24 the government legislation applicable nationwide, which
25 is a different cause altogether from locally proved

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1 cases of COVID-19 ...

2 "When the loss in respect of each hotel is tested
3 separately under a counterfactual [this is the important
4 point] assuming that the proved cases of illness
5 sustained within a 25-mile radius of the hotel in, say,
6 Herefordshire did not occur (but everything else remains
7 the same):

8 "(a) ... FCA cannot prove that, but for the proved
9 cases of illness within a 25-mile radius of the
10 Herefordshire premises, the government action would not
11 have applied to that location. Plainly it would."

12 Consequently, the insured have suffered no loss. So
13 this is a graphic illustration of insurers' argument
14 that you can have all the 25-mile radius areas in the
15 country, outbreaks of disease in all of them, and
16 insurers' positive case is that none of the policies pay
17 because they can always point to the other areas in
18 which the disease manifested itself.

19 It is rather like two insurance policies with
20 matching other insurance clauses, and insurers saying
21 neither of them pay because they both say: we don't pay
22 if there is other insurance in place. It is an
23 analogous point, but here you see it in black and white
24 what insurers' case actually is. Nobody pays, even
25 though the disease is everywhere, because they can

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1 always point to it being somewhere else as well.

2 Amlin I don't think, in the time available, really
3 adds anything more. As I said, it is at {B/11/47}.

4 It is slightly differently worded but to the same
5 effect. But it doesn't have any reference at all to
6 interruption or interference here, it just says "pay you
7 consequential loss following" for that clause. And on
8 page {B/11/48} that one is only interruption, it doesn't
9 refer to interference, but interruption, it is your
10 financial losses. But it is the same point. But that
11 does have denial of access or hindrance.

12 MR JUSTICE BUTCHER: That one has "caused by an incident
13 within 1 mile".

14 MR EDELMAN: Yes. But that you have had submissions on, and
15 I am not going to -- so there are differences there, but
16 it has all been covered by previous submissions.

17 Finally, the counterfactual. Again, it is similar
18 to some of the stuff you have heard before. If we go to
19 Amlin's skeleton {1/12/159} at paragraph 302, the only
20 matter to be reversed on the counterfactual is the
21 action and the identified authorities of the qualifying
22 type, which results from a specified situation which has
23 the specified effect, viz access will be prevented. So
24 that is what you strip out.

25 They spend a lot of time arguing that the insured

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1 peril under the prevention of access clause is only the
2 government action. The remainder of the clause serves
3 to, as they put it, "define, refine, qualify and
4 restrict the type of action which qualifies". That is
5 in this section of their skeleton.

6 But Mr Kealey's usual outpouring of verbs and
7 reasoning, I won't apply an epithet to it, is required,
8 because MSA needs to go to extreme lengths to narrow the
9 scope of the insured peril for its own counterfactual
10 purposes. That is a misapplication of the policy and of
11 the correct approach to causation in the context of
12 a clause like this.

13 My Lords, on the trends clause there is nothing we
14 needed to add to what we have said in writing, so unless
15 there is anything more on Amlin I am going to move
16 forward to Ecclesiastical.

17 It has two wordings. They have been referred to as
18 1.1 and 1.2., and they start at {B/4/1}, please. As you
19 might guess from the title "Parish Plus", it is for
20 churches, it is "Put your faith in us" unless you make
21 a claim under your insurance in current circumstances,
22 in which case your faith will be misplaced.

23 {B/5/1} is the other main policy. Two lead
24 policies. That is, as you can guess from the picture,
25 for nurseries. So in this category there are nurseries,

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1 churches and other businesses. Ecclesiastical 's
 2 skeleton says that as far as they are concerned it is
 3 categories 1, 2, 4, 6 and 7, but in a table prepared by
 4 insurers it says 3 and 5 as well. So other policies
 5 issued by Ecclesiastical appear to cover all categories,
 6 but anyway we are looking at these ones.

7 The relevant form of clause is a prevention of
 8 access clause. Let's take the Parish Plus policy at
 9 page 45 {B/4/45}. Thank you. The main dispute relates
 10 to prevention or hindrance, its access to use the
 11 premises being prevented or hindered by any action of
 12 government, police or local authority due to an
 13 emergency which could endanger human life. You will see
 14 it is covering for loss resulting from interruption or
 15 interference with your usual activities.

16 There is a relevant exclusion which there is an
 17 issue about, "closure or restriction in the use of
 18 premises" on the right-hand side, number 3, "due to the
 19 order or advice of the competent local authority as
 20 a result of the occurrence of an infectious disease or
 21 other issues such as food poisoning, defective drains or
 22 other sanitary arrangements". There is also, needless
 23 to say, the same causation arguments.

24 Since the FCA served its skeleton, we have had
 25 Ecclesiastical 's skeleton which, as we understand it,

1 accepts that there was an emergency from 12 March but
 2 not before.

3 Hindrance of use of churches is accepted but not
 4 before 23 March. So they don't accept that anything
 5 prior, including the 16 March announcement, amounted to
 6 a hindrance. And hindrance of schools is now accepted
 7 but again not before the 23 March, and they don't accept
 8 prevention of access, but that doesn't really matter
 9 because of the hindrance.

10 They do now accept that actions include the whole
 11 government, the whole gamut of government action. Let
 12 me rephrase that. They don't accept that actions
 13 include the whole gamut, but they appear to accept that
 14 there is hindrance at least from those actions which
 15 they accept do qualify. The limits you will see here in
 16 this one, it is €10,000, and in Ecclesiastical 1.2, it
 17 is as scheduled.

18 What I need also to show you in the Parish Plus
 19 policy is the definition of "income", which is at
 20 page 43. Sorry, page {B/4/42}. That gives you the
 21 provision for loss of income. And "income", 42, means:

22 "The money paid or payable to you including
 23 donations, collections, rent and hire charges."

24 So that is what this policy for churches covers.

25 Of significance to the construction exercise is also

1 extension 6 on page 46 {B/4/46}, and that has a list of
 2 diseases, and over the page {B/4/47} what is covered:

3 "Any occurrence of a specified disease ..."

4 Needless to say, COVID nor is SARS on that list,
 5 although it was a notifiable disease, it was made
 6 notifiable many years ago:

7 "Any occurrence of a specified disease being
 8 contracted by any person at the premises or within
 9 a radius of 25 miles."

10 Below (d):

11 "Which causes restrictions in the use of the
 12 premises on the order or advice of the competent local
 13 authority."

14 I will come back to that extension in a minute. If
 15 we come back to the clause itself, there is the broadest
 16 terms here.

17 Firstly, we start off with "interruption or
 18 interference with your usual activities", at the top of
 19 the page {B/4/45}.

20 Then we have "prevention or hindrance of access or
 21 use", so that is very broad.

22 We address schools at length in our written
 23 submissions, and I am not going to repeat it now. In
 24 its defence Ecclesiastical has denied that the
 25 announcement on 18 March that schools would close on

1 20 March was a prevention or hindrance because it had no
 2 legal force. It seems now to accept that educational
 3 premises, including schools and nurseries, did suffer
 4 a hindrance of access from 23 March, even though the
 5 legislation wasn't enacted to make that a legislative
 6 requirement.

7 So really the only question is whether the earlier
 8 date of Friday the 20th or Saturday the 21st perhaps
 9 should apply, because it was announced on 18 March that
 10 schools would close from the 20th.

11 So we say it should apply from the earlier date, it
 12 may make a marginal difference, but our position should
 13 be accepted; and Ecclesiastical doesn't explain why the
 14 instruction on the 23rd was a hindrance but the
 15 announcement of closure with effect from the 20th was
 16 not.

