

OPUS2

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

Day 8

July 30, 2020

Opus 2 - Official Court Reporters

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1 Thursday, 30 July 2020
 2 (9.56 am)
 3 Reply submissions by MR EDELMAN (continued)
 4 MR EDELMAN: My Lords, if I can start my reply submissions
 5 by dealing with the issue of causation. As Mr Kealey
 6 says, this is the central legal issue in this case and
 7 therefore necessary for me to focus on.
 8 The foundation of Mr Kealey's submissions on
 9 causation was that it is necessary to apply the "but
 10 for" test, jumping on to the Orient Express bandwagon.
 11 It obviously lies at the heart of the insurers' case.
 12 I think your microphone is on and that is
 13 unfortunately giving an echo, my Lord.
 14 No other authority is cited which, in our
 15 submission, supports their approach.
 16 The reliance on the "but for" test is most easily
 17 demonstrated by Mr Kealey's submission on {Day4/75:1},
 18 if we could have that up, please. He says at line 2:
 19 "... on any of the language in our cases there is
 20 never anything less than a factual causation "but for"
 21 standard that needs to be met in any event. That is the
 22 first stage.
 23 "The second stage, once you have identified the
 24 insured peril, has that caused the business interruption
 25 loss for which a claim is made? And that is

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1 traditional, legal causation principles that apply, and
 2 the very least of those principles is the "but for"
 3 principle."
 4 Mr Gaisman, we don't need to look this up, but for
 5 your reference he said on {Day5/11:11} that our approach
 6 represented a radical departure from the "but for" test.
 7 Before I turn to the position --
 8 LORD JUSTICE FLAUX: Just before you do that. I mean,
 9 I have sort of puzzled about all of this, and I sort of
 10 raised this point at various stages with defendants'
 11 counsel, there is a sort of element of abstract
 12 analysis, but what we are really concerned with, I mean
 13 we are concerned with two things, as I see it, in terms
 14 of "causation". One is really an issue of construction
 15 of the relevant wordings as to what is meant by linking
 16 words like "resulting from", "in consequence of",
 17 "following" et cetera, some of which, as a matter of
 18 established principle, are taken to be words of
 19 proximate cause or words of "but for" causation or
 20 whatever.
 21 That is the first issue. The second issue is the
 22 issue of whether any loss is proximately caused by the
 23 insured peril, and it is common ground that that is the
 24 correct test in terms of the link between insured peril
 25 and loss.

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1 MR EDELMAN: Well, my Lord --
 2 LORD JUSTICE FLAUX: So what is all this "but for" analysis
 3 really about, I ask myself, rhetorically or otherwise.
 4 MR EDELMAN: It is not us who raised it, my Lord. We accept
 5 that when you are quantifying a loss, obviously, and in
 6 this sense on quantification "but for" comes in because
 7 one is asking, well, but for the interruption how would
 8 your business have done; would the head chef have left
 9 the restaurant anyway and your turnover would have gone
 10 down?
 11 But that is a very different question from the
 12 primary causation question, which is the proximate
 13 cause. You will only get into quantification and
 14 a quantification analysis once you have got through the
 15 trigger mechanism in the policy for which a proximate
 16 cause test is required.
 17 Albeit it is obviously, as my Lords know, the
 18 Marine Insurance Act codifying the common law, it is the
 19 statutory test, it is the common law test for insurance.
 20 Where it comes in is that insurers are trying to
 21 knock us out at stage 1 by saying: if you have an
 22 outbreak of disease in a relevant policy area, you
 23 cannot prove that but for that relevant policy area's
 24 contribution things would have been different, therefore
 25 you fail at the first hurdle. That is essentially what

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1 insurers have been using "but for" causation to do; to
 2 knock us out.
 3 LORD JUSTICE FLAUX: They go further than that. Certainly
 4 the submissions that were addressed to us yesterday went
 5 further than that, went as far as to say you can't show
 6 that the occurrence of the disease in the location is
 7 the proximate cause of the loss.
 8 MR EDELMAN: Well, if we are on the battle as to whether
 9 it is the proximate cause, that is a battle on which
 10 I can engage on construction and on the facts. That is
 11 a much simpler issue to address.
 12 But what we have to nail, we as the FCA see it as
 13 needing to nail, is this suggestion that somehow, before
 14 you get to proximate causation -- this is Mr Kealey's
 15 submission, all their submissions -- before you get to
 16 proximate causation, there is some snap fingers test
 17 which requires you to overcome a "but for" cause hurdle.
 18 Now that, we say, is wrong as a matter of law.
 19 That's, in a sense, the major issue. That is why
 20 I called it the Orient Express bandwagon, because that
 21 was very much Mr Justice Hamblen's approach, because the
 22 first part of his judgment was to say: well, you can't
 23 overcome "but for" causation. And although Mr Schaff in
 24 that case valiantly showed him, tried to show him, some
 25 proximate cause cases, in fact if one goes to the

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1 judgment you will see that he posed to Mr Schaff the
 2 opposite question to that which my Lord,
 3 Mr Justice Butcher posed to the insurers. The question
 4 my Lord, Mr Justice Butcher posed was: are there any
 5 insurance cases in which the court has applied the "but
 6 for" test as a part of its reasoning? To which the
 7 answer was no. A couple of valiant attempts, but they
 8 were flawed attempts to show that cases had, but they
 9 haven't. But if you actually look at the passage --
 10 I am jumping far ahead in my notes, but I don't mind.
 11 There is a passage in Orient Express where
 12 Mr Justice Hamblen, in his judgment, has posed the
 13 opposite question to Mr Schaff. He said to Mr Schaff:
 14 can you point me to any insurance cases -- well, he
 15 said:
 16 "Mr Schaff could not point me to any insurance cases
 17 in which it was held to be inappropriate to apply the
 18 "but for" test."
 19 Now, the reason none of the insurance cases have
 20 held that it is inappropriate to apply the "but for"
 21 test is because they haven't gone there in the first
 22 place. Neither actually, if one looks at the
 23 authorities, in ordinary causation, do the courts. We
 24 have seen Lord Hoffmann in Fairchild -- this is not
 25 a passage to do with the decision itself. Lord Hoffmann

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1 in Fairchild and in an academic article and the High
 2 Court of Australia, endorsed by the Court of Appeal in
 3 Galoo, is saying this two-stage causation test is
 4 a creation of academics. It's not how the courts
 5 approach causation. You approach causation, you
 6 identify the appropriate legal test, which in this case
 7 is an easy thing to do, because we have got the statute
 8 to tell us what the test is, and then you apply it in
 9 a common sense way.
 10 One of the things that I was going to want to show
 11 you in the Miss Jay Jay is of course you have this
 12 sequence of authorities where you start with Leyland
 13 Shipping, where you have the court saying "dominant and
 14 effective cause". Then you have Miss Jay Jay, where you
 15 have got two causes which are not, either of them,
 16 dominant or effective, and what do you do?
 17 I will take you in a moment to a little bit more
 18 detail, this is just overview.
 19 When you go to the judgment, what you will see
 20 Lord Justice Slade saying, he says this is something
 21 which is not the dominant or effective cause, but which
 22 is nonetheless a concurrent cause which has contributed
 23 to the loss, it is to be treated as if it was
 24 a proximate cause. So adopting what we would say is
 25 a common sense approach to the application of the

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1 causation test.

2 From our perspective, we have approached this in
 3 a conventional way, trying to demonstrate that proximate
 4 causation, even if required, is satisfied. On our
 5 submission, although we say our case is easier if we
 6 have words which are less than proximate cause, we don't
 7 shy away from proximate cause at all.

8 What we say we have here is necessarily a unique
 9 situation in which we don't have two contributing
 10 causes, we have a multitude of contributing causes. And
 11 when you have a national picture, none of which, we say,
 12 can be said to be of any less causative efficacy than
 13 the other, they all contribute to a picture.

14 It was going to be much later in my submissions but
 15 it might be helpful just to show you a document we have
 16 added to the bundle, but it is based on all the
 17 information, it's just a piece of forensic work. It is
 18 {1/1.1/2}. If that could be brought up on the screen,
 19 please.

20 This is drawn from the government statistics all in
 21 the Agreed Facts; there is none of this that is taken
 22 other than from the Agreed Facts. This is all just
 23 dealing with reported cases, so it is not the
 24 controversial bit about projections.

25 The top picture shows you COVID on 2 March; the

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1 second picture shows on 9 March; the third picture, in
 2 the bottom left-hand corner, shows you 16 March; and the
 3 last picture shows you 23 March. This is why we use had
 4 the analogy of a jigsaw.

5 One can argue, as I may or may not have to, for
 6 quite a long time about the law. You can obviously see
 7 from the map in the bottom right-hand corner that there
 8 are a very small handful of blobs without a reported
 9 case. That means that if you took away one small blob,
 10 the result may have been the same, probably would have
 11 been the same. That's why, within reason, one cannot
 12 say that any particular, for example, 1 mile radius
 13 contributed.

14 It gets a bit more difficult if you get to 25-mile
 15 radius, and one can then perhaps have a look at another
 16 picture, which is in {1/1.2/1}. If that could be
 17 brought up, please.

18 I know this is artificial because areas go into the
 19 sea, so I am not suggesting that this is a completely
 20 accurate picture of every single 25-mile radius, but
 21 this is quite helpful in showing you how many 25-mile
 22 radiuses there are to fill England, and it is not that
 23 many.

24 We don't necessarily accept that if you had
 25 a 25-mile circle around London and that miraculously had

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1 been disease free, that the government necessarily would
2 have shutdown London if it could, for example, prevent
3 movement into the M25 ring. If it could just seal off
4 London and say: everywhere else is in lockdown, you
5 can't travel, you can't come into London, all trains
6 into London are stopped and flights into London are
7 stopped, and here you have this oasis in London, we can
8 all carry on normally.

9 But that shows you, in a sense, how it is again an
10 element of the jigsaw. If you imagine all of those
11 blobs all now in orange -- my Lord's video has just gone
12 off, my Lord, Lord Justice Flaux's video.

13 LORD JUSTICE FLAUX: Yes. Back on.

14 MR EDELMAN: All those coloured in in orange again
15 demonstrates our jigsaw, if we can go back to 1.1,
16 page 2, {1/1.1/2}.

17 My Lords, I can, and have the notes prepared to, go
18 through the authorities to show you that insurance law
19 applies proximate cause as the test. The authorities
20 which my learned friend cites on "but for" simply do not
21 work. There are cases without a relevant policy area,
22 let's not lose sight of those, I will come back to those
23 later on, but for those with a relevant policy area, in
24 a sense this is the answer.

25 Mr Orr said yesterday --

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1 LORD JUSTICE FLAUX: What do you mean "This is the answer";
2 you mean the jigsaw is the answer?

3 MR EDELMAN: Yes. It is either that or one sees that it has
4 become one indivisible mass; it is a national outbreak.

5 Mr Orr said yesterday that our notion of the
6 government actually following all this and monitoring it
7 all is fiction. The spreadsheet idea, which I confess
8 that I took forensic advantage of, having been referred
9 to in Mr Kealey's skeleton, was no more than a fiction.
10 But actually it isn't. If one goes -- sorry, I am
11 taking your point because this is all completely all out
12 of order, but I am happy to do it. If one looks at
13 {C/6/392}, I mean I am not sure if Mr Orr has ever
14 looked at this, or whether insurers have. This is a May
15 version of it, but this was information, it was in this
16 form on the government's database throughout.

17 This is the first of 560 pages of spreadsheet which
18 produces all the information that the government had.
19 You will see it starts with "Area Type", "Nation". If
20 we go to the next page, {C/6/393}, we have, you will see
21 the start, at the bottom of the page, of "Region" and
22 then that accounts for all the pages up to 407.

23 If we go to {C/6/407}, please, then you will see at
24 the bottom of the page you have got "Upper tier local
25 authority", and then that occupies just under 200 pages.

10

1 If we move forward to {C/6/596}, and that's where
2 you see the spreadsheet move to "Lower tier local
3 authority", and that continues all the way through from
4 596 to page 952.

5 Now, this is all covered by Agreed Facts. I'm not
6 introducing any new evidence, this is all there, they
7 just haven't looked at it or haven't thought about it.

8 If we go to {C/5/3} you will see it describes the
9 data:

10 "This data [which is what you have just seen] is
11 available for each day and cumulatively, at a number of
12 different levels of aggregation ..."

13 National level, regional level, Upper Tier Local
14 Authority, Lower Tier Local Authority:

15 "This information is available on the UK Government
16 website in spreadsheet form (the 'underlying data').

17 The figures set out in this document are taken from the
18 spreadsheet as it stood on 19 May ...

19 "The data is explained on the government
20 website ..."

21 Then the Agreed Facts explain what it is all about.

22 Then at paragraph 8:

23 "By sorting column A of the spreadsheet into the
24 different UTLAs and LTLAs, it is possible to see how
25 many individuals tested positive for COVID-19, on each

11

1 day and cumulatively, for that UTLA and LTLA (reported
2 cases)."

3 Remember, this is the uncontroversial bit of the
4 evidence about incidence, prevalence of COVID, the
5 reported cases, a screenshot, and then we give
6 a screenshot, and we don't need to refer to that.

7 The other point is did the government rely on this
8 information? Let's have a look at that.

9 The first government intervention that the FCA rely
10 on is 16 March. We have seen the map and what the
11 position is. Let's see the lead up to that, the SAGE
12 minutes of 10 March, {C/2/103}. It is paragraph 5,
13 "Situation update". This is 10 March:

14 "Based on surveillance, including cases in intensive
15 care units (for whom there is no travel history
16 accounting for infection) the UK likely has thousands of
17 cases -- as many as 5,000 to 10,000 -- which are
18 geographically spread nationally."

19 Then number 6:

20 "Transmission is underway in community and
21 nosocomial (ie hospital) settings."

22 Then at {C/2/105} there is a table which refers to
23 tracking and surveillance data. You will see that table
24 referring to tracking and surveillance data in each of
25 the boxes.

12

1 That is the position at 10 March. It is quite
 2 obvious that SAGE is monitoring and reporting on the
 3 progression of the disease across the country.
 4 Then we come to 13 March {C/2/119}, paragraph 3:
 5 "SAGE is considering further social distancing
 6 interventions -- that may be best applied
 7 intermittently, nationally or regionally and potentially
 8 more than once -- to reduce demand below NHS capacity to
 9 respond."
 10 So they are obviously again considering whether
 11 there will be a national or a regional application of
 12 social distancing; that is at 13 March. You will
 13 remember the maps, we will come back to them in
 14 a moment, just once you have seen this again.
 15 Then we come to 16 March, {C/2/125}, paragraphs 7 to
 16 8. Paragraph 7:
 17 "It is possible that there are 5,000-10,000 new
 18 cases per day in the UK (great uncertainty around this
 19 estimate).
 20 "The UK cases may be doubling in number every 5-6
 21 days."
 22 Then just keeping with the SAGE minutes for the
 23 moment {C/2/278}, at paragraph 1:
 24 "UK case accumulation to date suggests a higher
 25 reproduction number than previously anticipated. High

13

1 rates of compliance for social distancing will be needed
 2 to bring the reproduction number below 1 and to bring
 3 cases within NHS capacity."
 4 As my Lords know, the reproduction number is
 5 commonly referred to as the R number.
 6 Then if one goes back to what the Prime Minister
 7 said when he addressed the nation on 16 March, {C/2/145}
 8 at the bottom of the page:
 9 "As we said last week, our objective is to delay and
 10 flatten the peak of the epidemic by bringing forward the
 11 right measures at the right time, so that we minimise
 12 suffering and save lives. And everything we do is based
 13 scrupulously on the best scientific evidence."
 14 Then the next page, {C/2/146} the second paragraph:
 15 "Today we need to go further, because according to
 16 SAGE ... it looks as though we are now approaching the
 17 fast growth part of the upward curve."
 18 If we now go to {C/1/36}, please. I will have to
 19 minimise it on my screen.
 20 Sorry, I think that's a false reference, it should
 21 be the next page {C/1/37}. No, it was the previous
 22 page. It is the row number I have got wrong.
 23 {C/1/36} Row 76, this is Mr Hancock's press
 24 conference on 28 April, and he says:
 25 "There was a big benefit, I think, as we brought in

14

1 the lockdown measures, of the whole country moving
 2 together. We did think about moving with London and the
 3 Midlands first, because they were more advanced in terms
 4 of the number of cases, but we decided that we are
 5 really in this together, and the shape of the curve, if
 6 not the height of the curve, has been very similar
 7 across the whole country. It went up more in London but
 8 it's also come down more, but the broad shape has been
 9 similar, which is what you'd expect, given that we have
 10 all been living through the same lockdown measures. The
 11 other thing to say is that it isn't just about the
 12 level, it's also about the slope of the curve, and if
 13 the R goes above one anywhere, then that would
 14 eventually lead to an exponential rise and a second peak
 15 and an overwhelming of the NHS in that area unless it's
 16 addressed, so although the level of number of cases is
 17 different in different parts, the slope of the curve has
 18 actually been remarkably similar across the country, so
 19 that argues for doing things as a whole country
 20 together."
 21 Going back to 1.1, page 2, please {1/1.1/2}. That
 22 we can now revisit, because that is what the government
 23 was looking at, and you can see from what has been said
 24 that this is the picture that the government not only
 25 has but is reacting to:

15

1 So we invite you to find that as a fact; it is not
 2 difficult, because it is agreed. But this is the
 3 emerging picture that the government was facing and, as
 4 Mr Hancock says, they had considered maybe London and
 5 the Midlands because they are worse, but everywhere had
 6 it, bar those few little spots, by the 16th, and by the
 7 23rd it was a sea of orange; except, of course, the
 8 Scilly Isles and there is one spot in the South West,
 9 one little spot in the South West.
 10 LORD JUSTICE FLAUX: It looks like north Devon somewhere,
 11 doesn't it?
 12 MR EDELMAN: Yes. That hasn't got COVID, a reported case,
 13 by then.
 14 Of course, north Devon is insurers' "but for" case.
 15 This is how ridiculous we say it actually is. They say:
 16 well, north Devon and the Scilly Isles. We say there
 17 probably was COVID in north Devon, they just didn't have
 18 a reported case. But putting that to one side, they
 19 say: aha, the government, you can't prove that any
 20 relevant policy area was a "but for" cause because,
 21 look, north Devon, the Scilly Isles, they were subjected
 22 to the lockdown without perhaps a provable case, but
 23 anyway without the government having information that
 24 they had a case. Therefore, you can't prove causation
 25 for anywhere that is in orange. The whole country, you

16

1 cannot prove causation.
 2 Now, obviously there is a separate question of
 3 construction as to whether the true construction of
 4 policies with a relevant policy area is that they were
 5 intended to apply when the outbreak of disease was only
 6 within the relevant policy area. And that is a point of
 7 construction. If we lose on that, of course, unless
 8 people can show that there was some local restriction
 9 then that makes it difficult. But we are not on that
 10 point yet.
 11 We are on the snap fingers, you will fail with
 12 a relevant policy area, remembering there are some
 13 policies which don't, but for those that do, you all
 14 fail because of the "but for" test.
 15 That is the critical causation question that arises.
 16 If we get through that trigger, then you get into the
 17 quantification exercise. Then you get the issue as to
 18 what you excise for the purposes of trying to work out
 19 how the business would have done had it not been, for
 20 example, closed down by the government.
 21 What would have happened? What do you take into
 22 account? That is a separate question which you only get
 23 to once you have got through the proximate cause
 24 trigger. That is why a "but for" test in a trends
 25 clause has absolutely nothing whatsoever to tell you

1 about whether the proximate cause requirement is
 2 satisfied for a trigger.
 3 They are two completely separate questions.
 4 LORD JUSTICE FLAUX: So what you have really got are three
 5 issues, haven't you?
 6 The first issue is an issue of construction, as to
 7 whether the policy responds at all.
 8 There is then a related question, which is
 9 a proximate cause question as to whether the types of
 10 losses that are claimed -- I mean, we don't have
 11 specific claims, but we know what sort of claims there
 12 are likely to be -- are proximately caused by the
 13 insured peril in the policy.
 14 MR EDELMAN: It is the interruption or interference,
 15 my Lord. It is whether the interruption or interference
 16 is proximately caused.
 17 LORD JUSTICE FLAUX: It depends what the insured peril is,
 18 doesn't it? It may be interruption or interference, it
 19 may be something else. Some of these policies it is
 20 not; it is prevention of access or whatever. But if one
 21 is just focusing on the interruption and interference
 22 policies, yes.
 23 The third question is, assuming you get through
 24 proximate cause, what the effect is of the trends
 25 clauses, in terms of what "but for" scenario you look

1 at.
 2 MR EDELMAN: Yes. Absolutely. But the "but for" test, if
 3 there is one, is a quantification stage, because
 4 necessarily -- and it is nothing to do with the rule of
 5 causation, it is nothing to do with proximate cause,
 6 it is not an interposing a causation test before you get
 7 to proximate cause. What it is doing is saying: well,
 8 you have satisfied the trigger, now we have to work out
 9 what revenue your business would have had in the period
 10 of indemnity, the interruption period, and for that
 11 purpose you have to make a projection. What would your
 12 business have done in normal circumstances? And the
 13 question is: what are normal circumstances for these
 14 purposes?
 15 That is obviously what these clauses are aimed at.
 16 They are saying -- we can take, and you will see we also
 17 will come to the fact that they all use different
 18 periods. Some use the equivalent period last year, some
 19 use the period of 12 months prior, and one uses the
 20 immediate prior period. But they are all about, the
 21 trends clauses are all about asking: what would your
 22 business normally have earned during that period? And
 23 the question then is: what is "normal"? What do you
 24 take into account when you are asking "normally"?
 25 That's why we say Orient Express has completely gone off

1 the rails, because when asking what your business would
 2 normally have earned it's asking it in a totally
 3 artificial context, a context which is affected by the
 4 very peril that has caused the damage.
 5 But that really is the essence of it. So, you know,
 6 I can and I probably do need, unfortunately, if it is
 7 going to assist you, to spend some time on the law, but
 8 we say the first stage, which is asking do we get
 9 through the proximate cause test at all, is a common
 10 sense causation question. Once you have got the test,
 11 you know it's proximate cause, so we are not dispensing
 12 with the law. And you know that proximate cause, as
 13 Miss Jay Jay tells you, has flexibility in it, because
 14 it is treated as proximate cause even though it is not
 15 the dominant or effective cause. And we also know from
 16 Wayne Tank that this is a difficult question sometimes.
 17 In that case, although they were all agreed what the
 18 result would be, the court couldn't decide, it split
 19 2:1, on whether two causes were of equal efficacy, as
 20 Lord Justice Cairns thought, or there was one dominant
 21 cause, as the other two members of the court believed.
 22 But it's a question of judgment, and what we say we
 23 have here is either one indivisible cause or
 24 a collection of jigsaw pieces which together make up the
 25 picture. And it doesn't matter whether or not you can

1 say that we can take any one jigsaw piece out and the
2 picture would have still been essentially the same,
3 because you can't do that for all the jigsaw pieces.
4 That analysis, you can only take out one at a time and
5 still have the picture the same. Because if you take
6 out more than one at a time -- if we can scale this.
7 I think it got zoomed up; I don't know whether that was
8 on my screen or generally. But if one goes to the
9 picture on this one page that is showing on the screen
10 at the top left, please -- it's scaled down. Maybe
11 I zoomed it up. There we are.

12 If either of those two pictures -- if you take too
13 many jigsaw pieces away, then you start thinking: we
14 can't possibly justify a national lockdown on this.

15 So our central case is that the court needs to find
16 a common sense answer to this, and burying our heads in
17 the legal nicety of "but for", which is not even an
18 appropriate legal test, which I will seek to show you,
19 is not going to give an appropriate or reliable or
20 reasonable answer; it is going to be lawyers tying
21 themselves up in knots by artificial tests which are not
22 the statutory test anyway.

23 But perhaps I ought to nail the legal canard of the
24 "but for" test with just a few passages, because this
25 may assist my Lords in dealing with this problem.

21

1 Firstly, what Lord Hoffmann said in the Fairchild
2 case. This is not relying on any of the application of
3 causation in Fairchild, it is just what he said
4 generally about causation. It is {K/106/41}, please,
5 paragraph 52.

6 "The question of fact is whether the causal
7 requirements which the law lays down for that particular
8 liability have been satisfied. But those requirements
9 exist by virtue of rules of law. Before one can answer
10 the question of fact, one must first formulate the
11 question. This involves deciding what, in the
12 circumstances of the particular case, the law's
13 requirements are. Unless one pays attention to the need
14 to determine this preliminary question, the proposition
15 that causation is a question of fact may be misleading.
16 It may suggest that one somehow knows instinctively what
17 the question is or that the question is always the same.
18 As we shall see, this is not the case. The causal
19 requirements for liability often vary, sometimes quite
20 subtly, from case to case. And since the causal
21 requirements for liability are always a matter of law,
22 these variations represent legal differences, driven by
23 the recognition that the just solution to different
24 kinds of case may require different causal requirement
25 rules."

22

1 To which I say insurance law has chosen proximate
2 cause.

3 Then what he said in an article, but this is
4 important, on the contrast with the academic approach.
5 Can we go to {J/157.1/1}, please. Just to show you
6 where we are, it is "Perspectives on causation", and the
7 article by Lord Hoffmann is on page {J/157.1/2}, and he
8 says:

9 "The relationship between judges and academic
10 writers in the UK has much improved over the past
11 20 years or so. Although few judges are regular readers
12 of academic publications, that is because judges seldom
13 do any legal research of their own, nor do they have on
14 an individual basis the assistance of law clerks."

15 Then he says, on the final paragraph:

16 "The application of all such legal rules involves
17 applying the rule to the facts. One examines the
18 facts ..."

19 Then he deals with that. Then further down the
20 sentence he says:

21 "... exactly the same process applies to
22 requirements, elements of crime, murder and so on."

23 He says - if we go to the following page, I think
24 I may be on the wrong page, we need to move, here we go,
25 it is this page, {J/157.1/3} the final paragraph:

23

1 "This account of the way in which the law employs
2 causal (or indeed any other) concepts should explain why
3 judges find it so difficult to understand why academics
4 claim that the question of whether the causal
5 requirements of some legal rule have been satisfied
6 involves a 'two-stage process' in which you first decide
7 whether the putative cause amounted to a 'cause in fact'
8 and then, if it passes that test, whether it counted as
9 cause in law for the purposes of the particular rule.
10 There is no agreement on what amounts to being a cause
11 in fact."

12 Then he recites what Professor Stapleton says. Then
13 he goes on to say, a few lines down, if my Lords have
14 it:

15 "But no judge in fact adopts such a two-stage test.
16 Of course the application of the legal rule is always
17 a two-stage process in the sense that you find the facts
18 and then decide whether they answer to the requirements
19 of the rule, or (which comes to the same thing) you
20 decide as a matter of interpretation what are the
21 requirements of the rule, and then decide whether the
22 facts satisfy those requirements. That is the natural
23 process of decision-making when applying any legal
24 consequences. But that two-stage process is what the
25 advocates of 'cause in fact' or the NESS test have in

24

1 mind. Their theory is that when you have ascertained
 2 the facts, you do not go straight to the question of
 3 whether they satisfy the requirements of the particular
 4 legal rule, having resolved any question of
 5 interpretation which may be necessary to answer this
 6 question. But then, there is a two-stage process after
 7 you have decided the facts, so that the decision-making
 8 process really has three stages. First, you ascertain
 9 the facts. Then you decide whether they count as 'cause
 10 in fact' by being part of the history of the outcome or
 11 by satisfying the NESS test or whatever, and thirdly,
 12 [over the page, please] you decide whether they
 13 count as 'legal causation' for the purposes of the
 14 particular rule. That means that the concept of 'cause
 15 in fact' acts as a kind of filter which you have to get
 16 through ..."

17 And that is what insurers are doing here, they are
 18 trying to use a "but for" test as a filter.

19 Now, that is what Lord Hoffmann had to say about it
 20 academically and in Fairchild.

21 MR JUSTICE BUTCHER: Lord Hoffmann is in fact saying that
 22 academics aren't just using "but for" for that stage.

23 MR EDELMAN: No.

24 MR JUSTICE BUTCHER: The one other theory is that it has got
 25 to be a necessary part of the historical development.

25

1 MR EDELMAN: Yes.

2 MR JUSTICE BUTCHER: The passage you are saying is that
 3 Lord Hoffmann says that that is not an integral part of
 4 the judicial process.

5 MR EDELMAN: No, and it is not a rule of law.

6 The rule of law is what the causation test is. And,
 7 as I said, for insurance that is an easy one, it's
 8 proximate cause.