17 Now on to churches. I think we have referred
 18 already to the constitutional essays we have had from
 19 Mr Kealey on the status of what the government has done.
 20 It is rather puzzling why he thought it necessary to do
 21 so, because Ecclesiastical now accept that the use of
 22 churches, and now schools, was hindered at least from
 23 23 March 2020 by the lockdown announcement.

24 But we say, in fact, for churches the prevention or
 25 hindrance of action goes back to 16 March. I should

1 record also that Ecclesiastical, and this is in their
2 defence, have accepted that the clauses are focused not
3 just on those employed within the church, the clergy,
4 et cetera, but also the congregation.

5 So this is a case where there is an insurer, perhaps
6 more realistically than others, accepting that access by
7 the customers is relevant, although they may say they
8 are only admitting it because of use. So you can't use
9 it if the customers can't get there. I use "the
10 customers" perhaps as a general term, but obviously
11 I would say the congregants, for the purposes of the
12 church, although they may not be congregants, they may
13 just be visitors. All of the public were given clear
14 instructions to stay at home on from the 16th and to
15 avoid all unnecessary social contact, stop unnecessary
16 travel and that, we submit, is sufficient.

17 But what Ecclesiastical say, if we go to {1/12/78},
18 please at 120.4(b):

19 "The FCA says that clear instructions were given on
20 16 March 2020, well before the mandated closure. But it
21 is quite apparent that what the FCA describes as 'clear
22 instructions' were, in relation to churches, neither
23 clear nor instructions. Churches were noticeable by
24 their absence from what the Prime Minister said and
25 it is entirely reasonable to suppose that reasonable

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1 churchgoers would not have interpreted what the
2 Prime Minister said as requiring them not to go or
3 discouraging them from going to their places of
4 worship."

5 People were told to stay at home and avoid social
6 contact. I don't know how much clearer Ecclesiastical
7 would want the government to express their wishes, but
8 even if some people misinterpreted what the government
9 said, it would be sufficient for our purposes that this
10 caused a significant number of congregants not to go to
11 church, because that would, at the very least, be
12 a hindrance of access or use.

13 There is also a reference in their skeleton to "mass
14 gatherings", mass gatherings being addressed on
15 16 March, but what was said on 16 March went well beyond
16 mass gatherings and it was, as I have said, avoiding all
17 unnecessary contact and travel.

18 In other cases for other categories Ecclesiastical
19 has not been drawn, but they have given some an example.
20 If we can go to I --

21 MR JUSTICE BUTCHER: Sorry, what have they not been drawn
22 on, Mr Edelman?

23 MR EDELMAN: Sorry. On how their policy applies to
24 different categories. What they say about denial or
25 hindrance of access to --

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1 MR JUSTICE BUTCHER: You mean other than churches or
2 nurseries?

3 MR EDELMAN: Yes.

4 LORD JUSTICE FLAUX: Which policy wording do they insure
5 other categories under? Because this policy we are
6 looking at, Parish Plus, is clearly a churches-only
7 policy.

8 MR EDELMAN: Yes, my Lord.

9 LORD JUSTICE FLAUX: And the other one looks to be
10 a nurseries-only policy.

11 MR EDELMAN: But there are some other non-lead policies.
12 I am afraid I haven't had the time to go through them
13 all, but they do accept that they do issue policies to
14 other businesses. They haven't asked us to put any
15 others as lead policies frankly, so these are the terms
16 that we are testing.

17 LORD JUSTICE FLAUX: I would have thought that we have got
18 more than enough to be getting on with lead policies,
19 frankly. If Mr Kealey wants to tell us there is
20 something else that he wants us to deal with, let him do
21 so. But don't take up time dealing with it now, we
22 still have Argenta to go.

23 MR EDELMAN: I have an eye on the clock.

24 LORD JUSTICE FLAUX: Also we need to have a break for the
25 shorthand writers in about eight minutes' time.

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1 MR EDELMAN: I will desperately try to finish. Ms Mulcahy
2 needs about 20 minutes to half an hour on Argenta.
3 Maybe 20 minutes. We have a little bit more time,
4 but ...

5 LORD JUSTICE FLAUX: Okay.

6 MR JUSTICE BUTCHER: You have got the moot question to deal
7 with yet, Mr Edelman.

8 MR EDELMAN: I will --

9 LORD JUSTICE FLAUX: Competent local authority.

10 MR EDELMAN: Yes, that is the one I am coming to now. I was
11 about to say, you took the words, but I now come to the
12 main event on this policy, because this is the unique
13 and individual event, which is the exclusion to the
14 policy.

15 There is obviously a tension here between the
16 insuring clause and the exclusion, and what Mr Kealey
17 has done to rationalise the fact that the insuring
18 clause refers to "government, police or local
19 authority", whereas the exclusion only refers to
20 "competent local authority", is to delve into the public
21 health legislation, remembering these are policies
22 designed for churches and nurseries, delve into public
23 health legislation to suggest that anyone with
24 a detailed knowledge of public health legislation would
25 know that an order could be made for a local event by

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1 somebody that was either a local authority or some
2 national agency.
3 LORD JUSTICE FLAUX: Or a Crown Court judge.
4 MR EDELMAN: Or a Crown Court judge.
5 We don't dispute that that is the correct analysis
6 of the legislation .
7 LORD JUSTICE FLAUX: But that is not what the policy says.
8 MR EDELMAN: No, it isn't.
9 In some other context, and I want to be clear about
10 this, in some other context his argument may stand up.
11 But it is all about context. And you are looking at
12 this clause from a reasonable reader's perspective .
13 I appreciate that people are supposed to know the
14 general law and they can't be said not to know their
15 general law, but this is going way beyond the general
16 law; this is intricacies .
17 An ordinary reader would look at the words
18 "government, police, local authority ", see an exclusion
19 which refers to a "competent local authority " and
20 conclude that it wasn't excluding government. At the
21 very least it is ambiguous, and it's an exclusion . But
22 we say that's what it means.
23 Yes, you have got a list of diseases there, and I am
24 not going to trespass upon any evidential grounds.
25 LORD JUSTICE FLAUX: It is also of some significance, isn't

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1 it, that you have got to look at the entirety of the
2 exclusion? The exclusion is --
3 MR EDELMAN: Yes.
4 LORD JUSTICE FLAUX: -- not only of infectious disease but
5 food poisoning, defective drains and other sanitary
6 arrangements. Those matters are clearly ones which
7 would be dealt with by the local borough council .
8 MR EDELMAN: Yes. Exactly, my Lord. There is nothing to
9 alert you -- and then the next one, the next exclusion
10 is the vermin one.
11 So all of the subject matter, all of the other
12 subject matter is purely local and parochial . There is
13 not a lot to say about it really , because one looks at
14 it and just gets an impression that one knows that in
15 fact lots of people who might not be classified -- we
16 know now; I didn't have a clue about this before -- but
17 we know that other people have the capability of doing
18 things. If you had a clause which had "competent local
19 authority " and a 25-mile radius in the insuring clause,
20 then you might say: oh well, does that really mean
21 "local"?
22 So I am making it clear that this is purely
23 contextual for this exclusion in this particular policy .
24 Other policies , where it is in the insuring clause,
25 a different context may have a different meaning,

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1 because Mr Kealey is right about the authorities that
2 can deal with disease .
3 There is really no clue to it being different .
4 I know he relies heavily on extension 6, but one has to
5 look to see whether a reasonable reader of 3 would think
6 that it meant something fundamentally different from
7 what it appears to say. And 6, it has got diseases , but
8 if you are now assuming a reader with intimate knowledge
9 of all the public health legislation , you would think:
10 yes, well these correspond to the notifiable diseases
11 list , but hang on a minute, what is the most recent
12 epidemic disease of a type that could, if it resurrected
13 itself , spread across the country, it's SARS. And it's
14 not there.
15 I'm not saying it would be conclusive , but there is
16 nothing here that drags you into saying that it's not
17 local . If the list was unspecified in 6 and it was an
18 insuring clause, one might say -- and that was a unitary
19 clause, only dealing with disease , then you might say:
20 if it is only purporting to cover notifiable disease and
21 it's not limiting it, well maybe it could extend to
22 something else. But that is not what we have here. We
23 don't even have in the exclusion to the extension 3, we
24 don't even have a reference to "notifiable disease ", it
25 doesn't invoke the "notifiable disease " concept.

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1 LORD JUSTICE FLAUX: No.
2 MR EDELMAN: So --
3 LORD JUSTICE FLAUX: Even though clause 6(a) contemplates an
4 occurrence of a specified disease being contracted
5 within a radius of 25 miles, it has to cause
6 restrictions in the use of the premises on the order or
7 advice of the competent local authority . So it is the
8 local council or the local authority that restrict it .
9 MR EDELMAN: Exactly. What I was saying was if you have
10 a notifiable disease, an unspecified notifiable disease
11 list , and 25 miles and this, it might be open to it .
12 But we have got to look at the context in which this is
13 all used.
14 LORD JUSTICE FLAUX: Yes.
15 MR EDELMAN: My Lord, that is all I really wanted to say
16 about the exclusion . It is what it is, and it is a very
17 short point on which the fate of churches and nurseries
18 may turn, because they really are the sort of
19 institutions that, you know, however low the limits of
20 indemnity may be on this, €10,000 is actually quite
21 a lot of money. It is covering things like , you know,
22 you have lost your income from collections .
23 LORD JUSTICE FLAUX: Yes.
24 MR EDELMAN: Causation and counterfactuals, my last topic on
25 this .

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1 Ecclesiastical say in their skeleton, paragraph 298,
2 {I/12/158}:

3 "The only matter to be reversed on the
4 counterfactual is access to or use of the premises being
5 prevented or hindered where such prevention et cetera
6 has occurred:

7 "for the specified reason ...
8 "in specified circumstances ..."

9 Then they say:

10 "None of the other matters, including those set out
11 in paragraph 296 above is to be reversed. Specifically,
12 and importantly, the 'emergency endangering human life'
13 to which the government action which caused prevention
14 et cetera was a response is not to be reversed. That is
15 not an insured peril in its own right."

16 So you imagine that there was an emergency
17 sufficient to generate the government action. Because
18 it is only if there is an emergency of sufficient
19 seriousness to provoke the government into action that
20 it will act. But for your counterfactual you take out
21 the government action and assume that it didn't react to
22 the emergency which is contemplated by the clause.

23 With respect, you know, if that is the
24 counterfactual, it is cloud cuckoo land. From the
25 contemplation of this clause, it is just undermining the

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1 clause completely, because you say: yes, the government
2 may have acted but you assume that there was the
3 emergency still. It is back to the salami slicing.

4 You have got the arguments on this, we have
5 reiterated them in relation to the policies, and the
6 fundamental flaw in Mr Kealey's analysis is that he is
7 suggesting that we are saying that this is cover for an
8 emergency and unless you reverse, unless you treat the
9 emergency as part of the counterfactual, you are
10 treating the policy as if it is covering an emergency.

11 But that is not right. We are looking for cover for
12 the policyholders for the combination of events which
13 has occurred, and that combination includes the
14 emergency. If the government, like the insurers'
15 favourite government, the Government of Sweden, had
16 chosen not to act, although it did act in many respects
17 but it didn't impose a lockdown, if it had chosen not to
18 act, the clause would not be triggered. But it did
19 choose to act. But the fact that it did choose to act
20 doesn't mean that you assume it didn't act but there was
21 still the emergency, and it behaved like Sweden for the
22 purposes of a counterfactual.

23 LORD JUSTICE FLAUX: There is a tension as well, it seems to
24 me, Mr Kealey will no doubt deal with this, but if you
25 look at 298 of his skeleton, the only matter to be

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1 reversed is "access to or use of the premises being
2 prevented or hindered, where such prevention has
3 occurred for the specified reason, by reason of action
4 of the government, in specified circumstances, viz due
5 to an emergency endangering human life", which seems to
6 recognise that these are interconnected.

7 MR EDELMAN: Yes.

8 LORD JUSTICE FLAUX: And then says in 299: actually you
9 don't reverse out the emergency, even though it is
10 a specified circumstances. There is a tension there.

11 MR EDELMAN: Exactly. What it comes down to is trying to
12 identify -- and it is a fundamental error in approach to
13 the operation of these insurances. It is trying to
14 identify, in a clause which has a number of ingredients
15 which are required for cover to be triggered, a single
16 insured peril. And it is an over-rigorous approach,
17 because it is like saying, well there has to be one
18 single, unitary insured peril in here somewhere.
19 Something has got to be the insured peril. And these
20 clauses are quite unusual because, unlike in marine
21 insurance or non-marine insurance for property where you
22 would have it's either a storm, a peril of the seas, you
23 expect one single peril to cause a loss, occasionally
24 you might have two separate perils, which combine to
25 cause a loss like in the Miss Jay Jay. But these are

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1 composite perils, and it is a conceptual problem which
2 underlies all of insurers' approach to these sorts of
3 clauses, that they are trying to find in there somewhere
4 something they can single out as the insured peril.

5 It's why they all come up with a different answer,
6 because it is an artificial exercise. It is just simply
7 the wrong exercise for something which is a composite
8 package.

9 MR JUSTICE BUTCHER: Yes, and because it is a composite
10 package, it is quite impossible to know which bit of it
11 had what effect, and that is just something which never
12 happened. In a sense, that's what the insurance
13 contemplates.

14 MR EDELMAN: Yes, it is a package of things. They all
15 combine together, A causes B causes C causes D, and you
16 have got your interruption or interference.

17 MR JUSTICE BUTCHER: But that is subject to any amount or
18 any aspect where you can separate it out, for example
19 temporally.

20 MR EDELMAN: Yes, my Lord.

21 MR JUSTICE BUTCHER: We have been through that, Mr Edelman,
22 and you don't need to repeat what you say about it.

23 MR EDELMAN: No. That is the classic point.

24 LORD JUSTICE FLAUX: Is that a convenient moment,
25 Mr Edelman?

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1 MR EDELMAN: I have just got three or four more sentences on
 2 trends clauses and then we can finish, and there is
 3 enough time for Ms Mulcahy, she asked 20 minutes for
 4 Argenta and I think we will be bang on time.
 5 Just on the trends clauses very quickly, we deal
 6 with those in our skeleton argument. There is a dispute
 7 about trends clauses at 1.2, but there is no specific
 8 trends clause in 1.1. But under the damage basis of
 9 settlement clause, you will see that, there is a "had no
 10 damage occurred" point. But you will see that in our
 11 skeleton. I don't have anything to add to what we have
 12 said in our skeleton.
 13 LORD JUSTICE FLAUX: Right.
 14 MR EDELMAN: My Lord, that is all I wanted to say about
 15 Ecclesiastical.
 16 LORD JUSTICE FLAUX: Very well. We will have a break for
 17 ten minutes, until 3:40pm.
 18 (3.30 pm)
 19 (Short break)
 20 (3.40 pm)
 21 Submissions by MS MULCAHY
 22 LORD JUSTICE FLAUX: Are you ready, Ms Mulcahy?
 23 MS MULCAHY: Yes, I am, my Lord.
 24 The last insurer is Argenta and I will seek to deal
 25 with that briefly.