9 And then it is just simply a matter of applying that
 10 causation rule to the facts as you find them. Now, that
 11 is Lord Hoffmann, but I just want to show that the High
 12 Court of Australia has a similar thing to say, and more
 13 similarly about the "but for" test, and has been
 14 approved in the Court of Appeal for what it said. We
 15 can see that in the case of Galoo v Bright Graham
 16 Murray. That is {K/80.1/15}. Galoo v Bright Graham
 17 Murray. Sorry, it is the previous page, please.
 18 {K/80.1/14}. Thank you.

19 He refers to some authorities in which the "but for"
 20 test is being considered. Then just above letter G, he
 21 says:

22 "The recent decision of the High Court of Australia
 23 in March ... was in an action in tort. The plaintiff
 24 claimed damages ... ran into the back of a truck owned
 25 by the defendants ... parked in a position that

26

1 straddled the centre line of a 6-lane road ...
 2 [allegation] that their driver's negligence did not
 3 cause the accident."

4 The Supreme Court held they were not liable. The
 5 High Court allowed the appeal:

6 "Four of the five members of the court took the view
 7 that the 'but for' test was not a definitive test of
 8 causation in tort.

9 "In his judgment, Chief Justice Mason said ...
 10 "The Common law tradition is that what was the
 11 cause of a particular occurrence is a question of fact
 12 which "must be determined by applying common sense to
 13 the facts of each particular case" ..."

14 Then he cites Lord Reid in Stapley v Gypsum Mines:
 15 "It is beyond question that in many situations the
 16 question whether Y is a consequent of X is a question of
 17 fact. And prior to the introduction of legislation
 18 providing for apportionment of [the next page]
 19 liability, the need to identify what was the 'effective
 20 cause' of the relevant damage reinforced the notion that
 21 a question of causation was one of fact and, as such,
 22 had to be resolved by the application of common sense.
 23 Commentators sub-divide the issue of causation in a
 24 given case into two questions: the question of causation
 25 in fact -- to be determined by the application of the

27

1 'but for' test -- and the further question whether the
 2 defendant is in law responsible for damage which his or
 3 negligence has played some part in producing."

4 And they refer to the academic works:

5 "It is said that, in determining the second
 6 question, considerations of policy have a prominent part
 7 to play, as do accepted value judgments. However, this
 8 approach to the issue of causation (a) places rather too
 9 much weight on the 'but for' test, to the exclusion of
 10 the 'common sense' approach which the common law has
 11 always favoured; and (b) implies, or seems to imply,
 12 that the value judgment has, or should have, no part to
 13 play in resolving causation as an issue of fact. As
 14 Chief Justice Dixon [and other members of the court]
 15 remarked in Fitzgerald ... 'it is all ultimately
 16 a matter of common sense' and 'in truth the conception
 17 in question (ie causation) is not susceptible of
 18 reduction to a satisfactory formula'."

19 That was cited with approval. It is the High Court
 20 of Australia and it is cited with approval in Galoo.

21 That doesn't mean, I emphasise, that one simply
 22 throws away a rule book that the law prescribes just to
 23 say: we are going to give a common sense answer to it.
 24 The rule book is the causation test that the law
 25 requires, and, as I said, in insurance it is proximate

28

1 cause.
 2 One can almost test it going to this case, because
 3 if the outbreaks had occurred much more slowly, and
 4 therefore over a longer period of time, and attempts had
 5 been made to contain it within the UK, either locally or
 6 regionally, of course insurers would then not have a
 7 "but for" cause, "but for" argument, because you would
 8 have this creeping spread of the disease with local or
 9 regional reactions to it piecemeal as it progressed.
 10 What we see now is just that sort of strategy to
 11 prevent the emergence of a second wave in places like
 12 Leicester.
 13 But as those maps I showed you demonstrate, what we
 14 actually had was a rapidly developing outbreak
 15 presenting a national picture. To say that no local
 16 outbreak is of any causal relevance whatsoever is simply
 17 to defy common sense.
 18 Mr Salzedo, he alone amongst insurers, and perhaps
 19 we need to look at this, {Day7/156:20}, he alone
 20 accepted that -- it looks as though this has now changed
 21 since I looked at it. Can I go to the next or the
 22 previous page. Unfortunately, as they update it -- ah,
 23 yes, it is the foot of the previous page. The page
 24 numbers change sometimes. {Day7/155:20}. He refers to
 25 Leicester, and he says:

29

1 "Now, of course there may be intermediate facts
 2 where the circle around the premises includes some, but
 3 not all, of the cases that triggered the regional
 4 lockdown. That could give rise to a factual question as
 5 to whether the occurrence within the circle was
 6 sufficiently significant to the decision to lockdown
 7 that they amount [next page, please] to an effective
 8 cause of the interruption that has been caused by the
 9 regulations."
 10 Now, if you had -- and this also answers the
 11 construction case, because it must have been
 12 contemplated that a disease, being something amorphous
 13 and contagious and infectious, will not necessarily
 14 confine itself to the boundaries of a particular
 15 relevant policy area. And Mr Salzedo, quite rightly --
 16 LORD JUSTICE FLAUX: That is an argument that is very easy
 17 to understand in the context, say, of Leicester.
 18 Obviously if you take the 25-mile -- let's not take
 19 25 miles, let's take the 1 mile. If you have got
 20 a guest house, in his example, near the racecourse in
 21 Leicester, so within 1 mile of the city centre, right
 22 bang in the middle of the area which is locked down, and
 23 if in that 1 mile radius you have got, let's say,
 24 200 confirmed cases of COVID, but outside the 1 mile
 25 radius in the other parts of Leicester you have got

30

1 another 75 cases of COVID, then --
 2 MR EDELMAN: Let's say 200, my Lord.
 3 LORD JUSTICE FLAUX: Well, 200. You have got a factual
 4 issue, haven't you, as to whether the interruption
 5 and/or interference, whether or not you interpose a
 6 government action may not matter for present purposes,
 7 because that is how the interruption comes about, this
 8 is a lockdown, would have occurred anyway irrespective
 9 of the fact that there are cases outside the circle.
 10 That is easy to follow in the context of a local
 11 lockdown of that kind, but it is much more difficult in
 12 the context of a national lockdown.
 13 MR EDELMAN: My Lord, two points.
 14 Firstly, the minute that it is conceded, as
 15 Mr Salzedo rightly concedes -- and I am not taking
 16 a forensic point, because I think, you know, he at least
 17 has been straightforward in applying the proximate cause
 18 test, and actually understanding what his policies are
 19 doing -- then they are not putting a "it is within the
 20 boundary and only within the boundary". Realistically,
 21 the disease outbreak --
 22 LORD JUSTICE FLAUX: You say, and I understand your point,
 23 that that argument doesn't work. You can't just say:
 24 well, if there is an outbreak of a disease which extends
 25 beyond the 25-mile zone then tough, you don't have

31

1 cover. It is all a question of looking at the facts of
 2 the particular case.
 3 MR EDELMAN: Yes. But he would say, and let's say you have
 4 the 1 mile radius, you have Leicester, and you have 200
 5 cases within the 1 mile radius and 200 cases outside the
 6 1 mile radius, and a reaction to it, insurers' approach
 7 is the "but for" test or the construction case: as long
 8 as we can show that there would have been a lockdown in
 9 Leicester because of the 200 cases outside the 1 mile
 10 radius, you lose.
 11 Whereas Mr Salzedo was there accepting, quite
 12 rightly, that actually the true picture is that when the
 13 decision to lock down was made, on this hypothetical
 14 example there were 400 cases, the decision was made
 15 based on 400 cases, and those cases, the cases within
 16 the radius, were an effective cause. One can't say they
 17 were the dominant cause; they were an effective cause.
 18 And that is sufficient for the proximate cause test, as
 19 we see from Miss Jay Jay. As long as it is an effective
 20 cause of reasonable balance with other causative
 21 factors, then it is enough.
 22 He is also accepting that the policy must be
 23 contemplating this.
 24 The causal requirement, the proximate causal
 25 requirement is, firstly, you must have disease within

32

1 your area for the policy to be triggered at all. If you
2 are in the outskirts of Leicester but you are caught up
3 in it, and all the disease outbreaks are more than
4 a mile away from you, with your 1 mile radius, you get
5 caught up in it but you have no cover, because there was
6 no disease in your area; and secondly, it has to be an
7 effective cause of the decision that was taken, and so
8 that is also a threshold point.

9 But it doesn't have to be a "but for" cause. And
10 that also tells you about construction, that it means
11 that the control mechanism for the policy isn't through
12 saying that it applies only when the disease is within
13 the area; it is sufficient if the disease is in the area
14 and the occurrence of that disease satisfies whatever
15 the causal test is that the policy sets. Ordinarily it
16 will be proximate cause, and you have our submissions on
17 those cases where the word "following" is used. But
18 actually, although we say "following" makes it easier,
19 as I said before, that is not critical to the question.

20 So really --

21 LORD JUSTICE FLAUX: Whether it is "following" or "resulting
22 from" or whatever words you use doesn't actually resolve
23 the question, does it?

24 MR EDELMAN: No. There has to be some causal connection,
25 but it is just how strong the causal connection has to

33

1 be. But you still have this philosophical issue to
2 address as to how a common sense application of
3 causation is going to work in these circumstances. And
4 I am not, I emphasise, I am not asking you to invent
5 a new causation rule. This is not Fairchild, avowedly
6 not Fairchild. This is proximate cause.

7 My Lord, the video has gone again of
8 Lord Justice Flaux.

9 Sorry, I can't hear you now. You are muted.

10 LORD JUSTICE FLAUX: I don't know what is happening.

11 I think it is because I have got two cameras and one of
12 them has proved wonky, to put it bluntly. I will unplug
13 it during the break. I won't try and do it now, because
14 otherwise we might lose you completely.

15 MR JUSTICE BUTCHER: What we have to be satisfied of,
16 Mr Edelman, is that there were at least two effective
17 roughly equal causes.

18 MR EDELMAN: Well, my Lord, what you can say is to look at
19 the map and say that actually this is an indivisible
20 cause of which all the outbreaks form part. That is
21 actually probably the more realistic way of looking at
22 it.

23 MR JUSTICE BUTCHER: That might depend on what context one
24 was looking at it in.

25 MR EDELMAN: Yes.

34

1 MR JUSTICE BUTCHER: But yes, I take that point. So you say
2 we should look at it as one indivisible cause. But if
3 that is not the right way of looking at it, then you
4 would have to show there were at least two causes of
5 roughly equal efficacy, so they could both be called
6 proximate causes.

7 MR EDELMAN: That is where we have got to on the law, that
8 there has to be something which can satisfactorily be
9 described as an effective cause.

10 Now, what we have here, perhaps uniquely, is not two
11 or three concurrent causes, we have -- and it is another
12 analogy I am afraid, and it may be a poor one but it is
13 trying to give the pictorial equivalence of this; it is
14 like if you were sticking pins in the map for every
15 reported case. Every reported case is a pin and then
16 once you have stuck in all the pins you have the
17 national picture, and each pin is making its own equal
18 causative contribution, because it's --

19 MR JUSTICE BUTCHER: I understand that, Mr Edelman. You are
20 quite fairly saying that you are not inventing a new
21 causal test.

22 MR EDELMAN: Yes.

23 MR JUSTICE BUTCHER: But I think you would have to accept
24 that you are applying the existing causal test in a new
25 way or, you would say, in potentially a unique set of

35

1 factual circumstances.

2 MR EDELMAN: Yes, yes. Quite. But it is applying the
3 existing principles that you can have -- and this is
4 I think undisputed by the defendants -- for insurance
5 purposes, you can have more than one effective cause.
6 However odd that might have sounded prior to Miss Jay
7 Jay, you can do it. It is recognised in Miss Jay Jay
8 and it is recognised in Wayne Tank.

9 Then you now have a situation in which you have as
10 many causes as there are at least reported cases, but we
11 would say the government was also acting on what it knew
12 not only about the reported cases but what the reported
13 cases told you about overall prevalence of the disease
14 in the country. And it is plain that they are looking
15 at the R rates, because they are only too alive to the
16 fact that for every infected person going around before
17 the lockdown, they were probably infecting about three
18 other people.

19 LORD JUSTICE FLAUX: I understand your submissions, but the
20 difficulty I have with your one indivisible cause
21 argument is that it either is one indivisible cause or
22 it is 700,000 individual causes of equal efficacy. But
23 if it is one indivisible cause, there is an obvious
24 question as to whether, on the relevant policy wordings,
25 cover is triggered where there is one indivisible cause

36

1 which isn't actually a local outbreak, it's a national
2 outbreak.

3 I understand your point when you say, well, each of
4 the outbreaks, or each of the incidents, each of the
5 occurrences is of equal efficacy, and therefore the
6 relevant causation standard of proximate cause or
7 effective cause or dominant cause is satisfied.

8 I understand the argument. Whether you are right about
9 it is a different matter, but I understand the point.

10 But I have much more difficulty with the one
11 indivisible cause, in terms of how that can be a cause
12 which provides cover under these policies, because that
13 is not what these policies purport to cover.

14 MR EDELMAN: My Lord, I would only say about that -- when
15 I say "only", it is what I would submit is the answer to
16 it -- that one has to focus on the nature of the risk
17 that these policies must be taken to be contemplating,
18 most obviously the ones that are covering disease,
19 notifiable disease specifically. It comes in, for
20 example, when one is talking about occurrence, the
21 meaning of "occurrence" in Hiscox.

22 Funnily enough, the dictionary definition of
23 "outbreak" is "an occurrence of a disease". But, and
24 I will show you that later on when I get to Hiscox.

25 But they are talking about something which is an

37

1 outbreak -- a disease is going to be amorphous in its
2 nature.

3 Yes, I recognise that within the spectrum it is
4 possible that you will have one case only, and that will
5 cause a reaction. That is within the spectrum. But by
6 far the major range of the spectrum is there is going to
7 be an outbreak of the disease. It may be a small
8 outbreak, it may be a large outbreak. But even a small
9 outbreak, the policy is anticipating that the
10 authorities will react to the outbreak of the disease.

11 All the more so in a 25-mile radius case. What they
12 are anticipating for a 25-mile case is that there will
13 be, and necessarily must be, an outbreak of a case, of
14 a disease, that will affect a wide area. They can't be
15 contemplating a single case of Legionnaires' disease
16 25 miles away. It obviously covers something that is
17 close, quite obviously; it can be 100 yards away and be
18 within 25 miles. But it is covering something which of
19 its nature has an amorphous mass. And of course the
20 government here is specifically reacting to individual
21 cases, because they are deciding what that tells you
22 about what is going to happen in the future, as well as
23 what is happening at the moment. But, realistically,
24 the policies must be contemplating interruption or
25 interference with the business following public

38

1 authority reaction to an outbreak. Not individual bits
2 of an outbreak, but the outbreak.

3 So they are contemplating the indivisible cause and
4 that's of the very nature of the risk. It may seem odd
5 in the context of other sorts of perils to be talking in
6 these terms, but this is a very particular and unusual
7 peril that they have chosen to cover. It is a disease
8 risk. Whatever its ambit, it is a disease risk. So one
9 has to apply causation principles, having regard to the
10 nature of the risk that insurers are covering.

11 One has to adapt the causation test to the nature of
12 the risk that insurers are covering. One can't try
13 slavishly to apply a case like *Miss Jay Jay* on the facts
14 to something like this, because dealing with a vessel,
15 there is only so many things that can cause a vessel to
16 sink; maybe a lot more, and my Lords may know more about
17 that than I do, and I am sure do -- not may do, will do.
18 But with disease, you are dealing with a wholly
19 different scenario.

20 So if one is looking at ordinary contract
21 construction one would ask oneself: what is within the
22 reasonable contemplation of the parties, when they enter
23 into the contract, as to the nature of the problem that
24 they might be facing?

25 When I say "the nature of the problem", I don't mean

39

1 the scale of it, I mean the nature of it, and it will be
2 a disease outbreak.

3 My Lords, I have many pages of notes, which I can
4 see I haven't turned one page of them yet, but I seem to
5 have dipped into and out of them for many purposes.
6 LORD JUSTICE FLAUX: If we are not taking you out of your
7 course unnecessarily, it has been extremely helpful,
8 speaking for myself.

9 MR EDELMAN: My Lord, particularly in reply, I regard my
10 function as being here to help, rather than go through
11 a checklist of answering points. Hopefully, helping you
12 in that way will be more constructive than just, as
13 I say, ticking off: Mr Kealey said this and Mr Gaisman
14 said that.

15 That is our case in essence but, as I said, one
16 mustn't overlook in this analysis that there are
17 policies without any relevant policy area limit at all,
18 and those are Arch and Ecclesiastical 1.1 and 1.2 and,
19 if we are right about occurrence not imposing a locality
20 limit, Hiscox 1, 2 and 3. But then, the real issue is
21 when we get to business interruption.

22 Now, I just perhaps ought to say something about two
23 authorities that were relied upon, because there was
24 this -- and then *Orient Express* perhaps I need to take
25 you to in a little bit more detail if you are concerned

40

1 about this "but for" test applying at the preliminary
2 stage. If you want any more assistance with that
3 particular point, as opposed to coming in at the
4 quantification stage.
5 LORD JUSTICE FLAUX: I think I would certainly welcome
6 assistance from you on Orient Express, because we are
7 going to have to deal with it.
8 MR EDELMAN: I agree, that particularly. But perhaps then
9 I can briefly deal with two other authorities.
10 The first was the Blackburn Rovers case, which is
11 {K/119/1}. We have got the case there. You will
12 remember this was the professional footballer case.
13 Let's go to page {K/119/5}.
14 You will see that the heading in the right-hand
15 column above the beginning of the discussion on
16 causation is headed "Proximate cause and the effect of
17 the exclusion". Then you will see that the judgment of
18 Lord Phillips starts with a citation of MacGillivray on
19 proximate cause.
20 Then over the next page {K/119/6}, paragraph 12 then
21 starts analysing the ordinary application of
22 the proximate cause rule. I needn't go into the detail
23 of that.
24 Paragraph 13 then raises the issue of the exclusion,
25 and he says that:

41

1 "In the present case, however, the phrase in the
2 exclusion 'attributable either directly or indirectly'
3 opens the door to an argument that, if degeneration of
4 Mr Dahlin's disc was a proximate cause of his sustaining
5 injury to it in the incident alleged to have occurred
6 ... then the exclusion applies."
7 Again, he is expressing himself in terms of
8 a proximate cause.
9 Then at 16 you have the judge's approach to
10 causation being addressed:
11 "Up to the last sentence of paragraph 30 ...
12 Mr Justice Moore-Bick appears to have proceeded on the
13 premise that, however remote the causal nexus between
14 the condition of Mr Dahlin's disc and the disablement
15 that he sustained, this would render the disablement
16 'attributable, either directly or indirectly' to that
17 condition, within the meaning of the Exclusion. Thus he
18 assumed that, if 'degenerative condition' in the
19 Exclusion embraced 'normal' degeneration, the Exclusion
20 would apply to defeat a claim 'where a normal degree of
21 degeneration has played any part, direct or indirect, in
22 the injury'.
23 That was the issue that the court was deciding and
24 perhaps I ought to have shown you that. I think it is
25 on page 1. We probably have to go back to page

42

1 {K/119/1}. I realise in my haste I forgot to show you
2 that.
3 The issues, in the right-hand column, just over
4 halfway down the page:
5 "Mr Justice Moore-Bick held at first instance that
6 (1) exclusion 4 was capable of bearing a rational
7 meaning; (2) exclusion 4 was to be construed as
8 extending to death or disablement resulting directly or
9 indirectly from arthritic or other degenerative
10 conditions; and (3) in order to give proper effect to
11 the parties' intentions the reference to arthritic or
12 other degenerative conditions in joints, bones, muscles,
13 tendons or ligaments was to be construed as referring to
14 conditions of sufficient severity to be regarded as an
15 illness or an ailment and not to conditions that were
16 merely a recollection of the normal ageing process."
17 The appeal was only against the finding of
18 preliminary issue (3), what degenerative conditions
19 count.
20 Going back to paragraph 16 on page {K/119/6}, he
21 assumed, this is halfway through the paragraph:
22 "... he assumed that, if 'degenerative condition' in
23 the Exclusion embraced 'normal' degeneration, the
24 Exclusion would apply to defeat a claim 'where a normal
25 degree of degeneration has played any part, direct or

43

1 indirect, in the injury'. Only in the last sentence of
2 paragraph 30 did he draw back from that conclusion.
3 "The same approach to causative nexus appears in the
4 following statement ..."
5 And he deals with that. Then 18, the high watermark
6 of Mr Kealey's submissions:
7 "Mr Stuart Smith disavowed having advanced any such
8 argument ..."
9 And the argument was -- maybe I should have dealt
10 with 17 -- meaning that there would be no claim if,
11 instead of a broken leg, a player in a road accident
12 were to suffer an injury to his spine which was
13 exacerbated to any degree by a pre-existing degenerative
14 condition, even though it may be a function of age ...
15 "Mr Stuart-Smith disavowed having advanced any such
16 argument and, had he done so, it would have been
17 manifestly unsound. Disablement cannot be said to be
18 'attributable, either directly or indirectly', to
19 a pre-existing condition unless, at the least, the
20 condition is a causa sine qua non of the disablement.
21 In the situation postulated by the judge this was not
22 the case. The accident would have disabled the player
23 regardless of the pre-existing condition and,
24 conversely, the player would not have been disabled had
25 he not suffered the accident."

44

1 And then he addresses that. Of course, they then
 2 entirely focused on the language of the exclusion,
 3 because he then goes on so say at the end of that
 4 sentence:
 5 "The exclusion would not apply in such a situation
 6 even if the pre-existing condition fell within the
 7 description of 'degenerative condition'."
 8 At 19 he says:
 9 "If a proper test of causation is applied when
 10 considering whether an injury to a disc caused by trauma
 11 on the playing field is attributable to the degenerative
 12 pre-condition of the disc, we can see nothing
 13 unreasonable in excluding from cover disablement that is
 14 attributable to such degeneration, whether it is
 15 'normal' or not."
 16 If one goes on to perhaps on to the next page:
 17 "If 'normal' degeneration is liable to lead to the
 18 injury of the disc resulting in disablement, then there
 19 would seem good reason for insurers to exclude
 20 liability for disablement so caused. If 'normal'
 21 degeneration does not usually lead to injury to the
 22 disc, then the law is unlikely to conclude that it has
 23 been a cause ..."
 24 With respect to Mr Kealey, there is absolutely
 25 nothing in there to suggest that the "but for" test is

45

1 supplanted for the proximate cause, or is
 2 a pre-condition to the proximate cause analysis for the
 3 purposes of insurance law. On the contrary,
 4 Lord Phillips has cited the proximate cause test and has
 5 just addressed the construction and application of an
 6 exclusion.
 7 Then The Kamilla referred to by Mr Howard,
 8 {K/128/1}, another appeal under section 69. If we go to
 9 page {K/128/5} you will see what the award said. In the
 10 top left-hand corner, applying a causation test by the
 11 tribunal:
 12 "Adopting the common sense commercial approach which
 13 we believe from our own experience of the operation of
 14 the ICA is required, we were bound to agree with the
 15 charterers that provided the unseaworthiness of the
 16 vessel could be said in a practical sense to be a cause
 17 of the loss, it was not appropriate to embark upon
 18 a further enquiry as to whether it was the effective
 19 cause of the loss or whether the connection between the
 20 unseaworthiness and the loss was so tenuous that the
 21 loss itself could be said to be too remote.
 22 "We therefore agreed with the charterers that the
 23 real question which arose in relation to the owners'
 24 claim under the ICA was not 'what caused the loss?', but
 25 'did unseaworthiness cause the loss?'"

46

1 That is the basis on which they proceeded. Then at
 2 paragraph 15, the decision. The test that is applied by
 3 Mr Justice Morison, he deals with it quite shortly:
 4 "... the issues are, I think, clear-cut and the
 5 answers to them are equally clear. The test for
 6 causation is whether the act complained of is a
 7 'proximate cause' of the alleged damage."
 8 Then he says something about the "but for" test, and
 9 it is right that he says that. But he goes on to say,
 10 after the passage that Mr Howard referred you to, he
 11 says:
 12 "It was unfortunate that the charterers appeared to
 13 espouse a 'but for' test. I suspect that they were
 14 provoked into doing so by the equally erroneous approach
 15 of the owners in argument before the arbitrators that
 16 the damage which was not reasonably foreseeable could
 17 not have been caused by the wetting that occurred due to
 18 the unseaworthiness. [And he said] Yet foreseeability
 19 'is not the criterion ...'"
 20 Then at the top of the page next page, he says:
 21 "I agree with the charters that the correct test of
 22 causation was applied by the arbitrators when they found
 23 that 'provided the unseaworthiness of the vessel could
 24 be said in a practical sense to be a (and I stress the
 25 use of the indefinite article) cause of the loss, it was

47

1 not appropriate to embark upon a further enquiry as to
 2 whether it was the (and I stress the definite article)
 3 effective cause of the loss ...' In my judgment the
 4 arbitrators dealt with the causation in precisely the
 5 way required in law and they were not distracted from
 6 their task by some of the submissions which counsel made
 7 to them."
 8 With respect to Mr Howard, he seems to be equally
 9 critical of the "but for" test as he was of the
 10 foreseeability test. And, more particularly for my
 11 purposes, he approves and applies the common sense,
 12 commercial sense, practical approach that the
 13 arbitrators applied to the causation issue once they had
 14 identified the appropriate legal test.
 15 I emphasise again, common sense cannot be used
 16 broadly, in the sense that it can't be used free from
 17 the constraints of the legal test. But within the
 18 constraints of the legal test, it has free range.
 19 LORD JUSTICE FLAUX: Is that a convenient moment?
 20 MR EDELMAN: Yes, my Lord, and I will then turn to Orient
 21 Express.
 22 LORD JUSTICE FLAUX: Right. My clock says 22 minutes past,
 23 so just after half past.
 24 (11.22 am)
 25 (Short break)

48

1 (11.30 am)
 2 LORD JUSTICE FLAUX: Whenever you are ready, Mr Edelman.
 3 MR EDELMAN: I am grateful, my Lord.
 4 Orient Express is where I wanted to go to next,
 5 which is {J/106/5}. If we could start at page 5 as we
 6 have looked at the case before, and I just wanted to
 7 start with the submissions that were made, no doubt on
 8 instructions, by Mr Fletcher to the tribunal, at
 9 paragraph 20 in the left-hand column, because he
 10 obviously was encouraged to make some adventurous
 11 submissions.
 12 In the second sentence of paragraph 20, this is
 13 quoting from the award:
 14 "He criticised the submission as one creating
 15 a false hypothesis because the cause of the damage to
 16 the city and the hotel was the same event or events and
 17 submitted that the policy was intended to cover losses
 18 resulting from all damage caused by the events which
 19 damaged the hotel and only to exclude losses resulting
 20 from damage which was completely unconnected, in the
 21 sense that it had an independent cause. He submitted
 22 that the law relating to concurrent causes would in any
 23 event enable the hotel to recover in circumstances where
 24 a given loss was caused both by damage to the hotel and
 25 the damage to the city."