1 There are two wordings for Argenta. We don't need
 2 to go to them, but they are shown in the representative
 3 sample at {B/1/4}. They are on materially the same
 4 terms. The lead is the guest house and B&B policy.
 5 Both of them relate to category 6 businesses only, so
 6 catered and uncatered accommodation; although it is
 7 accepted that there may have been an impact from some
 8 category 1 measures, for example if there was a bar or
 9 a restaurant in the accommodation.
 10 Just to introduce the clause, the policy starts at
 11 {B/3/1} and then the business interruption clause is on
 12 {B/3/57}. It is page 56 of the policy itself. That is
 13 the main property damage business interruption clause --
 14 That covers interruption to the business at the
 15 premises, and "business" is defined on the previous page
 16 at {B/3/56} as "the provision of guest house
 17 accommodation, catering services and leisure facilities
 18 at the premises".
 19 Then if we go forward to page 57 of the policy and
 20 page {B/3/58} of the bundle, it sets out the extensions
 21 and the cover wording. So we can see from the top left:
 22 "The company will also indemnify the insured as
 23 provided in the insurance in this section for such
 24 interruption as a result of ..."
 25 We will come back to that in a moment. Then on the

1 right-hand side "Section exclusions", which apply in
 2 addition to other exclusions:
 3 "The company will not be liable for ..."
 4 If we go forward a page we come to the relevant
 5 clause, which is "defective sanitation, notifiable human
 6 disease, murder or suicide". It is subparagraph 4(d)
 7 that is relevant for this purpose:
 8 "Any occurrence of a notifiable human disease within
 9 a radius of 25 miles of the premises."
 10 We can see the exclusion on the right-hand side:
 11 "For any amount in excess of €25,000."
 12 That is a €25,000 limit:
 13 "For any costs incurred in the cleaning repair
 14 [et cetera]
 15 "For any loss arising from those premises that are
 16 not directly affected by the occurrence ..."
 17 So this is a very simple clause; it is interruption
 18 as a result of occurrence of notifiable disease within
 19 25 miles. So it is similar to QBE, which has already
 20 been discussed.
 21 What I would like to do, rather than repeating
 22 points that have been made already, is just pick up some
 23 issues specific to Argenta.
 24 We have an admission by Argenta in relation to proof
 25 of disease, which is at paragraph 35 of its skeleton,

1 that is {1/11/16}. They admit the FCA case that there
 2 is an occurrence within 25 miles whenever a person
 3 within that area has contracted COVID-19, whether or not
 4 it is medically verified or they are symptomatic. So
 5 there is an agreement by Argenta for that purpose as to
 6 what is required to satisfy the requirement for disease
 7 within the 25-mile limit.
 8 There is very little disagreement between the
 9 parties about interruption. As we understand Argenta's
 10 case, I'm sure they will correct us if we have
 11 misunderstood it, but it is worth just noting the
 12 approach of Argenta in comparison to other insurers.
 13 Argenta in its skeleton, it is paragraph 41.2(a) and
 14 footnote 70, so it is {1/11/19}, it accepts that the
 15 21 March regulations resulted in interruption if there
 16 was a bar or a restaurant in the accommodation, other
 17 than solely for room service, which is permitted by the
 18 regulations. They would accept that if the bar or
 19 restaurant was closed, then effectively part of the
 20 business was interrupted.
 21 At paragraph 12, which is on page {1/11/8} they seem
 22 to accept that the 24 March instruction to holiday
 23 accommodation providers to close interrupted holiday
 24 accommodation.
 25 Then at paragraph -- I will give you the reference

1 to the defence, it is 59.3 and footnote 7 in the
 2 defence, but it is expanded on in the skeleton at
 3 paragraph 41.2(b) to (c). It is accepted by Argenta
 4 that the 26 March regulations did cause interruption,
 5 subject to limited exceptions.
 6 So they say there is interruption insofar as the
 7 bookings did not fall within any of the exceptions, such
 8 as travelling to a funeral or housing the homeless,
 9 et cetera.
 10 So that appears to be an acceptance that in a guest
 11 house with, say, 30 rooms, where 20 or 25 of them were
 12 closed but the rest stayed open for these exceptional
 13 guests, there was still interruption; or if you had an
 14 occasional guest in a cottage, but huge voids in the
 15 bookings diary, it would appear to be accepted that
 16 there is interruption when it is not occupied.
 17 So Argenta appears to accept, on our understanding,
 18 that interruption to part of the business is enough. We
 19 say that must be right, and agree.
 20 So the real issue between the parties is yet again
 21 causation, and the main argument that is advanced by
 22 Argenta is this:
 23 Although it accepts that the cover does respond
 24 where a disease is not simply only within 25 miles, but
 25 also goes beyond it, and we can see that from its

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1 skeleton at paragraph 48.1, which is on pages {1/11/21}
 2 to 22 of this bundle, it is also at paragraphs 64 to 65
 3 {1/11/28}. So they accept the disease can go beyond the
 4 25 miles, but they then go on and say, and it is in
 5 a number of places in their skeleton, paragraph 50 and
 6 paragraph 58, they say that the interruption was not the
 7 result of the disease within 25 miles but instead was
 8 the result of the broader pandemic and the government
 9 and public response to it, which is not sufficient to
 10 bring the loss within the extension.
 11 Argenta's case, and it seems to be unique in this
 12 respect, at paragraph 79.4, so it is page {1/11/34} of
 13 this document, they say they will be paying no claims
 14 for interruption after 16 March.
 15 Just pausing there, that seems to implicitly accept
 16 that from 16 March there was an interruption, that that
 17 announcement led to an interruption of holiday
 18 accommodation.
 19 But just returning to causation, its argument is
 20 that even if there were no disease in this
 21 counterfactual, there was no disease within the 25 miles
 22 of a holiday location, and that obviously, if it is
 23 inland, a huge area, 2,000 square miles, we say that
 24 that would be a safe haven holidaymakers would flock to,
 25 what Argenta says is that there is no recovery because

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1 of what the Prime Minister and the government did, what
 2 they said, on 16 March, because they said you shouldn't
 3 travel for inessential purposes, and that, they say,
 4 resulted in the cessation of holidaying, so you don't
 5 have a cause by the occurrence within 25 miles; it is
 6 caused by the Prime Minister's speech instead.
 7 Now, absent the government intervention the disease
 8 clause would have been triggered, but they say the
 9 government intervention prevents cover.
 10 So the approach is therefore to say that the cover
 11 does respond where you have a notifiable disease going
 12 beyond 25 miles, but not where there is a public
 13 authority response which goes beyond 25 miles, despite
 14 the fact that they go hand-in-hand.
 15 You will recall on Monday, and it might be worth
 16 just looking at it again, it is {J/10/1}, the
 17 explanatory note to the notifiable disease regulations
 18 makes it clear that a disease is being made notifiable,
 19 the regulations are placing obligations on various
 20 persons for the purpose of preventing, protecting
 21 against, controlling or providing a public health
 22 response to the incidence or spread of infection.
 23 So we say the very essence of a notifiable disease
 24 is that it contemplates public authority response, a
 25 public health response in order to control the spread of

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1 infection and reduce the spread of infection. So we say
 2 they go hand-in-hand, but Argenta seeks to separate them
 3 out.
 4 I'm not going to deal with the jigsaw argument
 5 again, we say there is a single disease or each part of
 6 the jigsaw was a concurrent cause and made its own
 7 contribution to the disease.
 8 There's a specific point here with Argenta. They
 9 accept that the Leicester restrictions would trigger
 10 cover, because they say that that they are a local
 11 response. We can see that, it is footnote 20 on page 7
 12 of their skeleton, it is {1/11/7}. But they also say it
 13 at paragraph 56.3, which is on page {1/11/25}, and at
 14 that paragraph they talk about how a local lockdown
 15 would respond but a broader lockdown cannot.
 16 If we could go to {1/11/25} please, it is 56.3.
 17 They accept that targeted local restrictions such as
 18 those recently imposed in Leicester are capable of
 19 giving rise to loss caused by occurrence of COVID within
 20 25 miles of some policyholders, and consideration of
 21 this type of local lockdown confirms the loss caused by
 22 national restrictions is not covered by extension 4(d).
 23 That seems to acknowledge that the most obvious way
 24 for a disease to result in interruption is through
 25 a public authority response. But they are making

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1 a distinction between Leicester and the national
2 response.
3 But what if one had a regional shutdown? What if
4 the whole region from Birmingham to Nottingham, through
5 Leicester to Peterborough, was shutdown; would it be
6 said that the shutdown was not the result of the many
7 cases in Leicester but the cases elsewhere in the
8 region? We say that is simply not reality. England is
9 made up of regions that for the purposes of the national
10 lockdown were all shut down. And if the Prime Minister
11 had said now is the time for everyone, including in
12 Bedford and Brighton and Leicester and Birmingham, to
13 avoid essential contact, and you should avoid pubs in
14 Bedford and Brighton and Leicester and Birmingham, then
15 presumably Argenta would accept that that was
16 sufficient.
17 But that is effectively what the Prime Minister did
18 in imposing the national lockdown. It was imposed in
19 every locale. They considered doing it in certain
20 areas, but they did it nationally because the shape of
21 the curve was very similar across the country.
22 LORD JUSTICE FLAUX: They were considering London and the
23 Midlands, weren't they?
24 MS MULCAHY: Yes, but they decided it --
25 LORD JUSTICE FLAUX: But in the end they imposed it

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1 everywhere.
2 MS MULCAHY: -- was everywhere. The shape of the curve was
3 everywhere. The height of the curve was different, but
4 the shape of the curve was everywhere so they decided
5 that it needed national action.
6 Argenta would seem to accept this in principle.
7 They accept at paragraph 52, if we go back to
8 page {1/11/23}, they make reference there to the
9 pandemic being the "widespread occurrences of COVID-19
10 across the country". And then they say that those
11 occurrences caused government action, which they define
12 as events B and C., you can see at 2(a) and (b). Then
13 they try to separate out the local occurrence, event E,
14 as also caused by the pandemic.
15 Perhaps we can go over the page with that, so you
16 can see the rest of that {1/11/24}. They talk about the
17 concern at event E, but that is dealt with at (4):
18 "In addition, the pandemic (event A) also caused, at
19 least in most cases, local occurrences of COVID-19
20 within 25 miles of the insured property (event E)."
21 So they are accepting the government response is
22 a response to occurrences of COVID-19 around the
23 country; we see that from the skeleton at 46, the last
24 sentence, page {1/11/21}. But plainly the many
25 occurrences within 25 miles, the 2,000 square mile area,

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1 were part of that.
2 So what we don't understand is when you come to
3 paragraphs 54, for example, on page {1/11/24}, but it is
4 also at 58 and 78, it is said by Argenta, repeatedly,
5 that the local occurrence is simply not in the causal
6 chain at all. We just do not understand that. Of
7 course it is. The response was a response to all of the
8 local occurrences, including the local occurrence that
9 would have been within 25 miles of any specific
10 policyholder.
11 Just briefly, there is a point being raised about
12 the exclusion to extension 4(d) for any loss arising
13 from the premises that are not directly affected by the
14 occurrence, discovery or accident.
15 Mr Edelman made reference to this already in the
16 context of Amlin. We say that that is a common clause
17 that is dealing with multi-premise businesses to avoid
18 recovery for lost revenue across the whole business once
19 there has been an interruption only to the business at
20 a particular premises. That is how Amlin also explain
21 it at paragraph 219 of their skeleton. It means that
22 the premises must be directly affected by the occurrence
23 of the COVID-19 within 25 miles.
24 The FCA accepts that the interruption must be
25 directly caused by the occurrence within 25 miles,

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1 because the term "resulting from" imports a proximate
2 cause test, as Argenta also says in its skeleton, so we
3 say this clause adds nothing. It can't be said that
4 "directly" adds anything to proximate cause.
5 Indeed, Argenta itself doesn't really seem to rely
6 on this as excluding anything, because in its skeleton,
7 for example paragraph 18 on page {1/11/10}, but it is
8 also at 62 on page {1/11/27}, it merely says it confirms
9 the case, absent the exclusion; and we don't really
10 understand what sort of exclusion merely confirms the
11 existing position. So we think this is a non-issue.
12 If it was the case that there had been a shutdown
13 across a number of holiday cottages because of vermin at
14 one, because of an interconnection, as Mr Edelman
15 suggested, because it affected those who went in and
16 cleaned the others, then that would be different,
17 because it couldn't be said that all of the cottages had
18 been closed as a result of the vermin. But it is
19 a different situation where you have cottages all over
20 the country being closed because of disease all over the
21 country, and we say that that really is not addressed.
22 Then just to note that there is a trends clause. We
23 say that this is a case where the machinery and the
24 trends apply, and we accept that the word "damage" has
25 to be made to work.

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1 The basis of settlement clause is at {B/3/60}. If
2 we can just bring that up on the screen, it's just to
3 draw your attention to where it is. That deals with
4 what the basis of indemnity is, and you will see the
5 reference there to the amount by which gross income
6 during the indemnity period falls short of the standard
7 gross income due to the damage.

8 If we go back to page {B/3/56} we can see there the
9 reference to the definitions of "gross income" and
10 "standard gross income"; and you will note the
11 adjustments language that you will see in the definition
12 of "standard gross income" along with the words "but for
13 the damage". So it is the same points as before and
14 I won't repeat them. We say that doesn't make
15 a difference to the principles of causation, but that is
16 covered in our skeleton at paragraphs 946 to 950.

17 My Lords, those are our submissions on Argenta, and
18 those are in fact the FCA's submissions, having taken
19 you through the headline points from the policies
20 generally, and on that note I will hand over to Mr Edey,
21 who I think is up next for the Hospitality Industries
22 Action Group.

23 LORD JUSTICE FLAUX: Thank you very much, Ms Mulcahy.
24 (4.00 pm)
25

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Submissions by MR EDEY

1 MR EDEY: My Lords, as you know, the interveners I represent
2 are interested in QBE1-3, which your Lordships will find
3 in bundle B at tabs 13 to 15, and also in RSA4, which is
4 in bundle B at tab 20.

5 We adopt what the FCA says about those policies, and
6 similar issues that arise on other policies in this test
7 action, but there are a few points, my Lords, which we
8 would like to make or emphasise, starting, if I may,
9 with a couple of points about the nature of the
10 notifiable disease clauses in both the relevant QBE and
11 RSA4 policy. I then want to say something about the
12 insured peril relevant to both cases, before dealing
13 with the causation issue, which is the only real point
14 on QBE, and then finishing with a few discrete RSA4
15 points.
16

17 My Lords, all of that will have to be at a serious
18 gallop, I'm afraid, and as a result for the main part
19 I am not going to take you to documents, I am just going
20 to give you references to them, though no doubt when
21 I do they will pop up on the screen.

22 My Lords, starting then with the general nature of
23 the specific disease cover in the two cases. There are
24 two points.
25

First, focusing, as insurers are inclined to do, on

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1 the word "pandemic", as if it is some magical thing,
2 wholly distinct from a notifiable disease, is obviously
3 a diversionary tactic. A pandemic is or may be simply
4 a very widespread notifiable disease. It is nothing
5 more. Put the other way, it is common ground that
6 a notifiable disease could be or become a pandemic.