49

1 So there were two ways of putting it, and the first
 2 was perhaps the bolder of the submissions and was the
 3 one that the tribunal went on to dismiss. But it was
 4 the concurrent issue, concurrent damage issue, that was
 5 dealt with by the tribunal -- the concurrent loss,
 6 I should say, issue that was dealt with by the tribunal
 7 in relation to the trends clause in column 2, four lines
 8 down:
 9 "But in any event, the language of the trends clause
 10 is, the tribunal thinks, conclusive. This clause
 11 specifically requires the business interruption loss to
 12 be assessed by reference to the results which 'but for
 13 the damage' would have occurred during the relevant
 14 period. It is accordingly irrelevant whether there was
 15 a concurrent cause of any such losses."
 16 That is obviously a critical point. Just to remind
 17 you of the terms of the clauses, if we go back to
 18 {J/106/3} the policy's insuring clause, and paragraph 12
 19 at the bottom right, you have an all risks material
 20 damage except as excluded herein, and "hurricane" wasn't
 21 excluded. But it is important to look at the words. It
 22 says:
 23 "... against direct physical loss, destruction or
 24 damage except as excluded herein ..."
 25 So that must mean except for the causes excluded:

50

1 "... being hereafter termed Damage".
 2 So the word "Damage" encompasses damage caused by
 3 a non-excluded peril.
 4 Then:
 5 "Under the business interruption section against
 6 loss due to interruption or interference with the
 7 business directly arising from Damage ..."
 8 Now, the question is whether, when one is looking at
 9 the proximate cause of the interruption or interference,
 10 which is what I would submit is the correct analysis,
 11 one is looking at whether a concurrent cause of the
 12 interruption or interference which is associated with
 13 the operation of the same peril that caused the damage
 14 is to disqualify the damage caused by the hurricane from
 15 being a proximate cause of the interruption or
 16 interference.
 17 I may not have expressed that very well. I will
 18 come back to it and hopefully I will express it more
 19 succinctly later.
 20 If we go now to the decision of Mr Justice Hamblen,
 21 the judgment at {J/106/6}, you will see paragraph 21:
 22 "OEH accepts that the normal rule for determining
 23 causation in fact is the 'but for' test. This is
 24 generally a necessary but not sufficient condition."
 25 With respect to Mr Schaff, and it may be the way the

51

1 case was argued below or the way in which
 2 Mr Justice Hamblen presented the point to him that he
 3 accepted it, but I don't accept that that is the case.
 4 And although he goes on to cite textbooks, firstly they
 5 are of course tort and other general common law
 6 textbooks, and secondly they are academic works, which
 7 peddle this two stage causation test theory, which the
 8 courts and the judiciary, as you have seen, have not
 9 adopted.
 10 So, with respect, he ought not to have been applying
 11 the "but for" test. But in any event, it is apparent
 12 that Mr Schaff, as one would expect him to do, over the
 13 page at page 8 {J/106/8}, goes to the insurance cases on
 14 proximate cause in those paragraphs. But you can see,
 15 this is the passage I alluded to earlier, at the
 16 beginning of 29 he says:
 17 "Although OEH cannot point to any insurance or
 18 indeed contract case in which it has been held to be
 19 inappropriate to apply the 'but for' test, it relies on
 20 the generally accepted principle that where there are
 21 two proximate causes of a loss ..."
 22 That is, as I said, the reverse of the question
 23 my Lord, Mr Justice Butcher asked Mr Kealey, and it is
 24 not surprising that insurance cases don't say it is
 25 inappropriate to apply it, because they have never

52

1 applied it. There are no insurance cases, we submit, on
2 true analysis, that have ever applied the "but for"
3 test.

4 As for authorities outside contract, I have shown
5 you in particular Galoo and the High Court of Australia,
6 as well as Lord Hoffmann, saying that this two-stage
7 process which involves the "but for" test is not how the
8 causation test is applied by the courts. But it is what
9 the academics like.

10 Now, his reasons for rejecting the argument, I think
11 we have seen before, but perhaps we need to focus on
12 them again.

13 LORD JUSTICE FLAUX: One of the oddities of the way in which
14 it is analysed is that, as Mr Justice Hamblen says in
15 terms, the "but for" test is a necessary but not
16 sufficient condition. That is paragraph 21.

17 MR EDELMAN: Yes.

18 LORD JUSTICE FLAUX: So one might have thought that the
19 obvious question to be asked in the context of insurance
20 law was: well, was what is being relied upon the
21 proximate cause of the loss?

22 MR EDELMAN: Or a proximate cause.

23 LORD JUSTICE FLAUX: Or an effective or dominant cause,
24 however you put it, yes.

25 MR EDELMAN: Not necessarily dominant. We know from

53

1 Miss Jay Jay that it doesn't have to be.

2 LORD JUSTICE FLAUX: An effective cause.

3 MR EDELMAN: An effective cause. I am perfectly happy with
4 the phrase "the" or "an effective cause".

5 MR JUSTICE BUTCHER: Yes. But I mean proximate cause has
6 been defined in a considerable number of ways, and
7 "dominant" is certainly one of the formulae.

8 MR EDELMAN: Yes, but maybe I should have -- I was trying to
9 do this --

10 MR JUSTICE BUTCHER: I didn't want to stop you doing Orient
11 Express, Mr Edelman.

12 MR EDELMAN: Maybe I want to come back and show you the
13 passage, because what is quite interesting is the way
14 Lord Justice Slade refers to it, but I will come back to
15 that.

16 LORD JUSTICE FLAUX: Come back to The Miss Jay Jay. Let's
17 finish this.

18 MR EDELMAN: Yes. Let me say at the outset that my analysis
19 here is that what you actually had here, as far as the
20 interruption of the business of the hotel was concerned,
21 was two concurrent causes of the loss, both capable,
22 I accept capable, independently of causing the loss.
23 The hotel was damaged, couldn't be used; that
24 necessarily, on its own, was capable of causing the
25 loss. The devastation to the surrounding area meant

54

1 that nobody could get to the hotel; that of itself was
2 independently capable of causing the loss.

3 What does the law do about it in circumstances where
4 the hurricane, which was an insured peril under the
5 policy, is responsible simultaneously for causing the
6 two? And, what is more, both are insured. Added quirk,
7 both are insured. What do we do?

8 Now, the way Mr Justice --

9 LORD JUSTICE FLAUX: What is said against you is that the
10 hurricane isn't insured. The devastation caused to the
11 city by the hurricane was not insured under the policy.

12 MR EDELMAN: No, quite right.

13 LORD JUSTICE FLAUX: It wasn't excluded, you are quite right
14 about that, but it wasn't insured.

15 MR EDELMAN: No, no, the damage --

16 LORD JUSTICE FLAUX: What was insured was the damage caused
17 by the hurricane.

18 MR EDELMAN: My Lord, the damage to the surrounding area was
19 insured under the LOA.

20 LORD JUSTICE FLAUX: The LOA, yes. Sorry, I beg your
21 pardon.

22 MR EDELMAN: It was insured under those clauses. That is
23 what I meant. And maybe it is what Mr Fletcher was
24 getting at. But when one gets there, to paragraph 34,
25 he relies on the fact that the policy has agreed to

55

1 apply a "but for" approach in the trends clause.

2 We say that's irrelevant, because the trends clause
3 is dealing with quantification. It's not posing the
4 same question that you are posing at the first stage of
5 proximate cause.

6 Then he addresses fairness and reasonableness. That
7 is at paragraph 36. He says that that was a question of
8 fact for the tribunal but not a question of law, and the
9 case wasn't put and not addressed. But anyway, he goes
10 on to say that he wasn't satisfied that it wasn't fair
11 or reasonable to apply it.

12 Then he adopts the "but for" test, and in 38 you
13 will see he says:

14 "If such a test is not adopted, what is the
15 alternative?"

16 To which my answer would be: section 55 of the
17 Marine Insurance Act. Is it or is it not to be treated,
18 the damage to the hotel, as an effective cause to
19 satisfy the requirements of the policy?

20 We say that there are two stages to any analysis
21 here, and the analysis in that case.

22 Firstly, was the damage to the hotel caused by the
23 hurricane the or a proximate cause of the interruption
24 of or interference with the business? If so, secondly,
25 what is the quantum of the loss that the insured has

56

1 suffered? That is where the indemnity rule comes into
2 play.

3 On that second question, one is obviously seeking to
4 compensate the insured for what would have happened had
5 the interruption or interference not occurred. In that
6 context, that context only, the "but for" test in the
7 trends clause makes perfect sense. And it is why, as
8 reflected in Ms Mulcahy's submissions on the law, it is
9 an aspect of the dispute in this case. I am not saying
10 it isn't, because of the example that I gave of the
11 chef; but for the restaurant fire, the turnover would
12 have gone down anyway because your head chef was going
13 to leave.

14 The central question in this case at the
15 quantification stage is not whether you apply the "but
16 for" test for those sorts of exigencies of life, but
17 what do you apply it to. And that is where we get into
18 the sub-division bit, which is the other aspect of the
19 causation issue in this case, and we mustn't lose sight
20 of it, that there is an important issue as to what one
21 takes out on the quantification exercise, but for policy
22 trigger.

23 MR JUSTICE BUTCHER: That really is going to be a question
24 of the proper construction of the trends clause in
25 a way, isn't it?

57

1 MR EDELMAN: Yes. What it's getting at and the proper
2 construction of what is insured. Because you have got
3 to decide what it is that is insured and what is in the
4 pot, and there are some submissions I do need to make
5 about that in addition to the legal submissions that
6 I make.

7 So where we say Mr Justice Hamblen went wrong at
8 this primary stage was to ask whether an exception to
9 the "but for" test should be applied, or to have any
10 regard, in answering that question, to the approach the
11 policy took to quantification.

12 You will remember Ms Mulcahy's submission that if
13 his analysis was followed through to its logical
14 conclusion it would mean that neither damage to the
15 hotel nor damage in the vicinity under the POA or LOA
16 clause would be covered. Mr Kealey's answer to that was
17 that if there were two clauses under which an insurer
18 was liable, it would be a breach of contract for the
19 insurer not to hold the insured harmless against one of
20 them by saying that because of the other insured peril
21 the insured had suffered no loss. That was his answer;
22 it is {Day4/38:1} to 41.

23 There are some interesting aspects to that, because
24 they reveal the flaw in both his argument and
25 Mr Justice Hamblen's analysis;

58

1 Firstly, he is contending that when there are two
2 sets of insuring clauses like this, it would be a breach
3 of contract not to provide an indemnity under one of
4 them. But that must be accepting that you are providing
5 an indemnity under one of them even though neither of
6 them satisfy the "but for" test. And if neither of them
7 satisfy the "but for" test there can't be a breach of
8 contract, per Mr Kealey.

9 So you necessarily have to throw away the "but for"
10 test where it doesn't make sense.

11 The only way to rationalise his argument about
12 breach is that it is sufficient in such a case, in order
13 to trigger the right to indemnity, that the damage was
14 capable on its own of causing the interruption. We
15 would say that is quite right, because it is a proximate
16 cause.

17 We then move on to his analogy of double insurance,
18 and he said it's like if you have two insurance
19 policies. Well, the logic of his argument would mean
20 that Orient Express ought to have succeeded in its claim
21 under the hotel cover. Because what insurers did was
22 they chose to pay out on the covers with a lower limit
23 of indemnity and said: well, we have done that, so we
24 don't have to pay out on the higher limit applicable to
25 the hotel itself, there's a sub-limit for these

59

1 extensions.

2 If Mr Kealey's analysis was right, they ought to
3 have been about paying out on the hotel and Mr Justice
4 Hamblen's decision is wrong.

5 So there is no rationalisation for the decision,
6 because it goes on in 39 {J/106/9} -- let's go back to
7 the judgment:

8 "... it is not the case that the application of the
9 'but for' test means that there can be no recovery under
10 the main insuring clause or the POA or LOA. If, for the
11 purposes of resisting the claim under the main insuring
12 clause, Generali asserts that the loss has not been
13 caused by the damage to the hotel because it would in
14 any event have resulted from the damage to the vicinity
15 or its consequences, it has to accept the causal effect
16 of that damage for the POA or the LOA ..."

17 Why not the other way round? Why can't the insured
18 say: I accept that I can't claim under both, but I am
19 going to claim under the damage, and you can't deny me
20 a claim under the hotel damage because it is also
21 covered under those clauses.

22 Now we get to the -- I don't want to digress into
23 too many examples, I don't have too much time, but
24 my Lord Mr Justice Butcher's landslip example with the
25 train. Mr Howard tried to escape from this example by

60

1 saying that, well, really it was the signals that were
2 the problem. But as I understood my Lord's example, it
3 was that you have two causes which separately are
4 capable of causing a delay to the train service, let's
5 say to equal extent.

6 Now, if one is insured, the landslip, and one is
7 uninsured, the signals, we would submit rhetorically:
8 why shouldn't the insured be able to recover, saying
9 there are two causes -- on a proximate cause -- say, "It
10 is an effective cause, because it might not pass a 'but
11 for' test, but it is certainly an effective cause,
12 because even if the signals could be repaired, I still
13 wouldn't be able to run my train because of the
14 landslip".

15 It is also open to say: what if they were both
16 insured, both risks were insured? Would the insurer be
17 able to say, "Well, neither is a proximate cause or a
18 'but for' cause, so you can't succeed on either"? The
19 answer must be, in that case, that the insured could
20 choose which of the insuring clauses to claim under.
21 And if that is right, then why does it make a difference
22 if you only insure one?

23 Of course, if landslip is covered and signals are
24 excluded, you are in Wayne Tank.

25 So then one says: well, even if the landslip is

61

1 a proximate cause, what is the quantum of the loss? Do
2 we then take into account, on the indemnity principle,
3 that you would have suffered the loss anyway because of
4 the signalling failure caused by the storm? To which
5 our answer would be this -- and again it relates to the
6 nature of the risk -- when insurers are insuring
7 a landslip, what is the most obvious circumstance in
8 which a landslip will occur; it is when there is
9 exceptional rainfall.

10 And as a matter of application of the trends clause,
11 and what it is aimed at, is the purpose of a trends
12 clause or adjustment for the indemnity principle geared
13 to restoring you to what normal circumstances would be,
14 or is it taking into account the extreme effects of the
15 storm, that they not only provoked the insured landslip
16 but also, perhaps unsurprisingly given the severity of
17 the storm, had other impacts on the railway?

18 Now, the storm may not, in that case, be an insured
19 peril, but what if it was, what if it was landslip
20 caused by storm? Or landslip caused by natural perils?
21 Would one then say the signalling, also caused by the
22 storm, should be taken into account even though that is
23 the very thing you are anticipating -- I say you
24 implicitly anticipated -- by covering a landslip risk?

25 That is where one gets to. But Mr Kealey's answer

62

1 to this is: Mr Edelman has misunderstood all of this
2 because he has chosen the wrong peril, and that is the
3 error he makes.

4 But if one looks at the definition of "Damage" in
5 Orient Express, that I showed you on page 3, you can see
6 it actually encompasses the peril {J/106/3}. It is:
7 direct physical loss or damage except as excluded
8 herein, except for causes excluded, being hereafter
9 defined as the damage.

10 Then one also asks oneself: what is the business
11 interruption insurance? Mr Kealey is treating it as
12 some separate, freestanding form of insurance which has
13 its own insured peril. We say that is an incorrect
14 analysis. What business interruption insurance is, is
15 merely adding on to the damage cover a loss of profit
16 cover.

17 If A negligently destroys B's profit-earning
18 property, B's measure of damages is the value of the
19 property destroyed and the lost profit until it can be
20 replaced.

21 If A was insured under a liability policy, those
22 damages would be encompassed with an insuring clause
23 covering liability in respect of damage to property. My
24 Lords will be familiar with what Lord Justice Hobhouse
25 as he then was said in the Rodan case. What business

63

1 interruption insurance is doing for the profit-earning
2 property is to extend the indemnity for the loss caused
3 by the damage to the property to include not just the
4 loss represented by the physical damage to the property,
5 but also the loss of profit or loss of revenue from the
6 property itself.

7 If one goes to {J/149/1}, Honour & Hickmott on
8 business interruption insurance, and it is "Principles
9 and Practice". If we just go now to page {J/149/2}, and
10 what does he call it? Consequential loss insurance.
11 That is what it is. It is insuring you against your
12 consequential loss from damage caused by an insured
13 peril. It is giving you a more complete indemnity,
14 where what you have is property which generates revenue
15 for you, or generates profit for you.

16 Hence, the fact that the damage is covered damage
17 under the material damage section is always an integral
18 part of the business interruption policy. Can I just
19 show you some examples. Let's go to {B/14/28}.

20 This is the business interruption section in one of
21 the QBE policies. 3.1.1:

22 "In the event that any building or other property
23 used by the insured at the premises for the purpose of
24 the business is damaged by an insured peril during the
25 period of the insurance ..."

64

1 If you want, there is a definition of "Insured
2 Peril" at page 98. Perhaps we should go to that
3 {B/14/98}, it is 18.50:
4 "Insured peril means any cause not otherwise
5 excluded." Or risks.
6 One other example, RSA at {B/16/6} please. These
7 are the events for property damage insurance, just
8 casting an eye over them, you have seen them before.
9 Page {B/16/12}. Equivalent events for business
10 interruption insurance. Page {B/16/22}, then we go to
11 the cover:
12 "If any of the property insured under the contents
13 suffers damage by any event ..."
14 This is contents. Sorry, I have got the wrong page,
15 but you can see the point, it is covered by an event and
16 it is the same for the --
17 MR JUSTICE BUTCHER: No, it is that page, it is on the
18 right-hand column.
19 MR EDELMAN: The right-hand column, yes. And it is all the
20 same, it is "by any event". And your Lordships will I
21 am sure have seen material damage, business interruption
22 sections which start with the words "damage for which
23 liability has been admitted under the material damage
24 section", and that is because the business interruption
25 cover is parasitic on the material damage cover in its

65

1 primary role. What it is doing, as I said, is just
2 providing consequential loss cover for the damage to the
3 property.
4 If we go back to Orient Express, one can then see
5 that I was not -- as, using very strong language,
6 Mr Kealey criticised me for -- misleading the court as
7 to what the insured peril actually was. But to say that
8 the insured peril under a business interruption policy
9 is the damage and not the cause of the damage is, we
10 submit, fundamentally to misunderstand what the purpose
11 of business interruption insurance actually is, what its
12 relationship is in its primary role with the material
13 damage section. It is treating it as if -- and of
14 course it may be freestanding, but usually, even if it
15 is a freestanding cover, it will require that the damage
16 be covered by some other policy. Because, as was
17 rightly submitted, the insurer will want to know that
18 there are funds for the property to be rebuilt. But, in
19 essence, it is just an extension of the insurance cover
20 for the insurance of profit-earning property.
21 It was argued, contrary to what Mr Lockey said, that
22 special circumstances should not encompass the insured
23 peril. If we go to {J/106/9} paragraph 42:
24 "OEH submits that having regard to the purpose of
25 the trends cause, its language and commercial common

66

1 sense, the clause should be construed as not permitting
2 an adjustment for the consequences of very same insured
3 peril ..."

4 And over the page at 47 {J/106/10}, OEH specifically
5 addressed the scope of -- it said it's dealing with the
6 effect of real "trends, variations or special
7 circumstances", not imaginary or hypothetical things
8 like the hurricane not happening or -- sorry, not
9 damaging the hotel, I should have said, but damaging
10 everything else.

11 And 48, it was submitted that in particular, if one
12 goes to the third or fourth line up from the bottom:

13 "... these words are looking at trends, variations
14 or circumstances independent of the (insured) damage."

15 So it was plainly submitted, but it was rejected by
16 the judge because of his analysis of what the insured
17 peril was; and that, as I said, was taking far too
18 narrow a focus on the concept of the insured peril.

19 So I don't shrink from saying that in Orient Express
20 the insured had -- it is like my Lord's railway example
21 with both the landslip and the signals insured, but
22 a lower limit of indemnity on the signals and the
23 insurer saying: well, we have paid you on the signals so
24 that means we don't have to pay you for the landslip.
25 Why?

67

1 It really does not make, we would submit, any
2 commercial sense as a matter of fact or law. Let's look
3 at Riley, what Riley has to say. This is {K/206/6}. At
4 the bottom of the page, at 3.10:

5 "In consequence of the incident.

6 "It is important to bear in mind that the indemnity
7 in respect of reduction in turnover is qualified by the
8 words [the clause he was considering] 'in consequence of
9 the incident'. Therefore, if the reduction is
10 attributable wholly or in part to causes not connected
11 with the incident which would have affected turnover
12 irrespective of the incident, an adjustment must be made
13 to the figures in order to reflect as accurately as
14 possible the loss solely due to the incident. For this
15 purpose, the other circumstances clause referred [over
16 the page] to in the preceding paragraph is employed.
17 This link between the phrase 'in consequence of the
18 incident' and the 'other circumstances clause' is vital
19 to a proper understanding of the UK business
20 interruption cover."

21 Then if we can go, please, to paragraph 3.28 on page
22 {K/206/21} of this work:

23 "It must also be understood that this clause could
24 be invoked by insurers in calculation of a claim to
25 reduce the amount of the standard turnover or the rate

68

1 of gross profit where conditions warrant such action.
 2 For example, increased competition may force down
 3 selling prices during the period of interruption, with
 4 a lowering effect on both the rate of gross profit and
 5 turnover. Similarly, a general trade recession,
 6 unseasonable weather conditions [and so on] are typical
 7 of the circumstances which may cause a reduction in
 8 turnover concurrently with that due to the incident.
 9 Such events would have had the effect of lowering the
 10 insured's gross profit in the months after the incident,
 11 even if the incident had not taken place. Unless
 12 allowance is made for such circumstances, an insured
 13 would be over-indemnified contrary to the provisions
 14 under item 1(a) that specify that cover is for loss of
 15 gross profit that is 'in consequence of the incident'.
 16 You will note the language, he refers back to 3.10,
 17 where he talks about causes that are not connected with
 18 the incident; and that, we submit, is the correct
 19 approach.
 20 LORD JUSTICE FLAUX: What does he say about Orient Express?
 21 MR EDELMAN: My Lord, someone may have done a search about
 22 that. I'm not sure whether this book pre-dates --
 23 MR JUSTICE BUTCHER: No, no, doesn't he say it might be
 24 technically right, but it is not what either the insurer
 25 or the insured would have expected, something like that,

1 doesn't he?
 2 MR EDELMAN: Yes, sorry, I did refer to it. It is in the
 3 mists of time, I think I did refer to it in opening.
 4 Yes, I referred to that -- I have got my opening
 5 submissions at some stage, so I can remind you of that
 6 passage, but it might take too long to find. Because
 7 Riley was one of the criticisms.
 8 LORD JUSTICE FLAUX: Don't worry, we can find it in your
 9 submissions.
 10 MR EDELMAN: Yes.
 11 So he did criticise it as not being -- but that is
 12 what he says is the purpose of the trends clause, and we
 13 submit it would defeat the entire purpose of an insuring
 14 clause in a BI section and the application of the
 15 proximate cause test to it, to start using the "but for"
 16 test for quantification to start using elements of the
 17 insuring clause against the insured.
 18 This is where we come to the combination point.
 19 There are two different aspects.
 20 Firstly, does a trends clause bring into play
 21 something which can be said to be in some ways
 22 independent but interlinked, interdependent in that
 23 sense, with the cause; or can it bring in an ingredient
 24 of the insured peril into the counterfactual?
 25 So there are those two aspects.

1 On that latter aspect, we say if you have got the
 2 combination of ingredients, you must necessarily proceed
 3 on the premise that that combination of ingredients are
 4 covered and the loss associated with them is covered.
 5 The ingredients are identified in the clause because one
 6 anticipates that they will be associated together, and
 7 one doesn't then say: well, we can strip out, we can
 8 pretend that only one of the ingredients or a part of
 9 one of the ingredients occurred, and imagine what the
 10 world would be like with the rest of the ingredients,
 11 which is insurers' approach.
 12 We say, once you have got the insured combination,
 13 the insured combination is on one side, and the world in
 14 which that insured combination did not exist, with every
 15 ingredient of that insured combination taken out, that
 16 alternative world is what you compare it against. That
 17 will actually give you the normality that you are
 18 comparing against, ordinary circumstances.
 19 How do you deal with interlinked factors? This is
 20 the sort of concurrent independent cause element. This
 21 is perhaps the Silversea approach. We need to have
 22 a quick look at Silversea, it is at {J/90/1}, and one
 23 can see in A.ii, the insuring clause in the right-hand
 24 column:
 25 "Loss of anticipated income and extraordinary

1 expenditure incurred to prevent loss of anticipated
 2 income."
 3 It is 5 million in the aggregate. The risk is at
 4 the bottom of the left-hand column:
 5 "... A.ii of the policy covered 'loss of anticipated
 6 income and extraordinary expenditure to prevent loss of
 7 anticipated income'. The insured peril was '...
 8 resulting from a State Department advisory or similar
 9 warning by competent authority regarding acts of war,
 10 armed conflict, civil commotion, terrorist
 11 activities ..."
 12 I want to revisit Silversea in the context of the
 13 debate we have been having.
 14 It could be said that Silversea is straddling the
 15 insured peril quantification point, because you don't
 16 have some operative effect on the business required in
 17 terms of an interruption or interference; you have
 18 ascertained net loss resulting from.
 19 So the suffering of the loss itself was the trigger,
 20 albeit that obviously the recoverable loss itself had to
 21 be quantified.
 22 But the point is the same. If we go back to 67 to
 23 69, at page 29 of this report {J/90/29}, paragraphs 67
 24 to 69, and you were shown these, so I don't want to read
 25 them again, but there are three important aspects to

1 what was going on here.
 2 Firstly, it was impossible to separate out the
 3 impact that the two causes had, so that they were truly,
 4 the World Trade Center attacks and the warnings that the
 5 government gave were truly concurrent causes of the same
 6 loss. The insured cause, the warnings, necessarily
 7 contemplated some pre-existing state of affairs which of
 8 itself would be capable of impacting the insured's
 9 bookings. That was inherent in the nature of the risk.
 10 That is why sometimes one has to look at the nature of
 11 the risk to conduct an appropriate analysis in order to
 12 find what the inferred intention of the parties must
 13 have been.

14 As they were concurrent causes for the purposes of
 15 a proximate cause test, so that the warnings qualified
 16 as a proximate cause of the loss, the loss was
 17 recoverable even though it then may well have been, and
 18 there would have been bound to have been, some part of
 19 that loss which would also have been caused
 20 independently by the attacks themselves, even if they
 21 hadn't prompted the government warnings. Fear and
 22 anxiety of travel. What are they going to hit next?
 23 This is an unsafe world, I don't want to go on a ship
 24 which could be an easy target for terrorists.

25 But Mr Justice Tomlinson obviously didn't perceive

73

1 there to be any problem with either proximate cause or
 2 on quantification as regards the indemnity principle,
 3 and critically did not pose a "but for" counterfactual,
 4 rather he stuck to the proximate cause test.

5 We say that is appropriate where one has an insuring
 6 clause which is contemplating something happening which
 7 will trigger something else happening, and which may
 8 trigger something else happening. It is contemplating
 9 things that are likely to happen in combination.

10 An emergency, provoking a public authority response,
 11 which affects access to the premises or use of the
 12 premises. A disease prompting public authority action
 13 which has the specified effect on the premises. It is
 14 contemplating, obviously, a disease or emergency of such
 15 a nature that it will have an impact.

16 That is the first point I get out of Silversea. But
 17 the other point I also get out of Silversea is that
 18 there is no particular problem with having concurrent
 19 independent but interlinked causes being treated as
 20 proximate causes. If they are truly and completely
 21 independent, going back to my Lord's landslip example,
 22 if there already was a signalling problem and the trains
 23 were being delayed anyway, what happens with the
 24 landslip?

25 That is different from the question which insurers

74

1 would want to pose for the trends clause. They will
 2 say: what if an hour before the landslip, the storm had
 3 already knocked out the signals? Do you then say -- and
 4 this is the other point on the trends clause. Do you
 5 then say that the loss attributable to the landslip is
 6 zero or reduced because an hour before the signals had
 7 already been knocked out? Or do you say, well, it is
 8 contemplating a storm, storms do nasty things, the fact
 9 that you have got the embankment on your railway line is
 10 an effective cause of your inability to run the trains,
 11 and that's enough.

12 Can I try to translate that into a practical
 13 example, the last point I was making about the emerging
 14 impact of the peril, because this is actually quite
 15 a significant point for many policyholders, because
 16 a number of insurers are saying: even if you are
 17 covered, the effect of COVID on your business before the
 18 government lockdown is a benchmark against which your
 19 indemnity is to be calculated.

20 I want to try and analyse that in causation terms,
 21 and rather than using the railway analogy can I use the
 22 church collections.

23 Let's say that before closure of a church there had
 24 been a drop in attendance of collections of 60% as the
 25 COVID issue emerged. In the week or so before 16 March

75

1 the collection income had dropped 60%. Then the church
 2 was required to close and it reduces to zero.

3 In circumstances where 40% were still attending
 4 prior to closure, one can say, and we would say, that
 5 the closure operates not only on the 40% who had been
 6 attending, but also as a concurrent cause of the
 7 remaining 60% not attending. Because from then on that
 8 60% could not attend church even if they had wanted to.

9 I emphasise "concurrent cause". Because now one has
 10 added on to their reluctance to go to church their
 11 inability to go to church. They can't go, because it is
 12 closed. So there are now two reasons why they can't go
 13 to church, not just the one. And they are both, if one
 14 wants to look at it just separately, I won't say
 15 "independently", that's a loaded word, but they are both
 16 separately capable of causing a loss of revenue to the
 17 church.

18 But then let's analyse why the churches were closed.
 19 They were closed not just to stop the 40% who were still
 20 attending, but to stop the other 60% from deciding to
 21 start going to church again. The entire purpose of the
 22 closure was to stop people going back to normal
 23 behaviour. Hence the position, we say, is even actually
 24 stronger than the railway example.

25 Let's look at {B/4/45}. Yes, that is the right

76

1 page. Let's look at the risk that Ecclesiastical, who
2 do insure the churches in my example, contemplates.
3 They obviously contemplate an emergency of such severity
4 that it could require even government action and it
5 contemplates that the church could be closed. But that
6 is at the extreme end of what could happen. So the
7 clause itself is contemplating something so serious that
8 the government acts to close the church.

9 Yet insurers want to say: well, we will strip out
10 the restriction that the government imposed and we will
11 leave the emergency in. And they want to say: we will
12 insure you for your insured combination, but when we get
13 to quantification we are going to take out the money
14 that you are losing because of the emergency.

15 Now, as it so happened, we have got a matter of
16 a shortish period of time, a few weeks, where people's
17 behaviour was beginning to change prior to the lockdown.
18 But what if it's a few hours? If it is a different sort
19 of emergency, one that arose in a shorter timeframe, and
20 let's say the emergency arose on a Sunday morning, and
21 people had not come to church on the Sunday morning
22 because of the emerging emergency, and the government
23 shut the church on Sunday afternoon and shut it for
24 a week, including the following Sunday.

25 Are insurers entitled to say: well, we will take out

77

1 the restrictions, but we know from last Sunday morning
2 that because of the emergency people wouldn't have come
3 anyway, so we adjust it under the trends clause, because
4 at that time the emergency wasn't covered.

5 Now, the real question is: is that what the trends
6 clause is intended to do? We say that would really ride
7 a coach and horses through this insurance cover.

8 That is not, as the insurers say, insuring the
9 emergency. Because you don't get cover for the loss of
10 that first Sunday morning's collections when there was
11 the emergency but the church hadn't been required to
12 close. You don't recover it. It's all about the next
13 Sunday.

14 Do you say: no, the trends clause entitles us to
15 adjust it for circumstances. One of the circumstances
16 is you take away the closure and you leave the
17 emergency. And we know what effect that had last
18 Sunday, don't we? So we are not going to pay you
19 anything at all, even though your insured combination
20 has occurred.

21 That is the sleight of hand in insurers' submissions
22 on this point. Because they say: of course we are
23 insuring A plus B plus C plus D, we accept we provide
24 insurance cover for that. But then they take it all
25 away, and my Lords must not lose sight of this, the

78

1 importance of this, they take it all away under the
2 trends clause, in my example, you can't have the Sunday
3 morning loss of collections when you were closed because
4 on the Sunday morning, before the closure on Sunday
5 afternoon, people were so worried about the emergency
6 they didn't come to church. So the counterfactual is
7 the emergency without the closure.

8 That may be the answer my Lords come to. If it is,
9 it is a very, we would submit, unrealistic scenario.

10 One asks, in Silversea, would it have been open to
11 insurers to say: well, the counterfactual -- they didn't
12 argue the trends clause in that case. Would it have
13 been open to them to argue that the counterfactual in
14 this case is the existence of the attacks, the
15 World Trade Center attacks, but with the government not
16 issuing any warnings? However unrealistic that might
17 be. And that is your "but for" scenario. Because that
18 is the logic of the argument, that in Silversea the
19 insurers missed a trick. They should have argued that
20 but for the government warnings there would still have
21 been the attacks, and so if the insured could not prove
22 a separate impact of the warnings, then they should
23 fail. But actually what the insurers tried to do was
24 they tried to allocate something that was due to the
25 attacks themselves.

79

1 LORD JUSTICE FLAUX: The point wasn't argued, because it
2 was -- there wasn't an issue of quantification, because
3 one of the oddities of Silversea was that they had
4 already paid out the 5 million cover.

5 MR EDELMAN: The limit of indemnity, yes.

6 LORD JUSTICE FLAUX: I can't now for the life of me remember
7 why on earth the appeal went ahead, but it did. I think
8 it went ahead because we were appealing the other part
9 of the case, and I think this was all part of
10 Mr Swainston's cross-appeal, which Lord Justice Rix
11 dealt with in any event. But it was actually academic,
12 because they paid out under A.ii.

13 MR EDELMAN: Absolutely, but there appears --

14 LORD JUSTICE FLAUX: I can't now remember whether there was
15 a trends clause or not, Mr Edelman. I was just having
16 a quick look. I can't see anything in the wording that
17 is quoted, but there is no reason why it should have
18 been quoted because it wasn't relevant.

19 MR EDELMAN: I appreciate that. But what I am getting at
20 is: is the answer to Silversea to be found in proximate
21 causation or nothing? It is either proximate causation
22 or it isn't. Or is the "but for" test under for
23 quantification supposed to start parceling out the
24 elements in the peril and saying: well, although we know
25 the policy actually contemplates something like

80

1 a terrorist attack or a war, causing a government
2 warning, it's only the warning that is the insured
3 peril?

4 This is Mr Kealey's point about the insured peril,
5 and Mr Justice Hamblen's point in *Orient Express*. You
6 somehow identify the thing that is to be singled out as
7 the insured peril, and everything else that the policy
8 contemplates will be part of the chain of events that
9 occurs is then excluded from the insurance bit, and then
10 counts for the purposes of the counterfactual.

11 It's not doing what Riley says a business
12 interruption policy should be doing, and in the example
13 I gave it really is not consistent with the commercial
14 purpose of the policy.

15 Now, my Lords, I think in trying to deal with
16 matters in a way responding to my Lord's questions,
17 there were a couple of points that I wanted to pick up,
18 and I apologise if this is now going to be a bit
19 piecemeal. There are just a couple of points I missed
20 out that I need to collect up on the way.

21 I did want to show you what Lord Justice Slade said
22 about proximate cause. This is at {J/66/10}. You will
23 see at the top of the page, with the markings against
24 the column, he says:

25 "I therefore conclude that the loss in the present

81

1 case is properly to be treated as having been
2 'proximately caused' by a peril insured against ..."

3 So what he is doing is interpreting the statute,
4 because it was a section 55 case, and he is deeming
5 something to be proximately caused. But he has
6 identified, or certainly it was identified earlier on,
7 what he is referring to, and there was on -- I will find
8 the passage in my notes.

9 If one goes back to the previous page, I think it is
10 page 9 {J/66/9}, you will see that he has not just made
11 this up. It's page 40, column 1, where he looks at the
12 principles of law, and in the last part of the column he
13 says:

14 "... since the instant policy contains no relevant
15 exceptions [and he looked at *Wayne Tank*] different
16 principles apply. The legal position in such a case is
17 stated thus in *Halsbury's Laws* ... which relates to
18 marine insurance ...

19 "It seems that there may be more than one proximate
20 (in the sense of effective or direct) cause of a loss.
21 If one of these causes is insured against under the
22 policy and none of the others is expressly excluded from
23 the policy; the insured will be entitled to recover."

24 Interestingly the authors or the editors of *Halsbury*
25 seem to have anticipated a number of causes; they simply

82

1 say "more than one" and "one of these causes":

2 "No authority has been cited to us which leads me to
3 suppose that the passage incorrectly states the relevant
4 law relating to marine insurance and in my judgment
5 incorporates the principle applicable to the present
6 case."

7 He says that the Act was a codifying statute, which
8 we all know, and he looks for guidance as to the true
9 construction of section 55.

10 One must remember, that particularly in *Miss Jay*
11 *Jay*, this was an exercise in statutory construction, and
12 although these are non-marine cases we should be
13 engaging in the same exercise.

14 He refers to a particularly illuminating authority
15 in the decision of *Dudgeon v Pembroke*.

16 In that case he says:

17 "... the House of Lords was prepared to assume in
18 favour of the underwriters that the vessel in question:

19 "... was not seaworthy and that its want of
20 seaworthiness caused it to be unable to encounter
21 successfully the perils of the sea, and so to perish.

22 "Nevertheless, Lord Penzance pointed out that the
23 immediate cause of the loss of the vessel was
24 undoubtedly 'the action of the wind and waves' and that
25 a long course has established that:

83

1 "... any loss caused immediately by the perils of
2 the sea is within the policy, though it would not have
3 occurred but for the concurrent action of some other
4 cause which is not within it."

5 Then he goes on to analyse that case. So that was
6 the basis for his conclusion, going back to page 10, as
7 to the ambit of the phrase "proximately caused" in the
8 statute.

9 MR JUSTICE BUTCHER: I am not quite sure the point you are
10 making there, Mr Edelman. Although he said it is to be
11 treated as being proximately caused, he could have just
12 said "I find that it is proximately caused". He is not
13 saying that there are proximate causes and deemed
14 proximate causes; there's what you call "proximate
15 cause". It is a question of what you categorise as the
16 proximate cause in the particular case.

17 MR EDELMAN: I think maybe what he was getting at is it is
18 to be treated as a proximate cause even though it is not
19 the dominant cause, or the effective cause, because that
20 was the issue in *Miss Jay Jay*. It is not the dominant
21 cause; it is not the effective cause; it is just one of
22 two concurrent causes, neither of which is dominant or
23 effective, or the effective cause.

24 LORD JUSTICE FLAUX: It is interesting that in *Dudgeon v*
25 *Pembroke*, halfway down that right-hand column, what Lord

84

1 Penzance says is :
 2 "Any loss caused immediately by the perils of the
 3 sea is within the policy , though it would not have
 4 occurred but for the concurrent action of some other
 5 cause which is not within it ."
 6 So he is there looking at it in terms of "but for"
 7 causation .
 8 So he is saying , as I read it , the perils of the sea
 9 was a proximate cause, even though the ship would not
 10 have in fact foundered had it not been or but for the
 11 fact that she was unseaworthy; unseaworthiness in that
 12 case presumably not being an exclusion , or not being
 13 excluded, as in *The Miss Jay Jay* itself .
 14 MR EDELMAN: Yes, so it is --
 15 LORD JUSTICE FLAUX: As my Lord says, whether it is truly
 16 a deeming case may be debatable. I think from
 17 recollection the other judgment in the case doesn't --
 18 is that Lord Justice Lawton?
 19 MR EDELMAN: Yes. He doesn't put it in exactly the same
 20 way.
 21 LORD JUSTICE FLAUX: He doesn't put it in the same way, does
 22 he?
 23 MR EDELMAN: No, my Lord.
 24 LORD JUSTICE FLAUX: He puts it on the basis of effectively
 25 that it was a proximate cause.

85

1 MR EDELMAN: Or a proximate cause.
 2 LORD JUSTICE FLAUX: Right at the end of his judgment he
 3 says:
 4 "One without the other would not have caused the
 5 loss. In my judgment both were proximate causes."
 6 MR EDELMAN: But it is a matter of statutory definition , and
 7 that's where you get to .
 8 My Lord, there is one other point of law that I need
 9 to address which I skirted over in the way that the
 10 debate with my Lords developed. That is this hold
 11 harmless point that Mr Kealey made, which was a point of
 12 law, that somehow the common law "but for" causation
 13 test , which I have made my submissions about, comes in
 14 because the nature of the remedy is for breach of
 15 contract , and we are talking about ordinary contract
 16 causation .
 17 With respect to Mr Kealey, I struggled to follow the
 18 logic of that argument .
 19 My Lord Mr Justice Butcher may recollect that he and
 20 I did debate this , at least in our cases, in *Teal v*
 21 *Berkley*, the nature of the hold harmless remedy. It
 22 perhaps doesn't matter but I have already referred you
 23 to it but would emphasise again what Sir Peter Webster
 24 said in *Callaghan v Dominion*, that the holding harmless,
 25 although it is a fiction in the sense that you imagine

86

1 that the insurer has instantly made good the loss, the
 2 point he made is that is the fiction . It's not
 3 a fiction that the insurer promises you that your house
 4 won't burn down, which is sometimes the erroneous
 5 fiction that is assumed in this case .
 6 He analyses what was said in *The Fanti* and by
 7 Mr Justice Hirst in *The Italia Express*. He analyses
 8 them to demonstrate that is not what they meant. It was
 9 critical . Whereas in the *Sartex* case, which was cited
 10 to you, that point wasn't critical . In the point he was
 11 debating he was disagreeing with Judge Kershaw who had
 12 gone down that route of saying they are promising the
 13 damage won't occur. What they are doing is promising to
 14 hold you harmless against the loss you suffer by your
 15 house catching fire and they promise to hold you
 16 harmless immediately .
 17 LORD JUSTICE FLAUX: Yes. It is a promise that if your
 18 house burns down we will pay you an indemnity for the
 19 loss you suffer .
 20 MR EDELMAN: Yes.
 21 LORD JUSTICE FLAUX: The law has said for better or worse
 22 that that obligation , that cause of action for breach of
 23 contract , accrues at the moment when the house burns
 24 down, even though the insurers haven't had any
 25 opportunity to say "yea" or "nay" whether they are going

87

1 to pay the claim .
 2 MR EDELMAN: They may be in total ignorance of the claim but
 3 the obligation to indemnify arises immediately .
 4 But that has absolutely nothing to do at all with
 5 the causation test to be applied to whether the policy
 6 is triggered .
 7 LORD JUSTICE FLAUX: No.
 8 MR EDELMAN: It is utterly irrelevant .
 9 But Mr Kealey seemed to think that somehow the "but
 10 for" test came in through that back door. But it
 11 doesn't .
 12 LORD JUSTICE FLAUX: So you say with the possible exception
 13 of *Orient Express* none of the insurance cases analyse
 14 causation in terms of "but for" .
 15 MR EDELMAN: No.
 16 LORD JUSTICE FLAUX: It analyses it in terms of proximate
 17 cause .
 18 MR EDELMAN: And it has been the cornerstone of insurers'
 19 refusal of indemnity, because apart from the
 20 construction point about the disease clauses they are
 21 saying "but for" the outbreak within a 25-mile radius
 22 the government would still have locked the country down,
 23 so you fail on a "but for" basis . On the combination
 24 clauses they are saying if it is denial of access,
 25 government action due to an emergency, under trends

88

1 clauses or quantification they say, well, "but for" the
2 government restriction there would still have been the
3 emergency. So they rely on the second part probably,
4 the "but for". They rely on both parts of Orient
5 Express. And both parts are flawed, for the reasons
6 that we have given.

7 It is an edifice on which insurers' case is
8 primarily based. I know there are debates between us as
9 to the individual meaning of words, but this is at the
10 very heart of the real major roadblocks that insurers
11 have put in the way of policyholders. They are not even
12 countenancing the claims. All they are saying is, you
13 would have lost it all anyway because of COVID in
14 circumstances where the clause is contemplating the
15 disease.

16 So it is very important. And it is important not
17 only with effect from the date that the trigger occurs,
18 but also my emerging problem issue: the example I gave
19 of the church with the two Sunday mornings, which
20 hopefully puts that in stark contrast -- gives that some
21 focus.

22 My Lord, I have done great disservice to some
23 sterling work that Mr Kramer had done for me on some of
24 the policies.

25 Can I just give some focus to which policies are

1 affected. I have mentioned this before but I need to
2 just go through which policies are affected by which
3 arguments, just so you have it all in one place on the
4 transcript.

5 Clauses without an RPA, if I can use that shorthand
6 ...

7 MR JUSTICE BUTCHER: RPA, sorry?

8 MR EDELMAN: Relevant policy area. Acronyms are all the
9 range. Relevant policy area: Arch, Ecclesiastical 1.1
10 and 1.2, and Hiscox 1, 2, 3, if we are right about
11 "occurrence".

12 There is then a second category, those which on one
13 of our ways of putting the case we say do not have
14 a relevant policy area, because they use the word
15 "vicinity". You have our submissions on the scope of
16 "vicinity" and you will reach decision about that.
17 Those are RSA2.1 and 2.2; RSA4, which has a definition
18 of "Vicinity"; and Amlin1 and Amlin3, denial of access
19 clauses; and RSA2.1 and 2.2 with the denial of access
20 clauses.

21 Then there is a third category of disease clauses
22 with an RPA requirement and with language which we
23 accept is proximate cause language. That is Argenta
24 25 miles; QBE1 and 2 25 miles; QBE3 1 mile; and then of
25 course there are all the "vicinity" policies if you

1 decide that "vicinity" is imposing a localised relevant
2 policy area.

3 Then the final category are the cases with an RPA
4 requirement but which are not pure disease clauses --
5 the ones which I have referred to were pure disease
6 clauses -- those are Hiscox 1 to 2 and 4; and Amlin2 for
7 the denial of access clause; RSA1, the closure or
8 restrictions clause; RSA2.1 and 2.2, the actions or
9 advice of public authority clause; and RSA4, the
10 enforced closure clause.

11 Then finally there is a category with an RPA
12 disease, danger, risk of injury, which use the word
13 "following", which may or may not be proximate cause,
14 depending on my Lords' analysis of that word which we
15 have in the past made submissions about. Those
16 encompass Hiscox 4, the disease clause, 1 mile; Amlin1
17 and 2 the disease clause, 25 miles; RSA3, the disease
18 clause, 25 miles; Zurich1 and 2, the public authority's
19 clause; and Hiscox 1, 2, and 3, but only if Hiscox is
20 right about "occurrence"; and Amlin1 and 3 if "vicinity"
21 is a narrower meaning.

22 So those are the categories of case my Lords need to
23 address.

24 Can I just in the few minutes that remain to me
25 before lunch deal with one other issue. I am sorry,

1 this often happens in reply when one answers the court's
2 questions, it gets slightly taken out of order, and
3 things at the end have to be patched in. So I apologise
4 for that.

5 In {1/1.3/1}, if that could be brought up please,
6 what we have done is to prepare a table of comparator
7 revenue periods in lead policies. If I can identify
8 three types of clause, just so I can identify the nature
9 of the issue for you.

10 Firstly, if we can go to page {1/1.3/2} of the
11 document we have the first type of clause, which is item
12 4, Ecclesiastical 1.2. You will see under "Standard
13 Revenue" -- do my Lords have the full page on the
14 screen? If you have the full page on the screen, under
15 "Standard Revenue" for Ecclesiastical 1.2 you can see it
16 means the revenue during the period corresponding with
17 the indemnity period in the 12 months immediately
18 before.

19 So if the loss is in April to June 2020 you compare
20 that to April to June 2019.

21 In that case we would say the burden would be on the
22 insurer to show that the mechanism in the clause should
23 be engaged to alter what would be the product of that.

24 On the same page, item 5, a rather unique type of
25 clause, Hiscox 1, loss of income, the second line:

1 "... the difference between your income during the
 2 indemnity period and during the period immediately prior
 3 to the loss ..."
 4 So that is looking to the period immediately prior .
 5 The question would then be whether one strips out of
 6 that "immediately prior to the loss" anything that is
 7 affected by the emergence of what we would say falls
 8 within the ambit of the insured perils .
 9 MR GAISMAN: I think we really do need to read the
 10 immediately preceding words.
 11 MR EDELMAN: Right, I am sorry.
 12 MR GAISMAN: "... if that is your first trading year."
 13 MR EDELMAN: Yes, I am sorry, I have misread that. I am
 14 very grateful to Mr Gaisman. He is quite right about
 15 that. So that only applies if it is the first trading
 16 year. So that is what you would have earned during that
 17 period. But that doesn't give --
 18 LORD JUSTICE FLAUX: Maybe that is a very limited category
 19 of insured . We don't know.
 20 MR EDELMAN: Yes.
 21 LORD JUSTICE FLAUX: But the general wording is similar,
 22 isn't it :
 23 "... your actual income during the indemnity period
 24 and the income it is estimated that you would have
 25 earned during that period."

1 MR EDELMAN: Yes.
 2 LORD JUSTICE FLAUX: And that is obviously assessed by
 3 reference to amongst other things what you have earned
 4 in previous years .
 5 MR EDELMAN: Yes. That again would then need to be --
 6 previous years' figures would need to be adjusted by the
 7 insurers .
 8 Then Hiscox 3 on page 7 {1/1.3/7} has a rate of
 9 gross profit . It is the same thing in Hiscox 2. I am
 10 not making a particular point. I am just taking these
 11 at random. It is the same point. It is "during the
 12 financial year immediately before any insured damage".
 13 That is the same point really as Hiscox 1, except
 14 it is slightly different . They have got a specific
 15 business trends clause. But the question there would be
 16 whether the income during the financial year is then
 17 adjusted under the trends clause to take out the effect
 18 of the emerging peril .
 19 So you can see that how you take account of what
 20 I have described as the emerging peril varies according
 21 to the operation of the clause .
 22 That is all I wanted to say about it , that there is
 23 a difference in approach under the clauses whether it 's
 24 being taken out or put back in .
 25 LORD JUSTICE FLAUX: Is that a convenient moment,

1 Mr Edelman?
 2 MR EDELMAN: Yes, it is.
 3 LORD JUSTICE FLAUX: We will say 2 o'clock then.
 4 (1.00 pm)
 5 (The short adjournment)
 6 (2.00 pm)
 7 LORD JUSTICE FLAUX: When you're ready, Mr Edelman.
 8 MR EDELMAN: I'm grateful, my Lord.
 9 That reference to Riley that I was struggling for ,
 10 it 's quoted in paragraph 306 of our skeleton at
 11 {1/1/120}, but we don't need that up on the screen .
 12 My Lord, just two brief points before I hand over to
 13 Ms Mulcahy, because we need to get on to the policies .
 14 Firstly , the effect of reliance on the "but for"
 15 test . Perhaps, my Lords, if we can look at the Amlin
 16 policy for this purpose, {B/10/66}. You will see this
 17 is the notifiable disease clause. I am just taking this
 18 as an example, nothing special about it .
 19 The application of the "but for the disease within
 20 25 miles" argument means that one excludes any situation
 21 in which the disease prompts whatever it is that causes
 22 the interruption or interference , because obviously the
 23 disease is unlikely to do so itself if it is just within
 24 25 miles , is then treated as a competing concurrent
 25 cause of the interruption and interference , which then

1 prevents cover .
 2 It does involve , as I think I submitted earlier but
 3 I just wanted to show you it with a clause, it does
 4 involve inserting the word "only" in (a)(iii) before the
 5 word "within". Because that is the effect of the
 6 insurers' "but for" case, it is as if that read:
 7 "Any notifiable disease only within a radius of
 8 25 miles."
 9 Alternatively , it involves inserting an exclusion in
 10 the policy in respect of any interruption or
 11 interference concurrently caused by the presence of the
 12 disease outside the relevant area .
 13 The second point, my Lord, is this , and I know it
 14 has been a point that has been troubling particularly
 15 my Lord, Lord Justice Flaux throughout the hearing: if
 16 we are right , what is the commercial purpose and value
 17 of this clause?
 18 My first exhortation must be not to be influenced by
 19 the particular and unique circumstances which occurred
 20 in this country this year. One is looking at what the
 21 commercial purpose of this clause will be in the
 22 ordinary course of events, but perhaps even in
 23 a slightly less rapid epidemic than we have now.
 24 If it operates as we and, ironically , I think
 25 Mr Salzedo accepts, that it does not require the disease

1 only to have been within a radius of 25 miles, and it
 2 does not prevent the operation of cover where there is
 3 a disease elsewhere which is a concurrent cause of what
 4 has caused the interruption or interference -- the same
 5 disease outbreak, I emphasise -- then what does it do?
 6 What we say it does is it protects the insurer
 7 against having to indemnify against the effects on the
 8 business of disease outbreaks that are only distant from
 9 the insured's premises. There may be an outbreak in
 10 England, it may be an outbreak in another country, but
 11 if the disease outbreak is not within the radius of
 12 25 miles of the premises, then although the insured's
 13 business may be interrupted or interfered with by the
 14 external outbreak of the disease, there is no cover.
 15 So that protects the insurer against the impacts of
 16 remote, only remote, outbreaks, because they are not in
 17 the policy area.
 18 How distant the disease is from the relevant policy
 19 area depends on the clause. That is why 1 mile would
 20 ordinarily, of course, be much less of a risk for
 21 insurers. Because in a town like Leicester you have an
 22 outbreak on the eastern side of Leicester, a business on
 23 the western side of Leicester, more than a mile away
 24 from that outbreak might be affected by it because the
 25 Leicester council or the government may lock down

1 Leicester, but no cover because the insurers said no,
 2 the disease has got to be within a mile of your
 3 premises. That is how they are protected, and it does
 4 reduce the risk. And in that example you can see why an
 5 insurer with a 1 mile clause is exposed to less of a
 6 risk than an insurer with a 25-mile clause.
 7 Secondly, of course, there is protection through the
 8 causal test, and this is what we have been debating.
 9 The causal test, whatever it is, has to be satisfied.
 10 We say it is in this case.
 11 Those were the extra submissions that I wanted to
 12 make. There is a little bit more about counterfactuals
 13 that I want to say, if there is time, but we thought it
 14 would probably be safer to move on to the policies and
 15 make sure we got those covered before I return to
 16 anything more if there is time to do so.
 17 So without further ado I will hand over to
 18 Ms Mulcahy, who will now deal with Arch, Argenta and
 19 Zurich, and then I will return for some of the other
 20 policies.
 21 (2.05 pm)
 22 Reply submissions by MS MULCAHY
 23 MS MULCAHY: My Lords, I am going to deal with Arch and
 24 Zurich. Argenta is essentially a dispute as to
 25 causation and you have our submissions on that.

1 In relation to Arch, perhaps we can bring up the
 2 clause so you have it in front of you. It is {B/2/36}.
 3 It is in the top right, the "Government or Local
 4 Authority Action" clause.
 5 Arch doesn't require interruption, so the main cover
 6 dispute relates to the meaning of "prevention of access"
 7 due to the actions or advice of government. Now, this
 8 is a very important issue. There are huge numbers of
 9 businesses being told by Arch, and indeed other
 10 insurers, that even though the government told the
 11 owner, the employees and all the customers not to access
 12 the business, there was no prevention of access because
 13 the business itself was not told to close; or, because
 14 the business could carry on in part, this clause that is
 15 triggered by government action preventing access is not
 16 engaged, because the government has not ordered the
 17 business to close entirely, even though it has ordered
 18 it to close in relation to most of the business carried
 19 out.
 20 We say that that requires nothing short of
 21 a distortion of the meaning of "prevention of access".
 22 So the first question is about whether the movement
 23 restrictions, both in the form of the 16 March statement
 24 by the Prime Minister and regulation 6 of the 26 March
 25 regulations, amount to a prevention of access.

1 Arch accepts that the question is one of prevention
 2 of access to the premises for business use, that is
 3 {Day6/148:1}, and, more generally, that being ordered to
 4 cease a business counts as prevention.
 5 Mr Lockey's main submission was that the only advice
 6 which meets the requirement of preventing access is the
 7 advice given by the Prime Minister on 20 and 23 March
 8 and the regulations that followed, which advised that
 9 certain categories of business premises must be closed.
 10 So the closure of the doors for business use, but
 11 including the ceasing of the business, even if the door
 12 could literally be left unlocked. And he argued that
 13 the instructions relating to social distancing or
 14 working at home and the movement restrictions did not
 15 amount to a prevention of access.
 16 So he says the Prime Minister's instructions on
 17 16 March don't count because they didn't require
 18 businesses to close.
 19 Now, "close" was his gloss on the words "prevention
 20 of access", but he didn't explain, and we would submit
 21 could not explain, why that gloss was required.
 22 Imagine an order that all customers and employees
 23 not attend any pub, or any accountants' office for that
 24 matter. In that scenario we would say there is plainly
 25 prevention of access by all customers and employees.

1 Their access is prevented; they cannot access because of
2 the order or the advice. And it is as much, if not
3 more, a prevention of access than ordering the business
4 to cease, but leaving physical access unimpeded, which
5 Arch itself accepts counts.

6 Arch isn't taking any point that the prohibition
7 must be legally mandatory in some way. It can't,
8 because its clause includes advice. So Arch expressly
9 accepts that if the effect of the advice, if followed,
10 is non-access, then it doesn't matter whether people
11 could ignore the advice. Which was accepting my Lord,
12 Mr Justice Butcher's point on {Day6/148:1}.

13 So for that reason comparisons with force majeure
14 cases, saying that there must be impossibility, are
15 neither here nor there. Advice suffices here, although
16 it would be far from sufficient in a force majeure case.