7 So we say, in response to a point QBE make at
8 paragraph 51 of their skeleton argument {1/17/23}, and
9 a similar point that all insurers make in their joint
10 causation skeleton at paragraph 61.3, that cover
11 relating to notifiable diseases is in fact extremely
12 fertile ground for looking for cover which applies when
13 there is a pandemic.

14 It is not, of course, our case that the policy
15 provides specific cover for pandemics, which is the
16 Aunt Sally set up in QBE's skeleton at paragraph 51; and
17 that's the reference that I just gave.

18 Our case is simply that with a notifiable disease
19 cover provided by the policy extends to a case where the
20 notifiable disease becomes a pandemic, as well as to
21 less widespread diseases.

22 In fact, QBE accepts that in theory the policies may
23 provide cover in the event of a pandemic, because it
24 accepts that cover is not, in its words, per se lost
25 because the disease spreads more widely. It just says

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1 we can't prove causation.

2 My Lords, the second point is the question which
3 seemed to be troubling your Lordships a little on
4 Monday, which was the purpose of the area requirement.
5 We say the answer to that is simple: it precludes cover
6 if you don't have cases of the relevant notifiable
7 disease in the relevant area. And that is an important
8 purpose, albeit one which necessarily gives rise to the
9 postcode lottery to which QBE refer on their case as
10 much as ours.

11 The fact that in the case of a notifiable disease
12 which is everywhere, including within the relevant
13 policy area, and to which the government has responded
14 because of the cases everywhere, including within the
15 policy area, that there is, on our case, cover, that
16 doesn't mean something has gone wrong, unless, that is,
17 you start from the assumption which insurers make, that
18 the radius was intended to achieve what they wanted to
19 achieve. And that, of course, begs the very question
20 which is before you. And indeed it gives rise to the
21 more telling question: if the purpose of the area
22 requirement was to preclude cover for pandemics, why on
23 earth not just preclude cover for pandemics?
24

25 Can I then turn to the question of what the insured
peril is. For both QBE and RSA, we say that the insured

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1 peril starts with the words " interruption or
2 interference ", and includes everything which follows .
3 Just looking at QBE1, which is at {B/13/31}, I will
4 just ask you to note that it is common ground with QBE
5 that the words "loss resulting from" should be read in
6 before the words "interruption and interference ". That
7 is their skeleton argument at paragraph 255.
8 However, in their defence and their skeleton
9 argument at paragraph 214, that is at {1/17/76}, QBE
10 mis- identify the insured peril , because they remove the
11 words " interruption or interference ", and they then use
12 throughout the skeleton argument the term "BI loss" to
13 embrace "loss resulting from interruption or
14 interference " .
15 RSA does the same thing, and you will see that in
16 its skeleton argument at paragraph 17 to paragraph 18
17 {1/18/74} .
18 We say, you' ll see it there, 17, "The Insured
19 Perils " :
20 "The peril insured against is ..."
21 Then they have omitted the words. And we say the
22 missing words are plainly part of the insured peril , as,
23 for example, Hiscox rightly identifies in paragraph 340
24 of its skeleton argument, {1/13/108} and indeed in
25 various other places in that document.

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1 That it is also consistent , my Lords, with what is
2 said by all the insurers in their joint skeleton
3 argument at, for example, paragraph 64. It is also,
4 notably, how RSA correctly pleaded the insured peril in
5 their defence. I just show you that, it is
6 paragraphs 86 to 88 at {A/12/29}, which stands in stark
7 contrast to the relevant paragraphs in their pleading in
8 their skeleton argument, where you will see have seen at
9 the first stages, you see the pleaded case, number 1,
10 " interruption or interference ", contrast to what I just
11 showed you in the skeleton argument, where those words
12 have just been omitted.
13 We say this is not, as Mr Howard characterises it ,
14 an arid debate or a matter of semantics. That is so
15 because it is important obviously to start from the
16 right place in the analysis to avoid in particular going
17 down the wrong path in we say three particular respects .
18 First, it may matter when you are considering what
19 causal link is required within the insured peril . The
20 starting point is not proximate cause, as their entire
21 argument, QBE's argument, on "arising from" or "in
22 consequence of", at paragraphs 216 and following in
23 their skeleton argument, wrongly presupposes.
24 That is the standard required causal link between an
25 insured peril or an excluded peril and loss . And that

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1 is what the cases and the textbooks are talking about.
2 It is not orthodoxy the text that applies within the
3 description of the insured peril .
4 Indeed again I just ask you to note what is said in
5 the joint causation skeleton at paragraph 21 {1/6/13} .
6 If it is not coming up I am just going to move on, my
7 Lords. Again, similarly Hiscox -- there it is ,
8 paragraph 21:
9 "... enquiries as to proximate cause is only for the
10 purpose of answering one question: was the insured peril
11 the or a proximate cause of the loss ."
12 Correct. It has nothing to do with the causal test
13 within the insured peril .
14 Similarly -- and I will just give you the
15 reference -- see what Hiscox say at paragraph 324 of
16 their documents, where they distinguish between what
17 Mr Gaisman calls true causation issues and "causation"
18 in inverted commas, his inverted commas, which are in
19 reality coverage points .
20 The second reason that it is important to start with
21 the right insured peril , my Lords, is that in order to
22 apply the "but for" test at the stage of determining
23 whether the loss is proximately caused by the insured
24 peril , to the extent that counterfactuals are helpful at
25 all -- and that is the point the FCA has addressed --

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1 one has to posit a counterfactual that strips out the
2 insured peril entirely , including all elements of what
3 establishes the insured peril .
4 If you omit the interruption / interference from the
5 description of the insured peril when you get to the
6 counterfactuals you are almost bound to go wrong, as QBE
7 do .
8 The correct question is not, as QBE poses: would the
9 BI losses , using their rolled-up formulation , have
10 happened "but for" and were they proximately caused by
11 the cases within the area. The correct question is :
12 would the loss have happened "but for", and was it
13 proximately caused by the proven, on this hypothesis ,
14 interruption / interference arising from a manifestation
15 or occurrence of COVID cases within 25 miles or 1 mile .
16 Getting the insured peril right therefore helps you
17 see why you cannot possibly strip out the government's
18 unitary response to COVID-19 in the area in any relevant
19 counterfactual , because it is the unitary response which
20 gives rise to the interference or interruption , and is
21 an essential ingredient in the insured peril . You
22 cannot include in a counterfactual a key part of your
23 proven insured peril .
24 My Lords, of course if loss was proximately caused
25 by the insured peril , here for example the required

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1 closure, then if insurers wish to say that the same
2 amount of loss or part thereof would have been suffered
3 in any event by a different route, for example if the
4 premises had not been closed by the government, then
5 they bear the burden of proving it. That is the Dalmine
6 case, with the cracks only in defective pipes there
7 being here, for example, the shutting of businesses only
8 when ordered to do so by the government.

9 Just as in Dalmine, the correct incidence of the
10 burden of proof reflects the position in the pleadings.
11 It is QBE who in their defence at paragraph 68.2(i) at
12 {A/11/23} avers that the same loss would have been
13 suffered in any event. I am sorry, it is over the page
14 at {A/11/24}. Could you go back to 23; it spans 23 and
15 24. It is at the bottom:

16 "... would have been suffered in any event whether
17 or not the insured peril occurred".

18 And it is for it to allege that and it to prove
19 that.

20 It is important, my Lords, that you decide that for
21 these insureds because they can't, we say, sensibly be
22 expected to have to allege and then prove the negative.

23 In other words, even if they had not been required
24 to shut they would not have lost the same revenue for
25 some other reason.