17 But in any event, we say that line of authority has
18 to be treated with caution, because they are relating to
19 clauses which, if triggered, bring a contract to an end.
20 They have evolved from the common law doctrine of
21 frustration, which requires in essence impossibility;
22 whereas here we are looking at a trigger for an
23 indemnity to the extent that the prevention caused loss,
24 and there is no reason to think that prevention in this
25 scenario, our scenario, would be intended to be as

101

1 strict as in relation to the force majeure context.
2 LORD JUSTICE FLAUX: If you wanted something that was less
3 than impossibility you would use the word "hindrance",
4 which some of the policies do.
5 MS MULCAHY: Some of the policies do, and clearly that is an
6 easier test to satisfy. But we say, nonetheless,
7 "prevention" does not mean physical impossibility, legal
8 impossibility, total prevention of access.
9 LORD JUSTICE FLAUX: The difficulty I have with that
10 submission, that is not in the context of this policy
11 but in the context of ones which do say "prevention or
12 hindrance", is that it renders "hindrance" effectively
13 otiose. And given that some policies include
14 "hindrance" and some don't, it would be unlikely if it
15 was just intended to be surplusage. But anyway, we have
16 got your submission.
17 MS MULCAHY: My Lords, what the clause requires, as we can
18 see, is prevention of access to the premises due to the
19 actions or advice of a government or local authority due
20 to an emergency likely to endanger life, and we say that
21 adding the additional requirement of closure of the
22 specific insured premises is not the language of the
23 clause. Nowhere in the clause is closure mentioned or
24 required. That contrasts with some of the other clauses
25 that are under consideration in this litigation.

102

1 A government action cordoning off a square mile due
2 to a terrorist threat is also not an action which
3 requires or recommends the closure of the premises. The
4 police don't say: you have to close your business. So
5 we say it is unclear why this additional requirement
6 that the advice must recommend closure should apply in
7 the current circumstances.

8 It is prevention of access to the premises which is
9 required, it's not prevention of the business per se.
10 And there is no reason why an instruction to all who
11 would access not to do so cannot constitute a prevention
12 of access. It is directed at preventing, and we would
13 say any reasonable reader would say there has been
14 a prevention, and that that is met by the various
15 government advices and orders, including those on
16 working from home wherever possible.

17 So to briefly address the 16 March statement, that
18 advised all people not to attend pubs, clubs and
19 theatres, so categories 1 and 2, and it mentioned those
20 businesses specifically. We say for those categories
21 there was obviously prevention of access. Some people
22 might not have followed that instruction but, as
23 Mr Lockey rightly accepted, that doesn't matter for the
24 purposes of prevention, it is inherent in the nature of
25 advice.

103

1 But looking more generally as regards other
2 businesses, the 16 March statement involved advice to
3 stop non-essential contact, to stop all unnecessary
4 travel, to work from home where you possibly can, to
5 avoid confined spaces and to have no more mass
6 gatherings. Then the 26 March regulation 6 -- we can
7 perhaps bring it up, it is {J/16/4} -- made it illegal
8 to leave home without reasonable excuse, and those
9 excuses are set out, and they include to obtain basic
10 necessities, access critical public services, and to
11 travel for work where it is not reasonably possible to
12 work or provide services from home, and there are a few
13 other things.

14 So from those dates, we say there was prevention of
15 access to all business premises not falling within those
16 categories, for all owners, employees and customers.

17 Could they access the premises for business
18 purposes? Unless the purpose of the trip, the business
19 trip, fell within those limited categories, then no,
20 they could not. It is that simple. A cordon is
21 a prohibition on movement that prevents access
22 indirectly. But these instructions and regulations went
23 further, because they specified what movement was
24 permitted, and access to most insureds was not included.
25 The permitted uses were specified, but only essential

104

1 purchases and expeditions to seek medical assistance ,
2 et cetera , counted.

3 Just to look at category 5 businesses , Mr Lockey
4 said for those businesses there is no prevention of
5 access to those premises , the premises in question
6 remained fully accessible throughout. And Mr Orr for
7 Zurich said something similar ; he said to the extent
8 that category 5 businesses chose to close their doors ,
9 that was their choice.

10 We would respectfully submit that that is completely
11 divorced from the reality of the situation in which
12 thousands of office blocks in the City and around the
13 country have stood empty, and many still do. How can it
14 be possibly be said that they remained fully accessible ,
15 in circumstances where their usual occupants were not
16 allowed to enter them? This doesn't seem, we would
17 respectfully suggest, like the sensible commercial
18 approach that Arch claims it has taken.

19 So for example, with category businesses like
20 photography studios , where people come to have their
21 photos taken, or financial advisers , where customers may
22 not want to discuss their financial affairs over the
23 phone, they want to go and see their financial adviser ,
24 web designers, high street solicitors , et cetera , we say
25 their customers were prevented from accessing the

105

1 premises, and indeed the employees of the business were
2 prevented from going to work insofar as they could do so
3 from home.

4 So we seek a finding that the 16 March instructions
5 and regulation 6 are capable of amounting to prevention
6 of access , for example, where the business itself
7 provided no essential service . That is contrary to
8 Arch's case, which is that they never can, because they
9 only restrict movement.

10 Turning now to the second issue , which is full or
11 partial prevention, Arch is a policy which doesn't
12 require interruption . It covers increased costs of
13 working, the cost of maintaining the business during the
14 indemnity period. And the indemnity period is the
15 period during which the business results are affected ,
16 and the indemnity is for the amount of lost revenue.

17 We say, in those circumstances there is no reason to
18 do other than apply the ordinary meaning of the words.
19 If access was prevented, by government action or advice,
20 to one entrance or to one section of the employee base,
21 or to one section of the customer base, or to all
22 customers but only for some parts of the business , we
23 say that there was prevention of access.

24 Was it total? No. But was there prevention of
25 access to the premises? We say yes, there was.

106

1 Now, of course, if you simply have one entrance
2 blocked or only some employees or customers prevented
3 from attending, then the lost revenue or the additional
4 cost of working may be small, it may be zero, but the
5 clause is triggered because the government, responding
6 to an emergency likely to endanger life , has still
7 prevented some access; and the fact that the business is
8 still able to operate in part is a matter for
9 quantification of the loss , and insurers will take the
10 benefit at that point.

11 Now, Mr Lockey's position is that if customers can
12 still access the business for something more than
13 de minimis pre- existing trade, there is no prevention .
14 His initial formulation was " significant and
15 substantial ", but he was willing to agree, when pressed,
16 it needed to be "not de minimis".

17 So he is effectively saying to a restaurant with,
18 say, a 5 or 10% take-away business, where there is an
19 order that no customer can attend for the 95% or 90%
20 eat-in trade, that there is no prevention of access.

21 We would submit that that would be met by
22 incredulity by the operators of such businesses . And
23 yes, that might include a business with a substantial
24 take-away business like McDonalds or it might be
25 a family-run Indian restaurant seeking to claim on its

107

1 insurance. But for many urban restaurants there will be
2 some take-away service , for example through
3 organisations like Deliveroo or JustEat, and that means
4 that there will be no cover for businesses in that
5 category, based on Arch's construction .

6 Mr Lockey said he didn't want to deal with
7 category 7 in oral submissions, because Arch only has
8 two churches. Well, on Arch's case there was no
9 prevention of access to any churches, even after the
10 26 March regulations came into effect , because they
11 could still perform funerals , which would not be
12 a de minimis part of a church's business, sadly, far
13 from it. And that is not just important for those two
14 insureds ; what we say is that it chose the
15 uncommerciality of Arch's position .

16 Likewise, he tried to deal with the carve out
17 permission in the regulations for theatres to do remote
18 performances, saying that it was no part of the
19 theatre's business . Why not? The National Theatre Live
20 and many opera houses and theatres do remote
21 transmissions nowadays, it is part of its pre- existing
22 business . Of course we all know the businesses of
23 theatres have been devastated by the lockdown and the
24 regulations , and no one would suggest otherwise, but the
25 logic of Mr Lockey's position is that they can't recover

108

1 because they have a more than de minimis remote
2 transmissions business .
3 We say again, that may be happenstance, but it
4 produces an uncommercial construction . And by saying
5 that prevention must be total , Mr Lockey is saying that
6 the cover is in effect catastrophe insurance only , it
7 requires total interruption ; but there is no indication
8 in the cover of that .

9 He said that if employees of a category 5
10 business -- I think he referred to category 4 , but he
11 was talking about businesses like estate agents ; if they
12 can still attend the office because they can't update
13 the website , for example , from home , then even though no
14 customers can attend , there is no prevention . But as
15 my Lord , Lord Justice Flaux observed ,
16 Herbert Smith Freehills is not Kall Kwik . Attending the
17 office for a limited purpose such as photocopying , it
18 may be a small and very real part of the business , but
19 there has been a prevention of access because all people
20 are being prevented from accessing for most business
21 purposes .

22 Whilst Mr Lockey accepted a test based on
23 fundamental change to the business , we would say there
24 is a fundamental change to your business if you have to
25 drop half your business , or even a real part of it such

109

1 as the café restaurant that can only sell take-aways .
2 So we respectfully invite the court to find that
3 prevention of access under the Arch wording doesn't
4 require total prevention of access ; that any material
5 prevention counts , alternatively any substantial
6 prevention , whether it is of a proportion of the
7 customer base or a portion of the employees or a portion
8 of the business for which people would access the
9 premises . And the fact-sensitive question is whether
10 there was loss resulting from the prevention ; that is
11 when the question of how much work the business was able
12 to carry out remotely comes in .

13 But the question of prevention itself , and what that
14 means , is a threshold cover question . In these unusual
15 circumstances we would invite the court to find that for
16 all businesses access was prevented in some way and for
17 some people .

18 That includes in relation to category 3 , and I will
19 just deal with Mr Gaisman's challenge here . He
20 challenged the FCA to say what restrictions are imposed
21 on category 3 businesses in the 26 March regulations ,
22 and you will recall he went to the explanatory note to
23 the regulations , which I had read out , that say that
24 category 3 businesses are subject to restrictions .

25 Mr Gaisman sought to explain that away as a mistake ,

110

1 but query is it? We agree that the key is in what the
2 regulation themselves say , but they do impose
3 restrictions . Whilst they don't specify express
4 restrictions on category 3 businesses particularly ,
5 which were permitted to remain open , the movement
6 restrictions in regulation 6 indirectly affect
7 category 3 businesses , because they preclude individuals
8 visiting category 3 businesses except insofar as the
9 purpose of the business is to obtain a basic necessity .

10 So my example was you could go to a hardware store
11 to buy a light bulb so you have light , but you can't go
12 to buy something inessential like general DIY materials .
13 Again , if we go over the page in the document that's
14 onscreen , we see there was a prohibition on gatherings
15 in a public place of more than two people in regulation
16 7 , and that would also apply in relation to category 3
17 businesses .

18 So although they are permitted to stay open ,
19 category 3 businesses were subject to restrictions
20 imposed by the regulations . Further , whilst not derived
21 from the regulations themselves , category 3 businesses
22 were subject to restrictions in that they had to comply
23 with the two-metre separation guidances ; they had to
24 install screens , they had to put markings down to
25 separate people , they had to restrict access to those

111

1 customers beyond the number that could be accommodated
2 whilst maintaining the separation . We have all seen and
3 been part of the queues outside supermarkets . All of
4 this would increase the cost of working , which is
5 generally covered by these policies , including Arch , and
6 would reduce the number of customers who could access
7 the business , diminishing revenue .

8 There are no shops that only sell basic necessities
9 and for whom every visit is an essential trip . And Arch
10 and the other insurers don't suggest that is that the
11 case . They all had to limit the number of customers
12 attending , and they would have had vulnerable customers
13 and employees who could not attend . So there would have
14 been custom still , but reduced because of prevention of
15 access , we say .

16 I am going to turn now to --

17 LORD JUSTICE FLAUX: What is the position with food shops?

18 Which remained open throughout and if you wanted to you
19 could visit a food shop . I mean , if you didn't want to ,
20 you could try and order your food online . If you
21 didn't , you would have to go and queue up at --

22 Mr Gaisman obviously went to Waitrose in wherever it is ,
23 in Salisbury or whatever .

24 MS MULCAHY: In his Marigolds , yes .

25 LORD JUSTICE FLAUX: I have great difficulty in seeing that

112

1 as amounting to a prevention of access, rather than
2 a hindrance of use.

3 MS MULCAHY: Food shops are more likely to be in the basic
4 necessity category because they are selling food. But
5 category 3 extends much more broadly than simply --

6 LORD JUSTICE FLAUX: I understand that point, but I am
7 trying to test the width of your submission as to how
8 this can be a prevention of access. Because undoubtedly
9 far fewer people went to food shops than had previously,
10 as a result of either the government's advice or the
11 regulations, just as far fewer people went to hardware
12 shops.

13 MS MULCAHY: What we say is that for the customers who
14 couldn't access the premises, there was a prevention of
15 access. Insofar as employees couldn't be accommodated
16 without two-metre distancing, it is clear when one looks
17 at check-outs that some are closed in order to segregate
18 employees, so there has been a prevention of access.

19 Food shops may well be the least affected in that
20 regard, but we say that there is still prevention of
21 access. And there are many more stores in that
22 category, including hardware stores and so on, where
23 there will be more of a reduction in trade. But, you
24 know, even with food shops, they sell other than
25 necessities, and it is clear that it was illegal to go

113

1 out other than to shop for necessities and the other
2 essential purposes set out in the rule.

3 Turning now to Zurich, and just again to bring its
4 clause up on screen, it is {B/21/51}. I think Mr Orr
5 went to Zurich2, but they are both in the same form
6 substantially so let's just bring one of them up.

7 There we see it at top the "Action of Competent
8 Authorities" clause.

9 We explained in our skeleton and oral opening that
10 the natural meaning of the words in Zurich's clause
11 extend to a disease inside and outside the area, leaving
12 Zurich only with the question of whether the government
13 action followed the danger in the vicinity; a general
14 issue applicable to many insurers, which has already
15 been addressed.

16 Zurich persists in seeking to strain, we would say,
17 respectfully, strain its terms. Although it has now
18 dropped the argument that government is not a civil
19 authority, it is saying a broad disease cannot be
20 a danger because it is not transient and local, even
21 though it is plainly dangerous, and that vicinity must
22 be the immediate vicinity.

23 Now, orally Mr Orr didn't really add to the points
24 he had already made in written submissions, save to put,
25 we would say, an undue amount of emphasis on the

114

1 indefinite article, "a" danger, which we say it doesn't
2 bear.

3 Our case, as you know, is that vicinity doesn't
4 carry any specific proximity limit; it's more a question
5 of whether it has the potential to affect the insured
6 business premises. But if we are wrong about that, all
7 that "vicinity" implies is that the danger must be
8 present locally. It doesn't circumscribe the nature of
9 the danger in any way.

10 Mr Edelman will be addressing the meaning of
11 "vicinity" when he replies on RSA shortly, so I will say
12 no more about that.

13 The only other issue apart from causation, which
14 Mr Edelman has addressed, is prevention of access.
15 Mr Orr contends that prevention must have the force of
16 law. We say that that has no basis in the words
17 actually used. Instructing or ordering people not to go
18 somewhere, we say prevents them accessing that place.

19 One thing that Mr Orr did appear to accept is that
20 where it is reasonably possible to work from home,
21 employees are prevented from accessing the premises.
22 That was {Day7/28:15} to line 19. He said no employees
23 were prevented were accessing their premises for the
24 purposes of work where it was not reasonably possible
25 for those employees to work from home.

115

1 We would say the converse is also right. As the
2 words of regulation 6 show, you would be committing an
3 offence if you went to work if it was possible for you
4 to work from home. So we say their access is prevented.
5 I won't repeat the points I have already made in
6 relation to Arch.

7 In support of the contention that "prevention of
8 access" means physically or legally impossible to
9 access, Mr Orr referred you to two lines of authority.
10 He referred you to the force majeure and frustration
11 cases, and I have already told you why they are not
12 useful here, because they are dealing with a different
13 question.

14 The other line of authority he referred you to are
15 the US cases which are set out in Zurich's skeleton from
16 paragraphs 103 to 105. I said in opening that I would
17 deal with it in reply if Zurich relied on them, and they
18 do.

19 I don't have time to take you to all of them. My
20 short point is that they don't assist the court.
21 Briefly, most of the cases, and I am referring here to
22 Commstop, which is {K/146/1}, Dixson, {K/114/1}, Syufy
23 at {K/81/1}, and Bienville at {K/100/1} are about
24 "prohibits access" clauses.

25 This is a different wording to the clause you are

116

1 construing, and indeed if we could just go to Bienville
 2 at {K/100/1} this actually turned on the difference
 3 between a " prohibition ", which was not found to be the
 4 case by a closure of airports and a cancellation of
 5 flights by the Federal Aviation Administration, and
 6 "prevention".
 7 If we could go to page {K/100/2}. Thankfully, these
 8 are very short decisions. At the top of the second
 9 column, about six lines down it was said that:
 10 "While the FAA's closure of the airports and
 11 cancellation of flights may have prevented many guests
 12 from getting to New Orleans and ultimately to
 13 plaintiff 's hotels, the FAA hardly prohibited access to
 14 the hotels."
 15 So there was a distinction there between
 16 " prohibition " and "prevention". Some of the cases, such
 17 as Abner, {K/113/1}, By Development, which is {K/127/1}
 18 and St Paul Mercury at {K/91/1} are about traffic or
 19 road restrictions, making things more difficult, and
 20 that is an example where you might have hindrance but
 21 not prevention. They make things more difficult to
 22 access the premises but they don't prevent. Our case is
 23 different, it is about prohibitions on particular
 24 people.
 25 I want to refer to two other US cases that Zurich

1 did not refer to, and it is essentially for balance.
 2 I am asked by Mr Orr to let you know that they were
 3 uploaded yesterday. They came to my attention yesterday
 4 morning, so we uploaded them to the system. He may wish
 5 to say something about them. I will deal with them
 6 briefly.
 7 The first is Sloan v Phoenix of Hartford Insurance
 8 Company, at {J/57.2/1}.
 9 This is a case where, due to civil strife, riots,
 10 the government imposed a night-time curfew and closed
 11 all places of amusement in Detroit for eight days. We
 12 can see on page {J/57.2/2}, on the left-hand column,
 13 that the plaintiffs theatres were completely closed.
 14 This is in the middle:
 15 "In compliance the governor's order, plaintiffs '
 16 theatres were completely closed for the first four days
 17 of the period and then opened on a restricted basis the
 18 remaining four days."
 19 The clause, if we go on to the next page {J/57.2/3}
 20 we can see on the top left, second paragraph, covered
 21 interruption due to prohibition of access by civil
 22 authority. The plaintiffs suffered just over an €11,000
 23 net loss overall, and all of that sum was awarded by the
 24 Court of Appeals of Michigan.
 25 If we go over the page again to page {J/57.2/4} we

1 can see that it is stated:
 2 "... one of the perils insured against was riot. a
 3 riot ensued, the governor imposed a curfew, and all
 4 places of amusement were closed, thus preventing access
 5 to the plaintiffs ' place of business. Therefore
 6 plaintiffs suffered a compensable loss under the terms
 7 of the policy."
 8 Now, the opening on a restricted basis, and the
 9 judgment doesn't help with what the details of the
 10 restrictions were, but that was also treated as
 11 a prohibition of access.
 12 That is the reason we draw attention to this case.
 13 The second case is called Datatab v St Paul Fire and
 14 Marine Insurance at {J/57.1/1}. It is a decision of the
 15 US District Court in the Southern District of New York,
 16 which takes in New York City and Manhattan. In this
 17 case the claimant's policy covered aspects of its data
 18 processing business located on the 5th and 6th floors of
 19 a New York City building, and it covered business
 20 interruption loss relating to data processing systems,
 21 including when, as a direct result of a peril insured
 22 against, the premises in which the property is located
 23 is so damaged as to prevent access to such property.
 24 That we can see on page {J/57.1/2}.
 25 There was a watermain break in the basement, which

1 damaged water pumps and rendered the claimant's air
 2 conditioning system inoperative, and that in turn forced
 3 a shutdown of the computers and the data processing
 4 equipment.
 5 It was common ground that the claimant had no
 6 property in the basement, that the water didn't reach
 7 the claimant's offices on the 5th and 6th floors, and
 8 there was no physical damage to any part of the
 9 claimant's data or system.
 10 You will see on that page that it is made clear, it
 11 is in the second column, itemised at (1), (2), (3), (4),
 12 a third of the way down, at (4):
 13 "Physical access to Datatab's equipment was ...
 14 unimpeded."
 15 The cover hinged on the words "premises" and
 16 "access". The defendant argued that since physical
 17 access to the equipment was unimpaired there was no
 18 cover. The claimant in turn contended that "premises"
 19 covered the whole building, and that "access" did not
 20 refer to the ability of a person physically to enter the
 21 computer room on the fifth floor. What it was
 22 contemplating was the ability to utilise the equipment
 23 normally in the operation of the business.
 24 The court held that the claimant's construction was
 25 more reasonable than the defendant's. If we go on to

1 page {J/57.1/3} we will see that towards the top in the
2 left-hand column, at the bottom of that column, having
3 cited that under New York law ambiguities must be
4 resolved against the insurance company and in favour of
5 the insured. It is the paragraph in the middle of the
6 first column that I draw your attention to:

7 "To construe the words as narrowly as St Paul
8 suggests would lead to bizarre consequences. For
9 example, under St Paul's construction of the word
10 'premises', if an explosion or fire totally destroyed
11 the first four floors of the building, without reaching
12 the 5th floor, and thereby causing a total cessation of
13 Datatab's business, the loss would not be covered since
14 the damage would be to the 'premises in which the
15 property is located'. St Paul's interpretation of the
16 word 'access' is equally strained. Obviously, what was
17 relevant and important to Datatab when it bought the St
18 Paul policy was the ability to utilise the computers in
19 its business on a normal basis. Datatab could not have
20 been less interested in whether, following a peril
21 insured against, it had the ability to physically touch
22 a non-functioning mass of metal."

23 So in Datatab it was held there was a prevention of
24 access, where only part of the building had been
25 damaged, where physical access to the claimant's

121

1 business area was unimpeded, and "access" referred to
2 the claimant's ability to use its equipment in its
3 business on a normal basis, and that was prevented
4 because the claimant could no longer do so.

5 We rely on that equally in our case for all
6 categories of business. We say there was a prevention,
7 even if only part of the premises was affected, even
8 where physical access to the business was unimpeded,
9 where the ability to use the business area on a normal
10 basis was prevented because the business owner could no
11 longer do so.

12 We say that a construction of "prevention of access"
13 as being only where access to premises is physically or
14 legally impossible will almost never be satisfied. If
15 you take the oil spill outside a property, someone
16 could, in theory, put on their wellies and wade through
17 it. If you build a 6-foot wall, somebody could erect
18 a ladder and scale it. The key point is that business
19 owners access their premises for the purposes of their
20 business; they access the premises to make money, as
21 defined in the business in the policy. And if they
22 can't access the businesses to make money, they have
23 cover.

24 Here, if the employees and owners of the business
25 had been told they must work from home if they can, we

122

1 say they have been prevented from accessing.

2 The test must be more practical. Can the necessary
3 individuals, both the insured and its employees and
4 customers, get to and into the premises to operate the
5 insured business for remuneration?

6 Just to finally come back to my Lord,
7 Lord Justice Flaux's point in relation to the meaning of
8 "hinder" and "prevent".

9 "Hinder" will include "prevent", but it also has
10 a wider concept, such as impeding or obstructing. So it
11 is not limited to stopping people from attending. It
12 deals, effectively, with making it harder. An example,
13 as I have said, is the roadworks context; they hinder
14 but they don't prevent. That is an example of where
15 there will be hindrance of access but not prevention.

16 My Lords, I am going to pass back now to Mr Edelman
17 to deal with, I believe, Hiscox. Thank you.

18 Reply submissions by MR EDELMAN
19 (2.41 pm)

20 LORD JUSTICE FLAUX: Yes, Mr Edelman.

21 Thank you, Ms Mulcahy.

22 MR EDELMAN: If I can start with RSA. Perhaps if I deal
23 with that first. If we could go to {B/16/16}, please.

24 My Lords will see that is the insuring clause in
25 RSA, and it's under the disease clause, it is a 25-mile

123

1 clause, and those are the provisions that we will be
2 considering.

3 My Lords will see that it covers "loss as a result
4 of" and one submission that Mr Turner said was that if
5 the contractual machinery didn't apply, and you have got
6 our submissions on that, we would get no cover at all.

7 My Lord, the word "loss" is not something that is
8 difficult for a court to calculate. Courts are used to
9 dealing with loss of profits elements for the
10 calculation of damages, and there is no reason why that
11 couldn't apply.

12 The next relevant word which I just want to address
13 in reply is "manifesting itself". We say simply being
14 diagnosable is sufficient. Mr Turner said it requires
15 more than an occurrence of the disease. They say it
16 indicates a requirement that the disease is apparent.
17 We just simply submit that it requires it to be
18 diagnosable. But seeing as we are dealing with
19 government response to the information that it had, as
20 to actual and anticipated apprehended cases, in the
21 sense of reported and then known/unknown cases, this may
22 not be a matter of particular significance.

23 Mr Turner also said that the lockdown was not in any
24 way causative, because he said it was preventative or
25 anticipatory in nature. But, for the reasons we have

124

1 given, the lockdown was, we say, precipitated by the
2 manifestation of the disease, ie actual occurrences and
3 the high R number, in the relevant policy area, and in
4 all the relevant policy areas where the map that we
5 showed you and the spreadsheet showed the disease to be
6 present and apprehended.

7 My Lords, if I can now turn to RSA2 to pick up a few
8 points on that. That is at {B/17/36}, and the critical
9 question here is what the word "vicinity" means. What
10 they apply to, I should say.

11 Mr Turner suggested it was common ground that the
12 emergency needed to be in the vicinity. That is not
13 common ground. There is nothing in RSA2, it is the
14 prevention of access -- number F -- "an emergency likely
15 to endanger life or property in the vicinity".

16 RSA is actually forced, and Mr Turner said this, to
17 put a comma after "emergency" and after "property" to
18 try and limit the cover to a local emergency. That is
19 both unimpressive as a matter of impression from the
20 words used, and not necessary because the alternative
21 interpretation makes perfect sense.

22 Mr Turner, you may remember, gave a detonating --
23 LORD JUSTICE FLAUX: As a matter of normal grammatical
24 construction, if the words "in the vicinity of the
25 premises" were intended to qualify "emergency", it might

125

1 be thought they would appear after them.

2 MR EDELMAN: Exactly.

3 LORD JUSTICE FLAUX: In other words, an emergency in the
4 vicinity of the premises likely to endanger life or
5 property.

6 MR EDELMAN: Yes, my Lord, exactly.

7 Of course, it would then leave out of account, if
8 Mr Turner is right about what "vicinity" means,
9 a narrower scope, it means that there is no cover where
10 the emergency itself has a remote effect from the
11 location of the immediate emergency, where it is
12 something that has more distant effect. But we say
13 it is just a matter of ordinary language and there is
14 perhaps not more to be said about it than that. It
15 doesn't define where the emergency is, and it is
16 sufficient if there is an emergency which endangers life
17 or property in the vicinity of the premises, which is
18 the natural reading.

19 Then there are two points on the exclusion on this.
20 The first is B and Mr Turner made, with respect, the
21 rather valiant submission that the draftsman, having
22 given cover for prevention or hindrance of use or
23 access, decides in the exclusion to take three quarters
24 of that away by the use of the words "access was
25 prevented."

126

1 He says, rather perhaps audaciously, that we failed
2 to deal with this in our reply or skeleton argument.
3 That was primarily because he hadn't pleaded it. In his
4 defence he had actually referred to our having to prove
5 that there was prevention or hindrance of access or use.
6 I just give you the references for that, we don't need
7 to look at it; it is paragraph 49(c)(ii)(1) at
8 {A/12/20}, and also at paragraph 78(a) at {A/12/27}.

9 We weren't alive to that, and we say this is quite
10 obviously just shorthand --

11 MR TURNER: I think Mr Edelman is wrong on the pleading
12 point, but we will come back with a reference.

13 MR EDELMAN: Right. Well, we may have overlooked it. But
14 if we overlooked it, it doesn't make it any better
15 a point. Now we have spotted it -- if we have
16 overlooked it, I will confess. But you will see that --

17 LORD JUSTICE FLAUX: Your point, Mr Edelman, is that it is
18 extremely unlikely that the clause gives with one hand
19 and then takes away 75% with the other.

20 MR EDELMAN: Exactly.

21 LORD JUSTICE FLAUX: Which is effectively what it would
22 mean. Certainly 50%. It takes away hindrance and takes
23 away use.

24 MR EDELMAN: And this is not even a --

25 LORD JUSTICE FLAUX: It is just a slightly idle shorthand,

127

1 and given this is in an exclusion, it is to be construed
2 against the insurer anyway insofar as there is any
3 ambiguity.

4 MR EDELMAN: Exactly.

5 LORD JUSTICE FLAUX: This might be the one place where your
6 contra proferentem principle could arguably apply.

7 MR EDELMAN: There is one other, and it is also RSA. If we
8 can go back to --

9 LORD JUSTICE FLAUX: If that is the one about any amount in
10 excess of 10,000 ...

11 MR EDELMAN: We have three, actually. There is another one.
12 {B/17/36} if we go back that. That is the "any
13 amount in excess of €10,000". Not in this one, it is in
14 the next one, it is in 2.2. Let me get the reference to
15 that. It is {B/18/51}, which has got the same "access
16 to the premises was prevented" point, but it has then
17 also got this "any amount in excess of €10,000". It
18 reads perfectly normally.

19 I was going to say about the prevention of access
20 point, it is not even a Chartbrook point, because it is
21 obvious what the draftsman was doing, it was just is
22 a shorthand, and in E there is simply no obvious error
23 in it. It makes sense. It may not be what they
24 actually subjectively wanted, but it makes perfect sense
25 as grammar there, and it makes perfect sense that there

128

1 should be a very small limit of indemnity for diseases .
 2 We don't dispute it . £10,000, very modest. But
 3 nothing --
 4 LORD JUSTICE FLAUX: Given that the insureds under this
 5 policy have this policy rather than the other policy ,
 6 the fact that their other policy wording was different
 7 is neither here nor there .
 8 MR EDELMAN: Absolutely, my Lord. Absolutely.
 9 Then we perhaps go to the next. I said there were
 10 three, this is back to the third contra proferentem, if
 11 we need it. If we need it. That is {B/19/93} and it is
 12 in RSA3. It is back this exclusion .
 13 Now, curiously, Mr Turner accepts that "disease"
 14 must be excised from the exclusion , but he doesn't
 15 really satisfactorily explain how the exclusion , where
 16 it says "epidemic and disease" in line 2, how "disease"
 17 is excised without "epidemic" going with it . But it
 18 doesn't actually explain how "disease" is excised .
 19 Because the only possible way in which you excise
 20 "disease" from the exclusion is through A or B.
 21 If it is through A, that can only be on the basis
 22 that pollution and/or contamination is a rather
 23 cack-handed cross- reference to the exclusion . It is
 24 a shorthand for all the bits that are in there .
 25 Now, Mr Turner tried to explain that on the basis

1 that the words in capitals "Pollution and/or
 2 Contamination" are a reference to, all in lower case,
 3 "contamination/pollution" in the exclusion . But if that
 4 is right , then it doesn't cover "disease" . It just
 5 doesn't do the trick for him.
 6 And the second subparagraph:
 7 "All other terms and conditions of this policy
 8 remain unaltered".
 9 Well, if that is the route through, in saying,
 10 "Well, this exclusion isn't to override anything else",
 11 then if an epidemic is within the scope of a disease,
 12 which it is, and within the scope of a notifiable
 13 disease, then that must be within the scope of the
 14 policy .
 15 And the policy covers, if we go back to page
 16 {B/19/38}, notifiable disease, which by definition is
 17 something which is capable of being an epidemic.
 18 Now, he does rely on what is said about
 19 interpretation , which is {B/19/86} if we could go
 20 forward to that. Rather curiously, it has not got its
 21 own number but it is dumped into the middle of the
 22 clauses . At the bottom you will see " Interpretation "
 23 and it says:
 24 "The headings are for reference only and should not
 25 be considered when determining the meaning of this

1 policy ."
 2 So we go back to page {B/19/93}. Funnily enough,
 3 Mr Turner was prepared to use it to confirm that these
 4 exclusions don't apply to section 5 and section 6. So
 5 the heading there was plainly intended to be
 6 operative, because it was intended to determine which
 7 sections of the policy the exclusion applied to.
 8 But even putting aside that point, the name of the
 9 clause, albeit the words are reversed, "Contamination or
 10 Pollution" clause is a point of reference in exclusion
 11 (a) bis. So that's all pollution and contamination is
 12 using it as a point of reference .
 13 So that is what we say about the exclusion , and
 14 again it is an exclusion and this is the third instance,
 15 and it is all RSA, where we again can have
 16 contra proferentem, because if one is construing the
 17 disease clause that you saw against this exclusion , it
 18 must have been intended again, consistently with the
 19 other exclusion we saw, that you don't give with one
 20 hand and immediately take away with the other.
 21 My Lord, I think I have said all I need to say about
 22 the use of word "following" . As I said, this is one of
 23 the policies that uses the word "following", so I am not
 24 going to say anything more about that.
 25 Then finally in RSA, if we go to RSA4 and if we go

1 to {B/20/23}, please. Clause 17 on that page, on the
 2 right-hand side, he tried to use the fact that these are
 3 referred to as "covered events" as meaning that somehow
 4 it is contemplating something which is actually an
 5 event. But if one goes back to page {B/20/7} you will
 6 see that the heading for the relevant risks under 2.3 is
 7 "Business Interruption -- Specified Causes."
 8 So although they have used the word "covered event"
 9 for other purposes in the policy , when it comes to
 10 actually identifying the matters they use "Specified
 11 Causes". And you will see in the next one, 2.4, it is
 12 "Cyber Event". So the draftsman knows what he is
 13 dealing with; he knows when it is an event or it is
 14 a cause. So there is nothing in that point at all .
 15 Then on this policy we have the definition of
 16 "Vicinity" on page 35 {B/20/35}. He says we are
 17 ignoring the words -- page 35, please -- in clause 120,
 18 we are ignoring the words "surrounding or adjacent".
 19 We are respecting all of them, because it is
 20 "surrounding or adjacent", and "surrounding" is just
 21 a descriptive word, it means all around it . And that is
 22 what we say is our primary submission on "vicinity", and
 23 that is what we say should be should apply to other
 24 policies as well . But we have dealt with that in
 25 opening and I don't intend to say more about that at

1 this stage.
 2 Then going back to one of the topics covered in this
 3 policy, which is at {B/20/29} on this tab, my Lord,
 4 which is enforced closure.
 5 Now, Mr Turner made one concession, he said it
 6 either is or is legally capable of being enforced. We
 7 take it that what he means by that is that if, for
 8 example, a public authority was to ask a restaurant to
 9 close and the restaurant agreed, knowing that if they
 10 refused the local authority would go back and get an
 11 order, that that is an enforced closure.
 12 But we say it should also apply to measures which
 13 have the effect of closing businesses in whole or in
 14 part, if the actions are targeted at individuals to
 15 prevent them from attending the premises.
 16 In this regard I should perhaps draw my Lords'
 17 attention to the fact that there has been added to the
 18 bundle another French case, judgment handed down a few
 19 days ago, {J/144.1/1}. We don't need to take it up. It
 20 is SA Holding Hoteliere de Paris v SA Albingia.
 21 In essence, a Paris hotel was closed by national
 22 order, but the insurer argued that it was not completely
 23 closed because it stayed open for care givers and hotel
 24 staff; and the French court held that that still
 25 amounted to a closure by the authorities.

1 That is just for your information. Obviously it is
 2 a French case, you place what weight on it you wish.
 3 Now, in relation to this policy which has a number
 4 of perils, if you will remember, there are covers under
 5 the two heads of notifiable disease and other incidents,
 6 and also a prevention of access clause. Mr Turner
 7 concedes that if you have overlapping perils you cannot
 8 play them against each other. That is {Day5/33:1} to
 9 page 34. This, we submit, is a partial recognition of
 10 the validity of our case and we would just like to test
 11 it this way.
 12 What if you have a situation where the insured has
 13 20 premises in 20 different locations across the
 14 country, each of which has a 25-mile radius cover and
 15 they are all covered under a single policy, it all has
 16 the single policy with a 25-mile clause covering all the
 17 insured's properties, and it has 20 of them.
 18 What Mr Turner conceded was if you have overlapping
 19 perils, you can't play them off against each other.
 20 Well, what if, in our situation, you have disease within
 21 each of those 25-mile radiuses, which cover the vast
 22 majority of the country between them, if there is 20
 23 sets it will cover most of the country, is it said --
 24 and this is perhaps harking back to my causation
 25 argument -- that there is cover for none of those 20

1 buildings because for each of them it can be said: well
 2 the other 19, the outbreaks in the radius affecting the
 3 other 19 there would have been a lockdown anyway?
 4 It is perhaps an interesting way of testing
 5 insurers' argument.
 6 My Lords, that is all I wanted to say about RSA.
 7 Can I move on rapidly, I hope, to Hiscox.
 8 The major topic, although it is not the only topic
 9 but the major one I want to deal with is interruption,
 10 because we still remain troubled by Hiscox's rather
 11 extreme and highly restrictive approach to the meaning
 12 of "interruption". Because we say it is such an extreme
 13 approach to the meaning of the word that it does ride
 14 a coach and horses through policyholders' expectations
 15 for cover. And I say that not in the American sense,
 16 but whether there really is anything but the most
 17 extreme situation to cover this.
 18 If I just remind you, we don't need to go there, of
 19 Mr Gaisman's extreme examples, {Day5/148:1} to page 150,
 20 because this all arose -- perhaps we can go back to his
 21 policies -- perhaps I should have done that in the first
 22 place; more haste, less speed -- at {B/6/41}. It is the
 23 "Non-damage denial of access" cover, you can see, number
 24 3. But the preamble is "solely and directly from an
 25 interruption to your activities", and he said that --

1 because he was trying to deal with the fact that the
 2 cover also extends to specified and unspecified
 3 customers, and specified and unspecified suppliers, and
 4 my Lords were taxing him with that, and he said that
 5 there would be interruption if a business had only one
 6 critical customer at the relevant time. So if everybody
 7 was devoted entirely to the needs of one particular
 8 customer at the time of that customer's damage to
 9 property, that's what would arise. And presumably he
 10 would say if you only had one supplier, or one supplier
 11 for a critical component which means that you couldn't
 12 operate without that critical component, then you had
 13 interruption.
 14 Firstly, we submit that is totally unrealistic. But
 15 secondly, it doesn't also deal with the loss of
 16 attraction. He tried to say that that is only providing
 17 cover for a shortfall in income, but it is all prefaced
 18 by the same language. It is all prefaced by an
 19 interruption, caused by insured damage in the vicinity
 20 of the insured premises, resulting in a shortfall of
 21 expected income. So it is all linked to prevention.
 22 And Mr Gaisman simply did not deal with that.
 23 Now, one refuge that he sought to gain was from
 24 a case called Quality Oilfield, it was a Canadian case,
 25 {K/86.1/1}. I did deal with that case in my submission,

1 so I am not going to repeat what I said about that. But
 2 could we go to {K/86.1/1}, please. He cited this case,
 3 and I dealt with it so I am not going to repeat what
 4 I said there, but you will see in the top left-hand
 5 corner there is a flag for it, for negative treatment,
 6 which Mr Gaisman did not draw your attention to, and it
 7 says:
 8 "Distinguished by Archer Daniels Midland Co v Aon
 9 Risk ..."
 10 Perhaps if we go to that case, which we have now
 11 unearthed, and go to Archer Daniels which is --
 12 LORD JUSTICE FLAUX: That is a decision of the Court of
 13 Appeals of the Eighth Circuit by the look of it. The
 14 Court of Appeals of Texas. So this is not a Federal
 15 Court of Appeals.
 16 MR EDELMAN: No, that is not. Let's go to {J/91.1/1}, which
 17 is a federal decision.
 18 LORD JUSTICE FLAUX: Right.
 19 MR EDELMAN: This is applying Minnesota law but this is the
 20 federal decision. Under the heading "Insurance", you
 21 can see from the headnote, it says:
 22 "... triggering ... business interruption, expense
 23 and extra expense coverage ... did not require cessation
 24 of business at insured's plants, but only harm to
 25 insured's business arising from damage to supplier's

137

1 property ..."
 2 Then if we can go forward in the case to page 7
 3 {J/91.1/7}. Then you will see that they cite, in the
 4 right-hand column:
 5 "To support its position that the phrase
 6 'interruption of business' requires a cessation ... Aon
 7 relies primarily on ..."
 8 And then they list all the cases. The court gives
 9 various reasons for not agreeing with them, and you will
 10 see at the bottom of the page is the Quality Oilfield
 11 case which Mr Gaisman relied upon.
 12 If we can go to {J/91.1/8} please:
 13 "The cases cited by both parties demonstrate that
 14 parties to an insurance contract can require a slowdown
 15 or cessation of business before extra expense coverage
 16 applies. The DIC policy, however, does not include such
 17 a requirement with respect to the extra expense coverage
 18 with respect to extra expense coverage ..."
 19 I think we need to go back to page {J/91.1/5} for
 20 the fuller reasoning.
 21 You will see that that is the heading there,
 22 "Business Interruption" and going forward to the next
 23 page {J/91.1/6}, you will see they say:
 24 "An insurance policy is a contract, the terms of
 25 which must be construed in the context of the entire

138

1 contract ... In construing an insurance policy, the
 2 court's overriding concern must be to ascertain the
 3 intent of the parties based on the language of the whole
 4 policy ..."
 5 Unambiguous given its plain language:
 6 "The district court interpreted the phrase
 7 'interruption of business' as applied to the extra
 8 expense coverage ..."
 9 "In our view, the district court's interpretation of
 10 the phrase 'interruption of business' as applied ... is
 11 based on the language of the policy as a whole and
 12 correctly embodies the parties' intent."
 13 The court had held "an interruption to the business
 14 means some harm to the insured's business, including the
 15 ... extra expense that would not have occurred but for
 16 the damage (an insured peril) that caused the problem in
 17 supply."
 18 So that was the decision and what you then saw was
 19 them analysing, after that, all the cases on that. So
 20 they construe it as having a broader meaning.
 21 Mr Gaisman, I think I have mentioned Canadian, this
 22 is the other case, he cited Treport, made submissions
 23 about that. He said all I had to say was that it was
 24 under appeal, and rather dismissively about that. In
 25 fact I had rather more to say about the case, which you

139

1 will remember, but as it so happens yesterday we got the
 2 appeal decision. That is at {J/144.2/1}. This is
 3 perhaps of greater significance. Court of Appeal for
 4 Ontario, Lauwers J giving the judgment, leading judgment
 5 of the court.
 6 If we go to page {J/144.2/25} paragraph 66, remember
 7 this was the wedding venue that had the flooding damage:
 8 "Because the claim for business interruption was not
 9 made out the evidence as found by the trial judge, this
 10 is not a case in which to definitively interpret the
 11 meaning of the expression 'necessary interruption of
 12 business' in the profits endorsement form. However,
 13 I would not want to be taken as necessarily agreeing
 14 with the trial judge that the expression requires
 15 a total cessation of business activity for a period of
 16 time for coverage to arise.
 17 "I make two observations. First, I do not see this
 18 case as substantially different from the case referred
 19 to by the trial judge, EFP Holdings. In that case, the
 20 language of the policy provided coverage where
 21 a business is 'interrupted or interfered with ..."
 22 And you saw the passage he then quotes from that:
 23 "Pitfield J read the language as disjunctive ..."
 24 "Interruption", that is in this case, that the judge
 25 in the Treport case:

140

1 "Interruption' contemplates a break in the
2 continuity of the business. 'Interference'
3 contemplates ..."
4 Sorry, that was in the EFP case.
5 "In this case the trial judge contrasted and relied
6 on the absence of the words 'interfered with' ... in
7 order to hold that the form did not cover the
8 appellant's business interruption claim's."
9 MR JUSTICE BUTCHER: We need to go over to the next page.
10 MR EDELMAN: Sorry. I was reading from my hard copy and
11 I didn't see that. Mr Justice Pitfield was in EFP and
12 that was the statement.
13 The next page, please, page {J/144.2/26}:
14 "In this case the trial judge ... relied on the
15 absence of the words 'interfered with' in the profits
16 endorsement form in order to hold that the form did not
17 cover the appellant's business interruption claim.
18 "As useful as another case might often be to the
19 task of interpretation, the focus must be on the
20 specific language of the profits endorsement form.
21 I point out that the absolute meaning given by the trial
22 judge to 'interruption' is inconsistent with the text of
23 clause 7(f) of the endorsement, which states that 'The
24 insured shall with due diligence do and concur in doing
25 and permit to be done all things which may be reasonably

141

1 practicable to minimise or check any interruption of or
2 interference ... loss' ... The implication in the use of
3 the word 'interference' is that it might suffice to
4 trigger coverage.
5 "Second, on appeal, the insurer argued that there is
6 nothing in the trial judge's decision 'which suggests
7 that an interruption cannot be "partial".' The insurer
8 [in fact it was] put forward the example of an event
9 that shutdown the banquet hall but not the catering
10 business. One could also imagine part of the facility
11 being shut down but [over the page, on 27] not all of
12 it. These examples lead me to doubt the trial judge's
13 interpretation of the profits endorsement form."
14 Now that was obviously a decision reached in
15 context, but you have the same sort of thing here. And
16 it matches our submissions that you can have
17 interruption of part of the business. Really, when one
18 looks at the context in which this appears, and the
19 range of clauses to which it applies, one reaches the
20 conclusion that a far more flexible meaning of the word
21 "interruption" is appropriate.
22 LORD JUSTICE FLAUX: The other clauses, you have referred to
23 loss of attraction, I have referred to specified
24 customers and suppliers provisions, but if you look at
25 one or two of the others, 11, failure in the supply of

142

1 telecommunications or internet services, if there is an
2 interruption in the sense of disruption, it may be very
3 difficult to operate the business if you need your
4 computers, but it doesn't necessarily follow that there
5 has to be a complete cessation.
6 MR EDELMAN: Yes. The thing doesn't necessarily come
7 grinding to a halt. In an office situation, obviously
8 it is very inconvenient when the computers go down.
9 LORD JUSTICE FLAUX: Certainly is.
10 MR EDELMAN: It certainly is. But there are things you can
11 still do. But on Mr Gaisman's approach that would not
12 amount to interruption. So it is a contextual
13 construction. And it doesn't look as though the Court
14 of Appeals is particularly enamoured in that case with
15 the judge's interpretation of the word even in the
16 abstract, in this sort of context, in a business
17 interruption policy. And that also goes to commercial
18 purpose.
19 So it was actually quite significant that the case
20 was on appeal.
21 My Lords, I have seen the time, do you want to take
22 a break there?
23 LORD JUSTICE FLAUX: Yes. My clock says 18 minutes past, so
24 just before half past, please.
25 (3.18 pm)

143

1 (Short break)
2 (3.28 pm)
3 LORD JUSTICE FLAUX: When you are ready, Mr Edelman.
4 MR EDELMAN: Thank you, my Lord.
5 That is all I wanted to say about interruption.
6 Occurrence, which we need to go to, {B/6/42} so we
7 have got that in front of us and we know what we are
8 talking about. "Public authority" clause.
9 You will see it is, under 13(b), an occurrence of
10 any human infectious or contagious disease, and there is
11 a debate about what "occurrence" means. I have alluded
12 to this earlier but I would just like you to look at
13 {J/176/1}. It is very rare that I refer to dictionaries
14 but this is one of those rare occasions. An outbreak.
15 A sudden occurrence. But Mr Gaisman, going back to
16 {B/6/42} he says: oh no no, "occurrence" is looking at
17 some particular thing which must happen in a locality.
18 We say an occurrence in the context, it means an
19 outbreak. It doesn't mean one individual case, it means
20 an outbreak. They have linked this clause to the
21 insured premises, because there has to be an effect on
22 the insured premises. But if they haven't put in
23 a relevant policy area like others have, then they
24 haven't. And they can't get it in by the back door
25 through the word "occurrence".

144

1 Can we just have a look at --

2 LORD JUSTICE FLAUX: The difficulty with the argument here,

3 I mean in a sense it affects both of you, is it says "an

4 occurrence of any human infectious or contagious

5 disease, an outbreak of which must be notified to the

6 local authority". So although you can point

7 your dictionary definition of outbreak as being a sudden

8 occurrence, it suggests that whoever drafted this policy

9 intended the two words to mean something different. An

10 outbreak certainly would seem to me to have a wider

11 connotation than just an occurrence, in context.

12 MR EDELMAN: Yes. Yes, it may do, but it may be -- remember

13 this is dealing with an infectious or contagious

14 disease.

15 LORD JUSTICE FLAUX: Yes.

16 MR EDELMAN: -- that it's encompassing a multitude of

17 situations. Of course it will include the odd case,

18 somebody who has come back from a very exotic location

19 with an obscure but contagious disease and has visited

20 the shop. And that could be an occurrence. But it is

21 also capable of -- but it is also within -- there is no

22 geographic restriction and an occurrence could be

23 a cluster. An occurrence could be lots of clusters. It

24 could more generally be an outbreak.

25 In the context of being used in relation to disease

145

1 it is, we submit, a flexible term, and perhaps

2 intentionally so. It covers an outbreak, but it also

3 covers something which may be a one-off case, and that

4 may be why the word is used. Because it is has got

5 a range of possible things that might happen.

6 Anyway, my Lord, I have only got about ten minutes

7 to go because the interveners have their allocated time,

8 so can I move on to inability to use.

9 Mr Gaisman retreated from his original extreme

10 position that it requires impossibility, conceding that

11 on the facts partial use may amount to inability to use.

12 He didn't concede that it would, just that it may do.

13 We say this is simple. There is an inability to use

14 if it cannot be used in the manner in which it would

15 normally be used for the business' intended aim or

16 purpose.

17 One also needs to bear in mind that there can be

18 partial inability to use and inability to use a part.

19 So those are two different concepts that would be

20 covered.

21 My Lords, if we can move swiftly on to the

22 non-damage denial of access clause, which is on

23 {B/6/41}, the previous page. There we have just got the

24 word "incident". Just one point to note, or two really.

25 "Incident", we say, naturally includes the spread of

146

1 disease into the relevant area or outbreaks of disease

2 in the relevant area; that would be an incident. And

3 Mr Gaisman conceded that the Great Fire of London could

4 be described as an incident, so it doesn't have to be

5 a narrow range matter.

6 Then finally, I think I omitted to deal with one

7 point on public authority. If we can go back to

8 {B/6/42}, the "Public Authority" clause. "Restrictions

9 imposed", just to reiterate that if, as we say, the

10 government measures were measures -- this is the

11 16 March announcement -- which carried sufficient

12 authority and potential legal force, with either an

13 implicit or explicit threat that if it wasn't complied

14 with legal force might have to be applied, then

15 a reasonable observer would regard them as captured by

16 this clause. For example, that is exactly what happened

17 to schools. The schools did close, so the government

18 didn't have to carry out its threat to pass regulations

19 to require it.

20 My Lord, that is all I wanted to say about Hiscox.

21 Other points have been covered either in openings or in

22 other submissions.

23 I have nothing more to say about Amlin or QBE.

24 There is just one short point on Ecclesiastical, and

25 that is an authority Mr Kealey cited, Doleman v Shaw at

147

1 {K/137/1}. If we go to page {K/137/8}, please. Doleman

2 v Shaw.

3 You can see that this was a very different case.

4 This is all to do with the exclusion in the

5 Ecclesiastical policy, but I won't ask you to take it up

6 because we can't look at this at the same time. They

7 say:

8 "The impact of the disclaimer [at 34] on guarantee

9 liability was settled by the House of Lords in the

10 Hindcastle case. The disclaimer terminated the lease

11 ... but that did not affect the liabilities of any other

12 person. Section 178(4)(b) stated that the rights and

13 liabilities of third parties, such as a guarantor, were

14 not to be affected. The liabilities remained, as though

15 the lease had not come to an end, but had continued

16 after the disclaimer.

17 "That is the legal landscape in which the crucial

18 question has to be decided; has 'the liability period'

19 as defined in [the clause] come to an end?"

20 That was a very specific legislative provision which

21 applied directly to the liability in question. A very

22 different situation to that which arises on

23 Ecclesiastical's policy.

24 Finally, at {K/141/1} the C v D case, which was the

25 other authority relied upon by Mr Kealey. You can see

148

1 this is all about construing an offer letter , and the
2 court takes into account the fact that it is being sent
3 in the context of CPR part 36. Again, an immediately
4 applicable context which is readily available to the
5 parties , is directly governing the matter, and again we
6 say a very different sort of legal context to that which
7 Mr Kealey was contemplating.

8 My Lords, I may have to steal just a few minutes
9 from the interveners but that deals with the policies .

10 There was one final matter which I wanted to deal
11 with, which is the inconsistency in the insurers '
12 approach to their counterfactuals . Can I ask you to
13 look at {Day5/45/1} to see what Mr Gaisman says about
14 this . I 'm sorry to come back to this topic but we
15 needed to get the policies done first .

16 That is Day 5, page 45. He says:

17 "The FCA says that ... one must reverse out the
18 disease altogether , and the FCA accuses the insurers of
19 failing to reverse it at all . But as I have said , it is
20 not -- I only speak for Hiscox -- it doesn't matter how
21 often this is said by the FCA, it is still not true. It
22 is not Hiscox's case that we are failing to reverse out
23 the disease . We are not cherry-picking . We are not
24 ignoring the dominoes ... we did make it pretty clear in
25 our skeleton that we are reversing out the disease , but

149

1 only insofar as the disease caused the public authority
2 action, et cetera ."

3 Well, let 's go back to {B/6/42} now. What
4 Mr Gaisman said is that you remove each element insofar
5 as it is part of the chain . We can see what the chain
6 is . So what we need to ask ourselves is: what part of
7 the disease is removed, as he said it is , and what part
8 of the government restriction ?

9 Let's start with the restriction . On the insurers '
10 approach you would remove the government restriction
11 only insofar as it causes an inability to use the
12 insured premises . Then you would remove the disease,
13 but only insofar as the government restriction followed
14 it . Then, inconsistently , the insurers remove the
15 government restriction , not only insofar as it applies
16 to the premises but nationwide .

17 So if one was applying insurers ' approach strictly ,
18 you would remove the restrictions imposed and you would
19 remove the disease . But what do they do? They remove
20 the nationwide restriction , that 's what they actually
21 do, not what their approach says, they actually remove
22 the nationwide restriction , and then actually they
23 remove none of the disease at all , despite what
24 Mr Gaisman says.

25 This appears to be the fundamental approach of the

150

1 insurers . If they were right about the chain, you
2 remove the chain, as I say, you would be removing the
3 restriction on the premises and the disease which caused
4 it . You put all that to one side and then you say: now
5 what is left ? And that affects you.

6 If that had been their case I would understand it .
7 But it isn't . They all want the restriction , they say
8 nationwide restriction -- it is not even consistent --
9 nationwide restriction out, but you still have got all
10 the disease .

11 That demonstrates, in our submission, how misleading
12 it can be to start slicing up this clause into sections
13 and having the quantification of loss by reference to
14 individual elements . You must take everything out . And
15 that actually is what they should be doing, because they
16 espouse a case of taking everything out and then they
17 don't actually do it .

18 My Lords, unless I can help with that aspect any
19 further , I had two or three minutes to get that point
20 in, that is all I wanted to say by way of reply
21 submissions .

22 When the interveners have finished there will just
23 be some final matters which we need to discuss , so
24 I would ask for five minutes at the end just to discuss
25 logistics and so on.

151

1 LORD JUSTICE FLAUX: As long as we finish by 4.30 as
2 indicated .

3 MR EDELMAN: I think the interveners know that I wanted just
4 five minutes at the end for various matters to discuss
5 with my Lords, but not any further submissions .

6 LORD JUSTICE FLAUX: No.

7 MR SALZEDO: My Lords, I must place on the record, given the
8 public nature of this , that in one respect Mr Edelman
9 misstated what I said yesterday in respect of Argenta .
10 It was an important respect . We have submitted
11 a one-page document to your Lordships dealing with it ,
12 which I trust will be published with the rest of the
13 materials on the FCA website in due course .

14 LORD JUSTICE FLAUX: I saw you had sent it . I haven't read
15 it yet .

16 MR EDELMAN: I quoted from the transcript, but that's it .

17 LORD JUSTICE FLAUX: I think there may have been
18 a misunderstanding, I think is what Mr Salzedo is
19 saying, but we will read it and we can read the
20 transcript .