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1 In that context can I just correct one point in our
2 skeleton argument at paragraph 167 {1/2/48}. We there
3 refer in parenthesis to the Swedish point, and I am sure
4 you know what I mean by that, as an example of the sort
5 of point an insurer might want to raise, and we say
6 would have to prove at this stage of the argument.

7 In fact, of course, that is obviously not a point
8 relevant to disease clauses. If it is a point that
9 arises at all, it might be relevant only in public
10 authority cases. So I would ask you just to delete
11 that.

12 The further reason we say identifying the correct
13 peril matters is because it ensures one does not fall
14 into the error of seeking to introduce the trends
15 clause, if it applies at all, into the analysis of what
16 is required within the insured peril, where it simply
17 does not belong. That is the error which you will see
18 in QBE's skeleton argument at paragraphs 77 to 78, for
19 example, and 226.6. I am not going to take you there.

20 My Lords, that all said, I accept of course that
21 none of that avoids the need to grapple with causation
22 within the insured peril, and QBE, which is the key
23 point to which I now turn.

24 That raises first a legal question and second
25 a factual question, albeit the factual one takes account

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1 of the contractual context.

2 The legal question is what is the test required by
3 the relevant causal link within the insured peril. In
4 QBE1 that is "arising from" and in QBE2 to 3 it is "in
5 consequence of".

6 We say they do not require satisfaction of the
7 proximate cause test, but something looser than that,
8 akin if you will to what the FCA says "following" means.

9 We give the reasons for that in our skeleton
10 argument at paragraphs 138 and 142 to 143. I don't have
11 time to go over that but can I just summarise very
12 briefly; as I have already touched upon, the relevant
13 words are part of the insured peril, not the causal link
14 between the peril or excluded peril and the loss, so the
15 starting point simply is not proximate cause. That is
16 the test between insured peril and loss: see section 55
17 of the MIA.

18 While I am afraid I don't have time to go through
19 authorities and textbooks relied upon by QBE on the
20 meaning of "arising out of" or "in consequence of", when
21 you do look at them, either with Mr Howard, as part of
22 his four hours on this policy, or alone, you will see
23 that none of them say the phrases mean proximate cause
24 in the context of a description of the insured peril.

25 So, for example, the passage in MacGillivray which

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1 is referred to in their skeleton argument at
2 paragraph 220 {1/17/77}, is in the context of the usual
3 rule of proximate cause as between insured or excluded
4 peril and loss.

5 There is a similar error, we say, in Arch's skeleton
6 argument at paragraph 28. It is nothing to do with
7 establishing any causal link required within the insured
8 peril itself.

9 Second, outside of the context of defining the
10 required causal link between insured or excluded peril
11 and losses, there are many cases that treat "arising out
12 of", which we say is akin to "arising from", as
13 involving a relatively loose causal link.

14 We refer to those authorities at footnote 37 of our
15 skeleton argument at {1/2/39}, which I will not ask you
16 to turn up, but can I just give you one more, which is
17 the Cultural Foundation v Beazley Furlonge case, which
18 is in {J/137/1} at paragraphs 162 to 164.

19 The third point is that, as the cases make plain,
20 everything depends on context. Contrary to the
21 suggestion in QBE's defence at 226.5 {1/17/82}, that the
22 relevant phrases here standalone, they plainly do no
23 such thing, as we explain in our skeleton argument at
24 paragraphs 142 to 143.

25 In that regard, can I just ask you to note that in

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1 their skeleton argument at paragraph 38.2, which is at
2 {I/17/18}, QBE misstates what the test is under the
3 primary property damage BI cover in QBE1 and 3. It does
4 not say "arising from, "caused by" or "in consequence
5 of". It refers, my Lords, in QBE1, to "resulting
6 directly from".

7 It is that distinction which is one of the features
8 on which we rely in support of this argument.

9 So we say, my Lords, it is not proximate cause test
10 in this part of the debate. It is looser than that.

11 But, in any event, moving to the factual question,
12 we say that as a matter of fact the proximate cause test
13 is satisfied and that is the right test.

14 The FCA has dealt with this at some length and
15 I only want to add a few points.

16 The FCA has identified some of the important
17 concessions made by QBE, and you will find a summary of
18 some of those at paragraph 238 of its skeleton. But
19 just note too that unlike Argenta QBE explicitly accepts
20 that government response caused by or arising from, or
21 in consequence of, a local occurrence of a disease will
22 be covered.

23 So there is rightly no suggestion from QBE that the
24 government response to notifiable diseases breaks the
25 chain of causation. You will find that in their

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1 skeleton argument at 235.4 {I/17/85}.

2 But despite those concessions QBE argues that if
3 there were cases within and without the relevant policy
4 area, and the government therefore lock down an area
5 including but larger than the relevant policy area, then
6 there would be cover only to the extent that the insured
7 could show that it was the case, that it was the cases
8 within the area that caused the response. That is
9 paragraph 239 of their skeleton argument. They say,
10 "Ah, the insureds can't do that, of course, because they
11 would have been in lockdown within the area even if they
12 didn't have the cases there, because once there were
13 cases outside and around the relevant area the
14 government would have locked down the relevant area in
15 any event."

16 We say that in the context of notifiable diseases
17 that simply makes no sense.

18 The facts on which our case on causation are
19 premised, are premised, as opposed to the conclusion, is
20 not even seriously in dispute.

21 If you look at paragraph 89 of their skeleton
22 argument {I/17/38}, paragraph 89 at the bottom of the
23 page, if you ignore, as you should, the reference to
24 "worldwide", since the government here was plainly
25 responding to what was happening here, those facts get

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1 us where we need to go.

2 The FCA has explained why on those facts the entire
3 thing, COVID-19 and the response to it, should be seen
4 as one indivisible thing on which the cases in the area
5 are a part, and if that is right then we are home.
6 I have summarised that no doubt inelegantly but you know
7 the point.

8 But the alternative case is that each occurrence of
9 COVID should be seen as a concurrent cause. Although,
10 with respect, on that alternative QBE in paragraph 89
11 goes wrong, we say, are the final words "by itself".
12 There is no need for the single piece, ie the single
13 case anywhere in the country, to be the sole cause
14 whatever causal test you apply.

15 Even if proximate cause is required it is satisfied
16 because each piece of the puzzle is as dominant and
17 effective as any other piece. It is only the
18 combination of all the pieces that as it were reveal to
19 the government the message on the jigsaw "Act now and
20 act everywhere".

21 There is nothing to suggest that any one piece was
22 more important than another. And QBE does not suggest
23 otherwise. Rather their case is effectively that none
24 of the individual pieces were a cause. Common sense
25 tells you that cannot possibly be right.

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1 Just take my Lord's, Lord Justice Flaux's, example,
2 he gave a moment ago of London. The government even
3 thought about closing down London and in fact also the
4 Midlands first, as you will recall, because they were
5 ahead of the curve. That is item 76 in the chronology
6 at {C/1/36}.

7 We know from the government data to which the agreed
8 facts refer that by 16 March every one of the 32 London
9 boroughs, making up the Greater London, had at least one
10 confirmed case of COVID. Ten of those 32 had over 50
11 cumulative cases. By 20 March nine of the 32 had over
12 200 cumulative cases.

13 On the basis of all that an insured in London must
14 plainly be able to say that a cause, indeed if necessary
15 a proximate cause, of the shutdown was the cases in
16 London.

17 The idea that there would have been a lockdown even
18 if there had been no cases in London, which is the
19 extreme position QBE is forced to adopt in its skeleton
20 argument at paragraph 247 {I/17/90}, is therefore
21 completely unreal.