21 MR EDELMAN: The point remains the same whether I misread or
22 misunderstood what he said or not.

23 LORD JUSTICE FLAUX: Understood.

24 MR EDELMAN: If I did, I apologise and withdraw . But the
25 submission I made remains as it stands .

152

1 LORD JUSTICE FLAUX: Whether Mr Salzedo accepted it or not,
 2 your submission is the same. But the issue is whether
 3 he accepted it or not, I think.
 4 MR EDELMAN: Yes.
 5 MR GAISMAN: My Lords, may I just say a word about how we
 6 propose to deal with one new authority referred to in
 7 reply by the FCA. I understand Mr Orr and Mr Kealey
 8 want to, as it were, follow on on that. I am not going
 9 to deal with it now. We want to reply on the Archer
 10 Daniel case, and we can do so in short form in writing
 11 by the end of today. Mr Edelman has indicated
 12 pre-emptively that he doesn't accept that we have
 13 a right of response, or indeed that Zurich had, although
 14 Ms Mulcahy said she didn't mind Zurich exercising that.
 15 So our short document will deal first with the
 16 merits of the FCA's attempt to prevent us from
 17 responding on a new authority, which on any view I must
 18 be entitled to address, and secondly --
 19 LORD JUSTICE FLAUX: Mr Gaisman, unless Mr Edelman wants to
 20 try to dissuade us, I don't need any submissions in
 21 writing about that. If counsel for the claimant refers
 22 to a new authority in reply, which hasn't been
 23 previously referred to, counsel for the defendant is
 24 entitled to respond in relation to it.
 25 MR GAISMAN: That is very helpful, my Lord. The note is

153

1 actually prepared, and if your Lordships would be kind
 2 enough, it is only two and a half pages, your Lordship
 3 will see that the two points are actually interrelated.
 4 It won't take your Lordship long.
 5 LORD JUSTICE FLAUX: Don't worry, we can read another two
 6 and a half pages without too much difficulty.
 7 MR GAISMAN: I expect you can. Thank you.
 8 MR KEALEY: My Lord, it is Gavin Kealey. You will only get
 9 one page from us, cut down from 17, but we decided to
 10 cut it down. Your Lordship will see that it is in
 11 response to the Right Honourable Lord Hoffmann's efforts
 12 in 2011 to talk about causation, and he makes some
 13 observations there which are not entirely right, and in
 14 any event need to be responded to even if half right,
 15 and so we shall be doing that, my Lords, in one page.
 16 LORD JUSTICE FLAUX: Lord Hoffmann has had a not entirely
 17 satisfactory track record in, as it were, extra-judicial
 18 utterings, so I look forward to seeing it in due course,
 19 Mr Kealey.
 20 MR KEALEY: He seems to say that judges have obstinately
 21 refused to apply a two-stage test, and indeed a case in
 22 which he was a judge on the Appellate Committee of the
 23 House of Lords did apply a two-stage test, so a rather
 24 high authority did so and we think that is not a bad
 25 place to start.

154

1 LORD JUSTICE FLAUX: There's a surprise. Right.
 2 MR KEALEY: Thank you, my Lords.
 3 MR ORR: That leaves Zurich, my Lords.
 4 My Lord, Lord Justice Flaux is on mute, I think.
 5 LORD JUSTICE FLAUX: We have lost Mr Justice Butcher
 6 briefly. No, he is here. I think Mr Kealey pushed you
 7 off.
 8 MR ORR: That leaves Zurich, my Lords. We have two
 9 additional US cases to refer to. I can either deal with
 10 them briefly now or we also have a note that we can
 11 provide to your Lordships. It is one and a half pages.
 12 LORD JUSTICE FLAUX: Provide the note, Mr Orr.
 13 MR ORR: I'm obliged my Lord.
 14 MR TURNER: My Lord, could I just provide the reference
 15 which I promised, for what it is worth? I suspect I may
 16 have a sentiment as to what you think it may be worth.
 17 The reference to sub-exclusion (b), although it is not
 18 referred to in terms, it is quoted in paragraph 72 of
 19 our defence {A/12/26}. It is picked up in 78(b) of our
 20 defence, {A/12/27} which deals, and deals only, with the
 21 question of prevention. If, as I understand the
 22 position to be, my learned friends say they did not
 23 appreciate that we were placing reliance on
 24 sub-exclusion (b), then of course I accept that they
 25 didn't appreciate that we were placing reliance on

155

1 sub-exclusion (b).
 2 LORD JUSTICE FLAUX: Thank you, Mr Turner.
 3 Does anybody want to say anything else before I ask
 4 the interveners to make their reply submissions?
 5 Who is going first, Mr Lynch?
 6 (3.48 pm)
 7 Reply submissions by MR LYNCH
 8 MR LYNCH: It is unfortunate we have lost time now with
 9 a hard 4.30 cut off, time was very short as it is.
 10 I hope I will get through the points I would like to
 11 make, but I express some regret at the loss of time.
 12 My Lords, I would like to make one introductory
 13 point and then some short points of detail.
 14 The introductory point is respectfully to make
 15 a request which, understandably, might cause your
 16 Lordships to recoil in horror even more than usual when
 17 listening to me, given the two weeks your Lordships have
 18 had and the number of policies before your Lordships.
 19 But the respectful request on behalf of the Hiscox
 20 interveners is, with regret, for your Lordships
 21 carefully to read the Hiscox policies, and in particular
 22 to read the business interruption sections in full
 23 detail.
 24 I make this request, which I will come on to
 25 demonstrate why, because otherwise important points

156

1 could be missed, and a number of my learned friend
 2 Mr Gaisman's points will, with respect, otherwise appear
 3 to have more impact than they in fact do.
 4 In a rare moment of agreement, however, I note that
 5 Mr Gaisman has also, and more eloquently, invited your
 6 Lordships to read the policies in full.
 7 Please could I invite your Lordships to take up your
 8 hard copies of the Hiscox policies, in particular Hiscox
 9 policy 1, and if I could please direct your Lordships to
 10 the various references.
 11 The first point I would like to address and the
 12 first point of detail is the meaning of "interruption"
 13 and "inability to use". Now, this has been covered by
 14 Mr Edelman, and to an extent I use this point as
 15 a vehicle to demonstrate the importance of reviewing the
 16 full policy, and in particular the business interruption
 17 wording.
 18 Please could we go to {B/6/41}. That is a passage
 19 with which your Lordships will now be perhaps familiar,
 20 perhaps sick of the sight of some of these wordings to
 21 an extent, but here we are, and the heading "What is
 22 covered":
 23 "We will insure you for your financial losses and
 24 other items specified in the schedule, resulting solely
 25 and directly from an interruption to your activities

157

1 caused by ..."
 2 Your Lordships are familiar with that, and
 3 Mr Gaisman on Day 5, page 142, line 24, {Day5/142:24}
 4 argued that the meaning of "interruption" is very
 5 narrow, it means cessation or stop, ie a form of
 6 prevention, ie full prevention from operating the
 7 business. But please now turn to {B/6/45}, and in the
 8 middle of the page your Lordships will see "Your
 9 obligations", and immediately below "Your obligations":
 10 "If any damage occurs: We will not make any payment
 11 under this section unless you notify us promptly of any
 12 damage or event which might prevent or hinder you from
 13 carrying on your activities."
 14 Now, I would stress, obviously, "prevent or hinder".
 15 That notification requirement only makes sense if
 16 "interruption" means both total cessation and something
 17 less, hinder. Otherwise insurers would not care about
 18 "hinder" and would only care about "prevent".
 19 That is one example of how a careful and detailed
 20 review of the policies brings out these kinds of points.
 21 I will give some other reference but I will do so
 22 briefly, not least because time is short.
 23 On the same page, please see the "Accounts records"
 24 and "Backing up electronic data" obligations. It is our
 25 submission that these also make sense if the policy

158

1 envisages both a business which has ceased and also
 2 a continuing business which has been interrupted in
 3 a sense lesser than fully ceased.
 4 Please also see for future reference {B/6/40}. We
 5 note at the very top:
 6 "Please read the schedule to see if your loss of
 7 income, loss of gross profit, increased costs of
 8 working or additional increased costs of working are
 9 covered ..."
 10 Your Lordships, just to flag for future reference
 11 rather than now, because it is too detailed to go
 12 through with the time we have, the definitions of
 13 "Additional increased costs of working", "Alternative
 14 hire costs", "Increased costs of working" and "Indemnity
 15 period".
 16 Now Mr Gaisman addressed various of these in his
 17 oral submissions, for example, Day 5, page 169, line 21,
 18 {Day5/169:21} but, carefully reviewed and properly
 19 construed, these terms are only consistent with
 20 "interruption" meaning both the complete cessation and
 21 also something lesser.
 22 Please then see page {B/6/44}, and the "How much we
 23 will pay" heading, and in particular "Loss of income"
 24 and "Loss of gross profits". Just going straight to
 25 "Loss of income", it provides in relevant parts:

159

1 "The difference between your actual income during
 2 the indemnity period and the income it is estimated you
 3 would have earned ..."
 4 "Loss of gross profit" provides in relevant parts:
 5 "The sum produced by applying the rate of gross
 6 profit to any reduction in income during the indemnity
 7 period ..."
 8 Those are, in our submission, only consistent with
 9 "interruption" meaning something less than full
 10 cessation, or at least encompassing both full cessation
 11 and something lesser.
 12 If we then please look at page {B/6/41}, and we see
 13 clause 2 and the wording:
 14 "Insured damage in the vicinity ... which prevents
 15 or hinders ..."
 16 We then see, and my Lord, Lord Justice Flaux has
 17 already made this point today, that see clauses 6 to 9
 18 and over the page 15, and the kinds of impact that
 19 interruption in those circumstances might have, for
 20 example, at clause 7, and my Lord, Lord Justice Flaux
 21 has already made reference to clause 11.
 22 Now, my learned friend Mr Gaisman says there is this
 23 pesky clause 5 which refers to "shortfall", and that
 24 should just be moved and that is an answer. Well,
 25 another answer is that clause 5 and the reference to

160

1 "shortfall" is completely consistent with the other
 2 clauses which we have seen, which do not require
 3 "interruption" to mean full cessation. Clause 5 stays
 4 where it is.
 5 Please consider the wording of clause 13 and "your
 6 inability to use" in that context. The wording means:
 7 your inability to use to the extent of that inability to
 8 use. It need not be a complete inability to use, it may
 9 be partial and it will depend on the facts being
 10 a matter of fact and degree.
 11 My learned friend Mr Edelman has taken your
 12 Lordships to the Archer Daniels case, we don't need to
 13 go to that now, but a point I would make goes beyond the
 14 authorities, which is that for present purposes, in the
 15 context of this policy the words "interruption" and
 16 "inability to use" are not really matters for authority
 17 at all. They are words to be given their ordinary and
 18 natural meaning, which meaning also makes sense in
 19 context on a full review of the policy wording. And the
 20 danger is to put too much pressure on individual words,
 21 because individually those words can mean anything, and
 22 that is the difficulty with Hiscox's argument.
 23 Now my second point to move on to is "occurrence of
 24 disease". Again -- sorry, if you will excuse me, in
 25 fact could I just give your Lordships a couple of very

1 quick references also on interruption. Please could
 2 I refer to the statements of Mr Turner for RSA
 3 {Day4/150:1} to line 8, and I will just put that on the
 4 transcript, and also Argenta's defence, paragraphs 58
 5 and 59. I won't go to those now, because of shortness
 6 of time.
 7 My second point of detail is the "occurrence of
 8 disease" point. If we could go, please, to {B/6/42} at
 9 clause 13. Now, in response to Mr Gaisman on this
 10 issue, for example, {Day5/51:8} and page {Day5/102:11},
 11 and in particular in response to a point made by
 12 my Lord, Lord Justice Flaux just now, [draft] transcript
 13 page 141, line 3, which is the question about the
 14 difference between "occurrence" and "outbreak". My
 15 respectful submission is that the clause gives the
 16 answer, and the key point is this: "infectious" means
 17 liable to be transmitted to people, organisms,
 18 et cetera, through the environment; "Contagious" means
 19 can be caught by touching someone who has the disease or
 20 a piece of infected clothing. The wording expressly
 21 addresses both, and "outbreak" expressly envisages both.
 22 Now, Hiscox made submissions relating to an outbreak
 23 of Legionnaires', presumably because that is linked to
 24 a specific location. For example, in response to
 25 a point made by my Lord, Mr Justice Butcher at

1 {Day5/57:5} and later {Day5/135:20}, that Legionnaires'
 2 is an infectious disease, and we are dealing on our
 3 facts with a contagious disease. The policy expressly
 4 covers both.
 5 Now, as Mr Edelman said, there must be some
 6 flexibility in the meaning of "outbreak" and the word
 7 "occurrence" here. Yes, there must be. Because those
 8 words must envisage both infectious and contagious
 9 diseases.
 10 My learned friend Mr Gaisman's submissions in
 11 relation to "an occurrence" must be seen also in the
 12 context of a contagious disease, ie one which may be
 13 transmitted, unlike Legionnaires', from person to
 14 person. Almost by definition an "occurrence" of
 15 a contagious disease cannot simply be in the context of
 16 a single case; someone will always have caught it from
 17 someone else.
 18 It is easy to say that the public authority would
 19 instantly close premises if there was a source of
 20 infection within the premises, see for example
 21 Legionnaires', but contagious diseases are fundamentally
 22 different, and one cannot readily identify and isolate
 23 the local source of a contagious disease. But the
 24 answer is that the clause envisages that. An outbreak
 25 of a contagious disease is likely to have spread beyond,

1 and quite possibly very far beyond, the premises. It
 2 could have been caused by someone passing through only
 3 briefly on their way to infect others, possibly miles
 4 away.
 5 Notably on the issue of the meaning of "occurrence",
 6 Hiscox argues at paragraph 242 of its skeleton,
 7 {1/13/81} that the Hiscox1 covers are local or specific
 8 to the insured. This is important. We would agree that
 9 the various covers are specific to the insured in the
 10 broadest sense. They are the insured. But that
 11 limitation is provided by the main part of clause 13 at
 12 {B/6/42} by the stem. That is the point my learned
 13 friend Mr Edelman made earlier today. But that is
 14 a sufficient limit on the clause, particularly in the
 15 context of a contagious disease, which is likely not to
 16 be local to the insured, or certainly well capable of
 17 not being local to the insured.
 18 Now, looking at clause 13 yet again, your Lordships
 19 will note that there is localising wording in clauses
 20 (c) and (e). There is not in clause (b). But that
 21 makes sense, because we are talking about infectious and
 22 contagious diseases. The answer is in the clause.
 23 If we then go back, please, one page to {B/6/41}, we
 24 see, for example, clauses 6 to 9 also make clear that
 25 the underlying event need not be specific or local to

1 the insured; but the cover is specific to the insured,
2 as it must be, because of the stem wording. But the
3 underlying events at, for example, clause 7, have
4 nothing physically or locally to do, or specifically to
5 do, with the insured other than the impact. And that's
6 consistent throughout a number of these clauses, not
7 just clause 13.

8 Finally on the meaning of "occurrence", there is the
9 alleged non-points, {Day 5/115:23}, about how Hiscox4
10 has a 1 mile restriction and a point of distinction with
11 Hiscox1 to 3 and the unrestricted wording and what that
12 means. As we understand the figures, that non-point
13 accounts for 89% of Hiscox policyholders. We see
14 {1/13/22} paragraph 60, that there are roughly 31,000
15 policyholders with the relevant wording, and
16 paragraph 65 on {1/13/23} there are only 3,536
17 policyholders with the 1 mile restriction. So in terms
18 of numbers it is important.

19 We know Hiscox could have included some form of
20 localising restriction, as they did expressly in two
21 subclauses of the public authority clause itself, in the
22 NDDA clause, the denial of access clause and so on, on
23 the page we are on.

24 One can see, looking at the public authority clause
25 in Hiscox1, 2 and 3, that there is no such requirement.

165

1 This is not a non-point at all.

2 There is a further point, which is again a point of
3 detail, at page {B/6/44}, at the bottom, we see the
4 "Business trends" clause. It is a point that we don't
5 have time to get into properly, I just flag it for
6 future reference. The "Business trends" clause, which
7 then goes over the page, and if we could please go over
8 the page to {B/6/45}, we will see at the very top, the
9 first full paragraph, it is only a line and one word:

10 "Your schedule will show if business trends cover
11 applies and the additional percentage amount."

12 So in respect of the Hiscox Interveners, none of
13 them has marked in their schedule the business trends
14 cover applies, and again that is a point of distinction
15 across the policies. We address the 1 mile restriction
16 in our skeleton, we have addressed it in oral opening,
17 and the distinction between the words is obvious.

18 As your Lordships have rightly pointed out on
19 a number of occasions, you are not in fact being asked
20 to rule on the case of the century on causation, but
21 instead to set out some principles on fairly
22 straightforward wordings to be applied in the light of
23 government restrictions following often outbreak of
24 contagious disease. Nothing more and nothing less. If,
25 contrary to what the FCA has explained, and in response

166

1 to Mr Gaisman {Day5/76:10} to line 16, if the
2 circumstances which have arisen were completely
3 unprecedented and unpredicted, there is nothing unusual
4 about the court dealing with an unexpected event and the
5 application of contractual terms.

6 If we could go to {K/178/57}, please. We are here
7 partway through the judgment of my Lord,
8 Lord Justice Leggatt in the Equitas case, and we see at
9 159, picking it up just below D:

10 "The court's task is nevertheless to consider how
11 reasonable parties should be taken to have intended the
12 contract to work in the circumstances which have fact
13 arisen. As Lord Justice Chadwick explained in Bromarin
14 AB v IMD Investments Ltd, in this type of case:

15 "The task of the court is to decide, in the light
16 of the agreement that the parties made, what they must
17 have been taken to have intended in relation to the
18 event ... which they did not contemplate. That is, of
19 course, an artificial exercise, because it requires
20 there to be attributed to the parties an intention which
21 they did not have (as a matter of fact) because they did
22 not appreciate the problem which needed to be addressed.
23 But it is an exercise which the courts have been willing
24 to undertake for as long as commercial contracts have
25 come before them for construction."

167

1 Now, on the facts of our case --

2 LORD JUSTICE FLAUX: It is just an application of principles
3 of objective -- the court is ascertaining the objective
4 intentions of the parties, rather than the subjective
5 intentions of the parties.

6 MR LYNCH: Your Lordship is absolutely right. But that is
7 crucially important when bearing in mind Hiscox's
8 arguments, where they say: look at the wording and it
9 doesn't apply. Wrong. Look at the wording and construe
10 it objectively; and if it applies in the present
11 circumstances, it applies. But saying, well, it can't
12 have been intended that something like this was covered,
13 puts it the wrong way round. That's the crucial point
14 here, and the crucial point about starting and, in
15 a sense, ending with the policy wording.

16 My final point of detail is to draw a distinction
17 between the Hiscox interveners and other insureds to an
18 extent.

19 Many or most of the Hiscox Interveners, as noted in
20 our skeleton, for example paragraphs 4 and 5 on {1/3/3}
21 to 4, many of the Hiscox Interveners (1) have no
22 geographical limitation on their wording, (2) have no
23 trends clause, (3) the majority have little or no
24 pre-restriction loss, and (4) all of them emphasise
25 their claim under the public authority clause alone.

168

1 Now, just coming to one final point, one notes how
 2 many times the Fairchild Enclave has been mentioned, and
 3 this was addressed in part today, for example,
 4 Mr Gaisman {Day5/47:15} and line 21. Presuming this has
 5 been done to create the impression that if the FCA is
 6 right on causation, it is tantamount to putting these
 7 claims in the same extreme category as the Fairchild
 8 Enclave. These claims are a million miles away from
 9 that. The issue in this case is the proper construction
 10 and application of the policy wordings, applying a
 11 traditional approach to the law. And Mr Edelman has
 12 addressed you on causation earlier today.

13 But the point I would stress here, in conclusion, is
 14 that here we have real claims for real policyholders
 15 with real livelihoods and real families to support, who
 16 suffered loss as a result of government imposed
 17 restrictions, who quite understand their claims will
 18 have to be adjusted; but it cannot be right that the
 19 sort of convoluted counterfactual analysis has to be run
 20 on each of these claims on basic, simple, low level BI
 21 cover. These are simple claims under simple wordings,
 22 and with properly construed application of the wordings
 23 the policy should respond.

24 Unless I can help your Lordships further, those are
 25 our summarised points in reply.

1 LORD JUSTICE FLAUX: No, thank you very much, Mr Lynch, that
 2 is very helpful.

3 MR LYNCH: Thank you.

4 Now, I think we had a message Mr Edey couldn't be
 5 here, so Ms Jones or Ms Higgs, are you responding?

6 MS HIGGS: My Lord, I am. Can you hear me?

7 LORD JUSTICE FLAUX: I can hear you. I can't see you yet.

8 I can see you now.

9 (4.09 pm)

10 Reply submissions by MS HIGGS

11 MS HIGGS: My Lords, I am addressing the QBE wordings and
 12 Ms Jones is addressing the RSA4 wording. Mr Edey sends
 13 his apologies to the court.

14 My Lords, we are very conscious we are the Tail End
 15 Charlies at the end of a very long day and very long two
 16 weeks and it might well be thought that we have nothing
 17 useful to add, but despite that, my Lords, I have no
 18 doubt that you will not lose sight of the importance of
 19 these points to our clients.

20 My Lords, because time is very short indeed, I am
 21 going to give you only documents references and go only
 22 to the key documents.

23 My Lords, I start by responding to Mr Howard's
 24 submissions on construction and, taking his
 25 old-fashioned approach, I do so by looking at the policy

1 wording.

2 Could I ask you please to have probably hard copy
 3 bundle B is easiest, and the QBE1 policy wording is at
 4 {B/13/1}. If we could have up on the screen first of
 5 all {B/13/27}, and this is the start of the "Business
 6 interruption section".

7 My Lords, clause 7.1.1 is the property damage
 8 business insuring clause, and I draw your Lordships'
 9 attention to the fact that that clause provides cover
 10 for "loss caused by the interruption of or interference
 11 with the business resulting directly from damage to
 12 property".

13 My Lords, if we could go forward, please, to page
 14 {B/13/31}. This is the additional disease clause which
 15 we are interested in. If we could go forward to
 16 page 31. My Lord, the clause 7.3.9, which your
 17 Lordships have seen now many times, the agreement to
 18 indemnify the insured for:

19 "... interruption or interference with the business
 20 arising from any human infectious or human contagious
 21 disease, an outbreak of which the local authority has
 22 stipulated shall be notified to them, manifested by any
 23 person whilst in the premises or within a 25-mile radius
 24 of it."

25 My Lord, I would then like to show you the

1 exclusions which apply and which are specific to the
 2 business interruption section.

3 If we could turn over the page to page {B/13/32}.
 4 At the bottom of the page one sees the limitations and
 5 exclusions at section 7.4.

6 You will note there, my Lord, that these are in
 7 addition to the limitations and exclusions in the
 8 property related exclusions and the general exclusions.
 9 In other words, they are specific to the BI cover being
 10 provided.

11 If we could turn over the page, please, to page
 12 {B/13/33}, and to exclusion 7.4.3. We have a clause
 13 headed "Off Premises Damage".

14 Just for your note, this policy provides that
 15 headings aren't part of the policy and don't provide an
 16 aid to construction. But we have there an exclusion:

17 "Any loss caused by acts of any civil, government or
 18 military authority caused by or following ..."

19 And then, my Lords, one has a series of perils, all
 20 of which it will be obvious could have widespread
 21 impact.

22 But, my Lord, one does not have there human
 23 infectious or human contagious diseases.

24 My Lords, as has been explained and you have been
 25 shown the regulations, and I will not go over them

1 again, the point of a disease being designated as
2 a notifiable disease is that it is then required to be
3 notified to the local authority, and the local authority
4 is obliged to notify the Health Protection Agency.

5 The purpose of notifications is inter alia for
6 providing a public health response to the incidence or
7 spread of infection.

8 So, my Lords, in this policy there is BI cover for
9 interruption arising from notifiable diseases. Although
10 there is a specific exclusion in the BI section for acts
11 of a public authority caused by or following far
12 reaching perils, that does not exclude loss caused by
13 acts of the governmental authorities following
14 notifiable diseases.

15 Your Lordships do not need me to remind them that in
16 order to discern the ambit of cover the court considers
17 the perils insured against construed together with the
18 exclusions.

19 My Lord, that is Lord Justice Christopher Clarke in
20 *Atlas Navios* at paragraph 34. That is {J/130/1}. To
21 similar effect Lord Hodge in *Impact Funding* at
22 paragraph 7, and for good measure Mr MacDonald Eggers
23 sitting at a High Court Judge in *Crowden*, which is
24 {J/135/1} at paragraphs 60 and 65.

25 My Lords, we say that this exclusion is important

173

1 when construing the ambit of cover provided by
2 clause 7.3.9, and it is important when seeking to give
3 effect to the parties' intentions when approaching the
4 issue of causation.

5 My Lord, one other short point on construction.
6 Mr Kealey referred repeatedly to the disease clauses as
7 extensions to extensions. Mr Gaisman referred to them
8 as adjuncts to adjuncts. Mr Howard said that this cover
9 is just an extension to property cover.

10 Now to the extent that it might be thought that
11 those characterisations buttress Mr Howard's submission
12 that it would be very surprising to find all-singing
13 all-dancing pandemic cover buried away in this clause,
14 I would just remind your Lordships that the QBE policies
15 are combined insurance policies. They provide a number
16 of different insurance covers.

17 I will not go to it, but for your note the
18 "Contents" page is at {B/13/2} and one sees 16 different
19 heads of cover. The insured selects which covers
20 it purchases. For many of my clients BI cover is one of
21 the few covers they purchase because of its importance.

22 My Lord, in QBE3 the extensions within the BI
23 section are not automatic. They are optional. Again
24 the insured purchases the ones that it wants. In my
25 case many of my insureds purchase the disease extension

174

1 and not other extensions because that is the cover it
2 wanted.

3 Your Lordship should not approach, please, these
4 clauses on the assumption that they are add-ons,
5 extensions to extensions, or adjuncts.

6 My Lords, the next point very quickly is the proper
7 identification of the insured peril. You have Mr Edey's
8 submissions that we say that the interruption and
9 interference arising from the notifiable disease is
10 properly regarded as the insured peril.

11 Mr Howard dealt with Mr Edey's submission yesterday.
12 Initially he suggested that we said that loss was part
13 of the insured peril and that it was difficult to deal
14 with an argument that was so plainly wrong. That is
15 because that is not our argument, my Lord. Our argument
16 is that the insured peril starts with the interruption
17 or the interference.

18 We note, my Lord, that that is Mr Gaisman's
19 analysis, and it was accepted by Mr Orr for Zurich
20 yesterday. That is {Day7/8:1}.

21 The significance of that, my Lord, is that the
22 proximate cause test, the requirement for proximate
23 causation comes in at the stage between loss and insured
24 peril.

25 We accept, and we have always accepted, that we must

175

1 show proximate cause at that stage. But, my Lord, the
2 question of what the causal connection is,
3 intra-insuring clause, to use Mr Orr's phrase, is
4 a question of the words used by the parties.

5 My Lords, in his skeleton argument Mr Howard said
6 that our case that the language used within the insured
7 peril in our clauses was so without merit that he didn't
8 even address it yesterday.

9 My Lords, we say that in these policies there is
10 a distinction being drawn between the words "resulting
11 directly from" in the insuring clause that I showed you,
12 clause 7.1.1, and between the disease clause which
13 I have shown you, clause 7.3.9.

14 My Lords, we say the fact that an infectious disease
15 or contagious disease will itself never be the immediate
16 cause or the direct cause of interruption to or
17 interference with business is consistent with a less
18 direct causal link being required.

19 My Lords, I don't have time to get into the cases on
20 "arising from". We have set them out in our skeleton.
21 That was paragraph 1433. Mr Edey asks you to look at
22 Cultural Foundation.

23 The only other case that I am going to ask you to
24 look at, please, my Lords, is *Euro Pools v RSA*, which is
25 the Court of Appeal last year. It is {J/142.1/1}. In

176

1 that case Lord Justice Males said that the words
2 "arising from" require some causal link, but that this
3 is not a particularly demanding test of causation.

4 We make the same points about "in consequence of"
5 and the distinction between "in consequence of" and
6 "directly resulting from". I don't have time to go to
7 that.

8 But, my Lords, what we say is that even if your
9 Lordships conclude that the correct causation required
10 within the insuring peril is proximate causation, then
11 you apply that test having regard to and in order to
12 give effect to the parties' intentions.

13 These QBE policies do not evince an intention to
14 provide cover for interruption caused solely by disease
15 within the policy area, nor to preclude cover where
16 there is a governmental response to a contagious disease
17 manifest in the relevant policy area.

18 My Lords, we say, turning to causation, whatever
19 causative connection is required it is satisfied. That
20 is because the interference and interruption to the
21 insured's business as a result of the government
22 measures from 16 March onwards, including most
23 importantly the closure measures from 20 March onwards,
24 was plainly sufficiently causally connected to the
25 disease in the policy area.

177

1 My Lords, there have been various submissions from
2 insurers over the last six days that the FCA have
3 effectively conceded that the local occurrences were not
4 a proximate cause.

5 My Lords, that is not the case. I don't have time
6 to take your Lordship to all the references. Your
7 Lordships will read the pleadings for themselves. When
8 you do could I ask you, my Lords, please to pay
9 particular attention to paragraphs 53.1, 65, and
10 paragraph 68 of the particulars of claim. I ask you
11 please to pay attention to paragraph 822 of the FCA's
12 skeleton argument. Could we please get that page up on
13 the screen, which is {1/1/267}.