22 Once that is accepted, as it must be, everything
23 else becomes obvious. Why didn't the government just
24 shut down London, because of the confirmed and
25 unconfirmed, expected but no less real cases, which had

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1 spread everywhere else in the other cities , towns and
 2 rural locations where there were cases confirmed or not.
 3 There is simply no basis , and I put it that high
 4 before you, for a contrary assertion that even if there
 5 had not been all of the cases that there in fact were,
 6 including in the relevant policy area, the same measures
 7 would have been taken by the government in any event.
 8 That is why we say repeatedly and with no apology
 9 that the case advanced by QBE defies common sense, not
 10 only for the 25-mile radius , but also for the 1 mile
 11 radius , always , always my Lords, on the assumption that
 12 there was in fact at least one case confirmed or
 13 otherwise within that area at the relevant time.
 14 Mr Howard's Shops A to D prove, with great respect ,
 15 absolutely nothing the other way. Even with their
 16 highly contrived facts there is cover for Shops B to D
 17 for the reasons that Mr Edelman gave, and for the
 18 reasons that I have just given.
 19 My Lord, can I then turn to RSA4. If we are right
 20 on QBE it will almost certainly inevitably follow that
 21 there is also cover under at least the notifiable
 22 disease clause in RSA4. That is because unless the term
 23 " vicinity " in RSA4 is read as narrower than the radiuses
 24 in the QBE wordings, which we would say is an impossible
 25 reading, we can be no worse off under this notifiable

1 disease cover.
 2 My Lords, the converse however is not true. Even if
 3 we were wrong on QBE1-3 we still would say there is
 4 cover under RSA4 for essentially three reasons.
 5 First , because under RSA4, the notifiable disease
 6 clause , there is no fixed area within which the cases of
 7 COVID must have occurred and from which the
 8 interruption / interference results even if cases , as
 9 opposed to COVID more generally, are required on this
 10 wording. You have heard the FCA on that.
 11 If cases are required they must have occurred within
 12 the vicinity as defined at {B/20/35}. That is
 13 a flexible definition to which the key is the area
 14 within which events that occur within it would be
 15 reasonably expected to have an impact on the insured or
 16 its business .
 17 We say the reference to events that occur can only,
 18 it is on the right-hand side of 120, can only sensibly
 19 be a reference to whatever event has in fact occurred in
 20 respect of which the insured seeks to establish cover.
 21 So here the relevant event would be the occurrence
 22 of cases of COVID-19 or its emergence in the UK, and it
 23 would be reasonably expected that cases of COVID
 24 anywhere in the UK would have an impact on any insured
 25 or its business: in other words, interfere with or

1 interrupt with their business .
 2 By contrast, although RSA accepts that the
 3 definition is flexible up to a point it says that it
 4 requires close spatial proximity to the premises; and it
 5 varies only depending upon the nature of the business
 6 and the location . As a result it says you can give no
 7 answer to what " vicinity " means here; it all depends.
 8 Save, it says , it cannot ever be the whole of the
 9 UK, and it cannot even mean necessarily the village ,
 10 town, city or other development within which the
 11 premises sit .
 12 My Lords, RSA is wrong about all of that for the
 13 reasons that we have given in our skeleton argument at
 14 paragraphs 59 to 72.
 15 Crucially RSA's approach gives no meaning at all to
 16 the key part of the clause which reads, "in which events
 17 that occur within such area would be reasonably expected
 18 to have an impact".
 19 Indeed, while at paragraph 29 of their skeleton
 20 argument they are keen to tell you that it doesn't mean
 21 what we say it means for a number of reasons, all of
 22 which are bad, nowhere in their skeleton argument do
 23 they tell you what it means or how they would apply it ,
 24 or how close their spatial proximity definition works
 25 with it .

1 What is the event we are hypothetically talking
 2 about if it is not the events which we are actually
 3 interested in .
 4 I don't have the time, my Lords, given the time,
 5 have time to go through the points that we would make in
 6 response to the vicinity arguments, but truly my Lord
 7 there is nothing in them. We will deal with them very
 8 briefly in reply if we need to.
 9 But for example to suggest that we are trying to
 10 give a meaning to a clause after the inception of the
 11 policy , we are doing no such thing.
 12 The content and what fills that definition can
 13 obviously change afterwards. Unsurprisingly
 14 Mr Justice Popplewell , as he then was, in the Lukoil
 15 case, says nothing to the contrary .
 16 You can see that their close spatial proximity test
 17 cannot possibly be right simply by looking at their own
 18 57(b) at {1/18/95}, where they accept that it could
 19 embrace an area of a 25-mile radius . In other words
 20 almost 2,000 square miles . They say you just don't know
 21 how far. 2,000 square miles is nobody's idea of close
 22 spatial proximity, my Lords. Their test doesn't work.
 23 It doesn't work with what they themselves accept, and
 24 they do not give an answer as to how this works. The
 25 answer is the one with respect that we have given.

1 My Lords, if we are right about that and it embraces
 2 in this case all of the UK then we are home for that
 3 additional reason.
 4 The second reason why we can get home on RSA is that
 5 there is cover for interruption as a result of
 6 government action or advice within the vicinity, which
 7 prevents or hinders the use of or access to the insured
 8 location, and there is really no answer to the claim
 9 under that clause in relation to the effect of social
 10 distancing measures or closure measures, no matter how
 11 wide or narrow is the area covered by the vicinity. The
 12 FCA has dealt with that.
 13 But the suggestion, my Lords, that "within" means
 14 that there is no cover if the government, the national
 15 government, acts both within and without the vicinity,
 16 is simply untenable. It is not what it says anywhere.
 17 Finally, my Lords, the third basis of cover under
 18 RSA is the enforced closure:
 19 "Interruption / interference as a result of enforced
 20 closure by the government for health reasons or concerns
 21 in the vicinity".
 22 Again there is not actually a sensible argument that
 23 there weren't health reasons or concerns in the vicinity
 24 no matter how close that is to the insured premises.
 25 The attempt by RSA to get to a contrary conclusion

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1 by bringing in the concept of events taken from
 2 aggregation clauses and therefore to get the three
 3 particularities of place, time and manner into this
 4 clause, and then to say that the health concerns or
 5 reasons must relate to that, simply doesn't hold water.
 6 Finally, my Lords, just one last point. We
 7 obviously say we have cover under RSA4 on three
 8 alternative bases.
 9 In their skeleton argument at paragraphs 40 to 44
 10 RSA make some points about what happens if there is
 11 overlapping cover. What they curiously don't mention is
 12 general condition 8(iii) at {B/20/20}, which makes it
 13 clear that under this policy there may well be cover
 14 under different provisions, and in that event only one
 15 limit whichever is the largest applies.
 16 That puts beyond doubt what we say would in any
 17 event be the position, namely that RSA plainly cannot
 18 try to cancel out cover in respect of each insured peril
 19 by reference to facts which give cover on the basis of
 20 different insured perils.
 21 LORD JUSTICE FLAUX: Right.
 22 MR EDEY: My Lords, unless I can help you further those are
 23 the submissions on behalf of the interveners
 24 I represent.
 25 LORD JUSTICE FLAUX: No, thank you very much indeed,

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1 Mr Edey.
 2 We will finish for today now. Tomorrow we are
 3 sitting at 10.00 am again with I think Mr Lynch having
 4 half an hour on behalf of the Hiscox Action Group.
 5 There was a request to my clerk from Mr Gaisman to
 6 sit at 10.00 am on Monday. I don't know if the message
 7 has got through from my clerk but if it has not
 8 Mr Justice Butcher and I have discussed that and we are
 9 happy to sit at 10.00 am on Monday as requested.
 10 Otherwise we will see you at 10 o'clock tomorrow.
 11 (4.32 pm)
 12 (The hearing adjourned until 10.00 am on Thursday,
 13 23 July 2020)

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