14 If you could note please in 822 the FCA's case as
15 to, and in particular the final line:

16 "... by further alternative the local outbreak was
17 a proximate and 'but for' cause of the interruption or
18 interference ..."

19 My Lords, there are many other references but I am
20 afraid I don't have time to give them all to your
21 Lordships' now.

22 Yesterday Mr Orr submitted that the FCA had not
23 discharged its burden on behalf of any policyholders
24 that there was any -- it had not demonstrated any
25 meaningful causal connection on the Agreed Facts between

178

1 the local disease and the national response from
2 16 March onwards. He gave several reasons and they
3 included, and I paraphrase and summarise, that the
4 primary concern was to prevent the NHS being
5 overwhelmed.

6 My Lord, your Lordships must not be seduced into the
7 idea that the NHS is some sort of amorphous beast
8 separate and distinct from the local hospitals. The
9 concern was to prevent the local hospitals becoming
10 overwhelmed with cases as a result of cases throughout
11 the country.

12 My Lord, Mr Edelman showed your Lordships this
13 morning the maps demonstrating the local incidents
14 throughout the country. He took you through the SAGE
15 minutes, and we endorse everything said by Mr Edelman
16 this morning.

17 Could I ask you, please, to read those SAGE minutes
18 carefully. Could I please give you two further
19 references to those that Mr Edelman gave you earlier.
20 The first is to the government's Coronavirus Action Plan
21 on 3 March. That is at {C/20/60}. I draw
22 your Lordships' attention in particular, please, to
23 paragraph 3.8. Could we just get that up on the screen,
24 which is {C/2/69}.

25 This is what the government said it was going to do

179

1 at 3.8:

2 "The different phases, types and scale of actions
3 depends upon how the course of the outbreak unfolds over
4 time. We monitor local, national and international data
5 continuously to model what might happen next over the
6 immediate and longer terms."

7 My Lords, that is what the government did and that
8 is why they imposed the national restrictions on
9 16 March.

10 My Lords, I see that the time is six minutes before
11 we are due to close. Ms Jones has submissions she needs
12 to make on behalf of RSA4. There are further
13 submissions, my Lords, that I wish to make to your
14 Lordships, but in the light of my Lord,
15 Lord Justice Flaux's indication I should raise now the
16 timing.

17 LORD JUSTICE FLAUX: The parties agreed to divide up the
18 time in the way in which they did, Ms Higgs.

19 MS HIGGS: My Lord, the only point I would make is that the
20 interveners lost ten minutes, which out of a total
21 allotment of 22 minutes, or whatever we had, was a
22 significant ...

23 LORD JUSTICE FLAUX: We will give you permission to put in
24 anything else you wish to put in in writing limited to
25 no more than 4 pages, to be received by the court by

180

1 4.00 pm tomorrow afternoon at the latest .
 2 MS HIGGS: My Lord, on that note then I am going to make one
 3 final --
 4 LORD JUSTICE FLAUX: Which covers the point, frankly.
 5 MS HIGGS: My Lord, I am grateful.
 6 On that note I will make one final point before
 7 I hand over to Ms Jones. That is for the avoidance of
 8 any doubt we do say that cases within a 1 square mile
 9 radius did contribute to the government response, or may
 10 have done. I want to give your Lordships one example.
 11 It is paragraph 1235 of our skeleton argument. That is
 12 {1/2/33}. It is the Dixon Hotel, my Lords. It is one
 13 of my clients. It is in Central London with a 1 mile
 14 radius wording. There is a map showing its location at
 15 {1/2/53}. It is in Southwark. By 21 March Southwark
 16 had more reported cases than any other London borough.
 17 So we don't accept, my Lords, that cases within
 18 a 1 mile area did not constitute a significant
 19 contribution .
 20 My Lords, I will then hand over to Ms Jones because
 21 otherwise she is not going to have any time to make
 22 submissions on behalf of her clients .
 23 LORD JUSTICE FLAUX: Thank you, Ms Higgs.
 24 (4.26 pm)
 25

181

1 Reply submissions by MS JONES
 2 MS JONES: My Lords, in relation to RSA4, RSA's oral
 3 submissions placed heavy reliance on the definition of
 4 "Covered Events", which is at {B/20/23}.
 5 The argument was that because of this RSA4 must be
 6 a policy which provides insurance against events, not
 7 continuing states of affairs , which they say include
 8 pandemics {Day5/22:11}.
 9 We have a short point to add to what Mr Edelman said
 10 at page 128: This definition of covered events is
 11 merely a convenient shorthand adopted to make the
 12 quantification provisions easier to use. Nothing in it,
 13 or in the context, indicates an intention to override
 14 the clear language of the insuring clauses .
 15 By way of example, see bundle {B/20/29}, SARS is one
 16 of the diseases covered by this policy . RSA themselves
 17 describe SARS as a global pandemic at paragraph 31,
 18 {1/18/84}, (b)(v) of appendix 4 to their skeleton .
 19 Further down the page at (ii) on the left -hand side
 20 we have the retrospective deeming provision envisaging
 21 there will be an initial outbreak, then a subsequent
 22 elevation to the status of a notifiable disease .
 23 In summary there is no particularity of place, time
 24 and manner required in this cover, and the definition of
 25 "Covered Events" does not provide any basis for reading

182

1 one in .
 2 Standing back, we have RSA4, a composite policy, not
 3 an adjunct or an extension , providing very wide business
 4 interruption cover with three responsive provisions :
 5 simple disease , enforced closure and prevention or
 6 hindrance of use by government action or advice.
 7 We have RSA's concessions. I don't have time to go
 8 to those, but they are at paragraphs 2 and 20.3 of the
 9 list of issues , and paragraph 37 of appendix 4.
 10 Thirdly, we have RSA's oral acceptance in relation
 11 to overlapping cover at {Day5/33:1}. Mr Edelman
 12 addressed you on that.
 13 Pausing there , one of the interveners , Radley, whose
 14 position is set out at paragraphs 28 to 30 of our
 15 skeleton , {1/2/9}, provides a perfect example of the
 16 issue raised by Mr Edelman in relation to this
 17 concession at page 131 of this afternoon's transcript .
 18 Radley has 340 locations across the UK. The
 19 vicinity of each of those locations will cover a large
 20 swathe of the country. Nevertheless, RSA's argument is
 21 that none of those locations can prove that "but for"
 22 the cases in their area the country would have been
 23 locked down.
 24 How can an insurer simultaneously reject cover for
 25 each of Radley's 340 locations on the basis that no

183

1 single location can prove that the peril in their area
 2 was the "but for" cause of the loss .
 3 So we say as a result of the concessions and the
 4 wide terms, all RSA have left is their arguments in
 5 relation to vicinity , and how that is said to affect
 6 causation .
 7 However, we would say this doesn't offer RSA any
 8 escape route in relation to cover for actions or advice
 9 of the government which prevent or hinder use:
 10 prevention of access non-damage. That is at {B/20/30}.
 11 It is definition 87(ii) .
 12 On RSA's case the actions have to be specific to the
 13 vicinity even if they could have an effect which goes
 14 beyond the vicinity . We rely on the simple point that
 15 the government's actions or advice undoubtedly were in
 16 the vicinity of the insured locations . They were
 17 nationwide. They were everywhere. Nothing in the
 18 language used requires that the actions are specific to
 19 or only in the vicinity .
 20 So we say there must be cover under this clause from
 21 the point of the relevant government action or advice,
 22 whatever the meaning of " vicinity " .
 23 Finally , dealing very briefly with " vicinity " in the
 24 context of the disease and enforced closure clauses .
 25 Our case is at paragraph 65 of our skeleton . That is

184

1 {1/2/18}. We say that the area and the reference to
 2 "events in vicinity" is a reference to the relevant
 3 triggers within each insured peril. That is not
 4 hindsight. That is starting at the time of entering
 5 into the contract of insurance when the parties knew
 6 that the policy covers SARS, a disease which had already
 7 caused a global pandemic, and they knew that it covered
 8 any newly emerging notifiable disease serious enough to
 9 be made notifiable.

10 They also knew that governments in the past had
 11 imposed lockdowns, including school closures, banning of
 12 assemblies in the UK, and more radical closures
 13 elsewhere.

14 Viewed against that background at the time of
 15 entering into the policy the parties' reasonable
 16 expectation would have been that serious highly
 17 contagious diseases could have an impact on insured
 18 locations some significant distance away, over a very
 19 wide area, and certainly much further than a close
 20 spatial proximity.

21 The question is not whether the dramatic events of
 22 this year could be reasonably expected. That is not
 23 what the definition of "vicinity" requires. It is the
 24 different question I have explained.

25 The first criticism of our case was dealt with by

185

1 Mr Edelman at page 129. The second was that we ignore
 2 the dictionary meaning of the word "vicinity". This is
 3 my final point.

4 It is important to look at the dictionary definition
 5 that RSA actually rely on. That is footnote 16 at
 6 page 79 of their skeleton. They refer to {K/215.1/2}.
 7 That dictionary definition says that "vicinity" means
 8 the area around a place. That is consistent with the
 9 word "surrounding" in the agreed definition and adds
 10 nothing more. The position remains that to establish
 11 the size of the area around the insured location you
 12 have to look to the reasonable expectation language in
 13 the remainder of the definition.

14 And furthermore, I would refer back to paragraphs 79
 15 to 80 of our skeleton argument and our point on contra
 16 proferentem.

17 That was faster than planned but unless I can help
 18 you further those are the submissions on behalf of the
 19 interveners.

20 LORD JUSTICE FLAUX: Very well. I am conscious that you two
 21 were cut rather short. If there is anything else you
 22 want to add, Ms Jones, if you could do it in the same
 23 way as Ms Higgs by something in writing, no more than
 24 four pages, by 4.00 pm tomorrow please.

25 MS JONES: I am very grateful, my Lord, thank you.

186

1 LORD JUSTICE FLAUX: Mr Edelman.
 2 (4.32 pm)

3 Remarks by MR EDELMAN

4 MR EDELMAN: My Lord, I hope I will only be two or three
 5 minutes.

6 Can I say on behalf of the FCA, and I am sure the
 7 insurers will join in this, can I thank the court for
 8 dealing so expeditiously with a case that is so
 9 important to so many policyholders and their insurers.

10 Naturally policyholders are desperate to know as
 11 soon as possible where they stand. For many their
 12 future depends on this. Though of course they may have
 13 to wait for a final outcome until the hearing of any
 14 appeal.

15 However we recognise the heavy burden on the court
 16 of having to deal with all the issues in this case and
 17 that writing a judgment is likely to be a lengthy
 18 process.

19 It would nonetheless help the parties in their
 20 planning to know either if there is an anticipated
 21 timeframe for circulation of a draft judgment or if not
 22 at the very least a not before timeframe. But of course
 23 we are entirely in the court's hands as to that and
 24 entirely understand and appreciate the task that the
 25 court has been faced with in dealing with all these

187

1 issues and all these policies.

2 LORD JUSTICE FLAUX: Mr Edelman, we are not going to give
 3 any sort of binding indication, but obviously we have
 4 discussed this. We would hope that a draft judgment
 5 would be available by the middle of September. But, as
 6 I say, we are not going to bind ourselves to that. All
 7 sorts of things may happen and it may turn out that the
 8 judgment is a more onerous task to write than appears at
 9 first sight. So inevitably there may be slippage on
 10 that. But we will do our very best.

11 Speaking for both of us I am sure, we are conscious
 12 how important the issues in this case are for everybody
 13 who is involved. So we would not want to rush it or
 14 shortcut it. It is sufficiently important; it needs
 15 a lot of thought and work. So I think that is a sort of
 16 6 weeks timescale.

17 Is there anything else that you wanted to say?

18 MR EDELMAN: My Lord, other than also to thank the
 19 transcribers and all those who provided all the
 20 technical support, and again to thank my Lords for the
 21 expedition with which this has been dealt. There is
 22 nothing more I wanted to say, no.

23 LORD JUSTICE FLAUX: Can I just say on behalf of
 24 Mr Justice Butcher and myself that we are extremely
 25 grateful to all the parties, not just counsel but to all

188

1 their solicitors and those who are behind the scenes who
 2 have made this remote hearing as effective as we think
 3 it has been, and as largely civilised and good humoured
 4 as it has been, and at least so far as you lot are
 5 concerned have a good holiday. Thank you.

6 (4.35 pm)

7 (The hearing concluded)

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 10
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 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

189

1 INDEX

2 PAGE

3 Reply submissions by MR EDELMAN1
 (continued)

4 Reply submissions by MS MULCAHY98

5 Reply submissions by MR EDELMAN123

6 Reply submissions by MR LYNCH156

7 Reply submissions by MS HIGGS170

8 Reply submissions by MS JONES182

9 Remarks by MR EDELMAN187

10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

190

191

<p>A</p> <p>a1220 (1) 127:8</p> <p>a1226 (1) 155:19</p> <p>a1227 (2) 127:8 155:20</p> <p>ab (1) 167:14</p> <p>ability (6) 120:20,22 121:18,21 122:2,9</p> <p>able (5) 61:8,13,17 107:8 110:11</p> <p>abner (1) 117:17</p> <p>above (3) 15:13 26:20 41:15</p> <p>absence (2) 141:6,15</p> <p>absolute (1) 141:21</p> <p>absolutely (8) 17:25 19:2 45:24 80:13 88:4 129:8,8 168:6</p> <p>abstract (2) 2:11 143:16</p> <p>academic (7) 6:1 23:4,9,12 28:4 52:6 80:11</p> <p>academically (1) 25:20</p> <p>academics (4) 6:4 24:3 25:22 53:9</p> <p>accept (14) 3:4 8:24 35:23 52:3 54:22 60:15,18 78:23 90:23 115:19 153:12 155:24 175:25 181:17</p> <p>acceptance (1) 183:10</p> <p>accepted (10) 28:7 29:20 52:3,20 103:23 109:22 153:1,3 175:19,25</p> <p>accepting (4) 32:11,22 59:4 101:11</p> <p>accepts (6) 51:22 96:25 100:1 101:5,9 129:13</p> <p>access (92) 18:20 74:11 88:24 90:18,19 91:7 99:6,11,12,15,21,25 100:2,6,15,20,25 101:1,1,3,4 102:8,18 103:8,11,12,21 104:10,15,17,21,24 105:5 106:6,19,23,25 107:7,12,20 108:9 109:19 110:3,4,8,16 111:25 112:6,15 113:1,8,14,15,18,21 115:14 116:4,8,9,24 117:13,22 118:21 119:4,11,23 120:13,16,17,19 121:16,24,25 122:1,8,12,13,19,20,22 123:15 125:14 126:23,24 127:5 128:15,19 134:6 135:23 146:22 165:22 184:10</p> <p>accessible (2) 105:6,14</p> <p>accessing (6) 105:25 109:20 115:18,21,23 123:1</p> <p>accident (4) 27:3 44:11,22,25</p> <p>accommodated (2) 112:1 113:15</p> <p>according (2) 14:15 94:20</p> <p>accordingly (1) 50:14</p> <p>account (9) 17:22 19:24 24:1 62:2,14,22 94:19 126:7 149:2</p> <p>accountants (1) 100:23</p> <p>accounting (1) 12:16</p> <p>accounts (3) 10:22 158:23 165:13</p> <p>accrues (1) 87:23</p> <p>accumulation (1) 13:24</p> <p>accurate (1) 8:20</p> <p>accurately (1) 68:13</p> <p>accuses (1) 149:18</p> <p>acronyms (1) 90:8</p> <p>across (6) 13:3 15:7,18 134:13 166:15 183:18</p> <p>acting (1) 36:11</p> <p>action (21) 26:23 31:6 69:1 74:12 77:4 83:24 84:3 85:4 87:22 88:25 99:4,15 103:1,2 106:19 114:7,13</p>	<p>150:2 179:20 183:6 184:21</p> <p>actions (9) 91:8 99:7 102:19 133:14 180:2 184:8,12,15,18</p> <p>activities (4) 72:11 135:25 157:25 158:13</p> <p>activity (1) 140:15</p> <p>acts (6) 25:15 72:9 77:8 172:17 173:10,13</p> <p>actual (4) 93:23 124:20 125:2 160:1</p> <p>actually (42) 5:9,22 10:6,10 15:18 16:15 29:14 31:18 32:12 33:18,22 34:19,21 37:1 54:19 63:6 66:7,11 71:17 75:14 76:23 79:23 80:11,25 115:17 117:2 125:16 127:4 128:11,24 129:18 132:4,10 143:19 150:20,21,22 151:15,17 154:1,3 186:5</p> <p>adapt (1) 39:11</p> <p>add (4) 114:23 170:17 182:9 186:22</p> <p>added (4) 7:16 55:6 76:10 133:17</p> <p>adding (2) 63:15 102:21</p> <p>addition (2) 58:5 172:7</p> <p>additional (8) 102:21 103:5 107:3 155:9 159:8,13 166:11 171:14</p> <p>adds (1) 175:4</p> <p>address (10) 4:11 34:2 86:9 91:23 103:17 124:12 153:18 157:11 166:15 176:8</p> <p>addressed (15) 4:4 14:7 15:16 42:10 46:5 56:9 67:5 114:15 115:14 159:16 166:16 167:22 169:3,12 183:12</p> <p>addresses (3) 45:1 56:6 162:21</p> <p>addressing (3) 115:10 170:11,12</p> <p>adds (1) 186:9</p> <p>adjacent (2) 132:18,20</p> <p>adjournment (1) 95:5</p> <p>adjunct (1) 183:3</p> <p>adjuncts (3) 174:8,8 175:5 179:4,11,23</p> <p>adjust (2) 78:3,15</p> <p>adjusted (3) 94:6,17 169:18</p> <p>adjustment (3) 62:12 67:2 68:12</p> <p>administration (1) 117:5</p> <p>admitted (1) 65:23</p> <p>ado (1) 98:17</p> <p>adopted (3) 52:9 56:14 182:11</p> <p>adopting (2) 6:24 46:12</p> <p>adopts (2) 24:15 56:12</p> <p>advanced (3) 15:3 44:7,15</p> <p>advantage (1) 10:8</p> <p>adventurous (1) 49:10</p> <p>advice (19) 91:9 99:7 100:5,7 101:2,8,9,11,15 102:19 103:6,25 104:2 106:19 113:10 183:6 184:8,15,21</p> <p>advices (1) 103:15</p> <p>advised (2) 100:8 103:18</p> <p>advisor (1) 105:23</p> <p>advisers (1) 105:21</p> <p>advisory (1) 72:8</p> <p>advocates (1) 24:25</p> <p>affairs (3) 73:7 105:22 182:7</p> <p>affect (5) 38:14 111:6 115:5 148:11 184:5</p> <p>affected (10) 20:3 68:11 90:1,2 93:7 97:24 106:15 113:19 122:7 148:14</p> <p>affecting (1) 135:2</p> <p>affects (3) 74:11 145:3 151:5</p> <p>afraid (2) 35:12 178:20</p> <p>after (10) 25:6 47:10 48:23 69:10 108:9 125:17,17</p>	<p>126:1 139:19 148:16</p> <p>afternoon (3) 77:23 79:5 181:1</p> <p>afternoons (1) 183:17</p> <p>again (29) 9:9,14 13:10,14 34:7 42:7 48:15 53:12 62:5 72:25 76:21 86:23 94:5 109:3 111:13 114:3 118:25 131:14,15,18 149:3,5 161:24 164:18 166:2,14 173:1 174:23 188:20</p> <p>against (28) 43:17 50:23 51:5 55:9 58:19 64:11 70:17 71:16,18 75:18 81:23 82:2,21 87:14 97:7,15 119:2,22 121:4,21 128:2 131:17 134:8,19 173:17 182:6 185:14</p> <p>age (1) 44:14</p> <p>ageing (1) 43:16</p> <p>agency (1) 173:4</p> <p>agents (1) 109:11</p> <p>aggregate (1) 72:3</p> <p>aggregation (1) 11:12</p> <p>ago (1) 133:19</p> <p>agree (6) 41:8 46:14 47:21 107:15 111:1 164:8</p> <p>agreed (12) 7:21,22 11:5,21 16:2 20:17 46:22 55:25 133:9 178:25 180:17 186:9</p> <p>agreeing (2) 138:9 140:13</p> <p>agreement (4) 24:10 157:4 167:16 171:17</p> <p>ah (1) 29:22</p> <p>aha (1) 16:19</p> <p>ahead (3) 5:10 80:7,8</p> <p>aid (1) 172:16</p> <p>aii (3) 71:23 72:5 80:12</p> <p>aiii (1) 96:4</p> <p>ailment (1) 43:15</p> <p>aim (1) 146:15</p> <p>aimed (2) 19:15 62:11</p> <p>air (1) 120:1</p> <p>airports (2) 117:4,10</p> <p>albeit (3) 3:17 72:20 131:9</p> <p>albinia (1) 133:20</p> <p>alia (1) 173:5</p> <p>alive (2) 36:15 127:9</p> <p>alldancing (1) 174:13</p> <p>allegation (1) 27:2</p> <p>alleged (3) 42:5 47:7 165:9</p> <p>allocate (1) 79:24</p> <p>allocated (1) 146:7</p> <p>allotment (1) 180:21</p> <p>allowance (1) 69:12</p> <p>allowed (2) 27:5 105:16</p> <p>allsinging (1) 174:12</p> <p>alluded (2) 52:15 144:11</p> <p>almost (3) 29:2 122:14 163:14</p> <p>alone (3) 29:18,19 168:25 116:5,11 160:17,21 185:6</p> <p>also (52) 15:8,12 19:16 20:15 30:10 32:22 33:8,10 36:11 60:20 61:5 62:16,21 63:10 63:5 68:23 73:19 74:17 76:6 89:18 103:2 111:16 116:1 119:10 123:9 124:23 127:8 128:7,17 133:12 134:6 136:2,15 142:10 143:17 145:21,21 146:2,17 155:10 157:5 158:25 159:1,4,21 161:18 162:1,4 163:11 164:24 185:10 188:18</p> <p>alter (1) 92:23</p> <p>alternative (5) 56:15 71:16 125:20 159:13 178:16</p> <p>alternatively (2) 96:9 110:5</p> <p>although (22) 4:23 7:5 15:16 20:17 23:11 33:18 52:4,17 80:24 83:12 84:10 86:25 97:12 101:15 111:18</p>	<p>114:17 132:8 135:8 145:6 153:13 155:17 173:9</p> <p>altogether (1) 149:18</p> <p>always (7) 22:17,21 24:16 28:11 64:17 163:16 175:25</p> <p>ambiguities (1) 121:3</p> <p>ambiguity (1) 128:3</p> <p>ambit (5) 39:8 84:7 93:8 173:16 174:1</p> <p>american (1) 135:15</p> <p>amlin (2) 95:15 147:23</p> <p>amlin1 (3) 90:18 91:16,20</p> <p>amlin2 (1) 91:6</p> <p>amlin3 (1) 90:18</p> <p>amongst (2) 29:18 94:3</p> <p>amorphous (4) 30:12 38:1,19 179:7</p> <p>amount (12) 30:7 68:25 99:25 100:15 106:16 114:25 128:9,13,17 143:12 146:11 166:11</p> <p>amounted (2) 24:7 133:25</p> <p>amounting (2) 106:5 113:1</p> <p>amounts (1) 24:10</p> <p>amusement (2) 118:11 119:4</p> <p>amalogy (4) 8:4 35:12 59:17 75:21</p> <p>analyse (4) 75:20 76:18 84:5 88:13</p> <p>analysed (1) 53:14</p> <p>analyses (3) 87:6,7 88:16</p> <p>analysing (2) 41:21 139:19</p> <p>analysis (20) 2:12 3:2,14 21:4 40:16 46:2 51:10 53:2 54:18 56:20,21 58:13,25 60:2 63:14 67:16 73:11 91:14 169:19 175:19</p> <p>andor (3) 31:5 129:22 130:1</p> <p>announcement (1) 147:11</p> <p>another (10) 8:15 31:1 35:11 46:8 97:10 128:11 133:18 141:18 154:5 160:25</p> <p>answer (24) 5:7 9:24 10:1,2 21:16,20 22:9 24:18 25:5 28:23 37:15 56:16 58:16,21 61:19 62:5,25 79:8 80:20 160:24,25 162:16 163:24 164:22</p> <p>answering (2) 40:11 58:10</p> <p>answers (3) 30:10 47:5 92:1 anticipated (9) 13:25 68:3 71:25 72:1,5,7 82:25 124:20 187:20</p> <p>anticipates (1) 71:6</p> <p>anticipating (3) 38:9,12 62:23</p> <p>anticipatory (1) 124:25</p> <p>anxiety (1) 73:22</p> <p>anybody (1) 156:3</p> <p>anything (13) 1:20 78:19 80:16 93:6 98:16 130:10 131:24 135:16 156:3 161:21 180:24 186:21 188:17</p> <p>anyway (14) 3:9 16:23 21:22 31:8 56:9 57:12 62:3 74:23 78:3 89:13 102:15 128:2 135:3 146:6</p> <p>anywhere (2) 15:13 16:25</p> <p>aon (2) 137:8 138:6</p> <p>apart (2) 88:19 115:13</p> <p>apologies (1) 170:13</p> <p>apologise (3) 81:18 92:3 152:24</p> <p>apparent (2) 52:11 124:16</p> <p>appeal (13) 6:2 26:14 27:5 43:17 46:8 80:7 139:24 140:2,3 142:5 143:20 176:25 187:14</p> <p>appealing (1) 80:8</p> <p>appeals (5) 118:24 137:13,14,15 143:14</p> <p>appear (3) 115:19 126:1 157:2</p> <p>appeared (1) 47:12</p> <p>appears (6) 42:12 44:3 80:13</p>	<p>142:18 150:25 188:8</p> <p>appellants (2) 141:8,17</p> <p>appellate (1) 154:22</p> <p>appendix (2) 182:18 183:9</p> <p>applicable (4) 59:24 83:5 114:14 149:4</p> <p>application (18) 6:25 13:11 22:2 23:16 24:16 27:22,25 34:2 41:21 46:5 60:8 62:10 70:14 95:19 167:5 168:2 169:10,22</p> <p>applied (17) 5:5 13:6 45:9 47:2,22 48:13 53:1,2,8 58:9 88:5 131:7 139:7,10 147:14 148:21 166:22</p> <p>applies (13) 9:19 23:21 33:12 42:6 48:11 93:15 138:16 142:19 150:15 166:11,14 168:10,11 56:1,11 57:15,17 82:16 103:6 106:18 111:16 124:5,11 125:10 128:6 131:4 132:23 133:12 154:21,23 168:9 172:1 177:11</p> <p>applying (14) 23:17 24:23 26:9 27:12 31:17 35:24 36:2 41:1 46:10 52:10 137:19 150:17 160:5 169:10</p> <p>apportionment (1) 27:18</p> <p>appreciate (5) 80:19 155:23,25 167:22 187:24</p> <p>apprehended (2) 124:20 125:6</p> <p>approach (33) 1:15 2:5 4:21 6:5,5,25 23:4 28:8,10 32:6 42:9 44:3 46:12 47:14 48:12 56:1 58:10 69:19 71:11,21 94:23 105:18 135:11,13 143:11 149:12 150:10,17,21,25 169:11 170:25 175:3</p> <p>approached (1) 7:2</p> <p>approaching (2) 14:16 174:3</p> <p>appropriate (9) 6:6 21:18,19 46:17 48:1,14 73:11 74:5 142:21</p> <p>approval (2) 28:19,20</p> <p>approved (1) 26:14</p> <p>approves (1) 48:11</p> <p>april (3) 14:24 92:19,20</p> <p>arbitrators (4) 47:15,22 48:4,13</p> <p>arch (18) 40:18 90:9 98:18,23 99:1,5,9 100:1 101:5,6,8 105:18 106:11 108:7 110:3 112:5,9 116:6 137:8 147:8 153:9 161:12</p> <p>archs (4) 106:8 108:5,8,15</p> <p>area (43) 3:22 9:21,23 10:19 15:15 16:20 17:4,6,12 30:15,22 33:1,6,13,13 38:14 40:17 54:25 55:18 90:8,9,14 91:2 96:12 97:17,19 114:11 122:1,9 125:3 144:23 147:1,2 177:15,17,25 181:18 183:22 184:1 185:1,19 186:8,11</p> <p>areas (3) 3:23 8:18 125:4</p> <p>arent (2) 25:22 172:15</p> <p>argenta (4) 90:23 98:18,24 152:9</p> <p>argentas (1) 162:4</p> <p>arguably (1) 128:6</p> <p>argue (3) 8:5 79:12,13</p> <p>argued (9) 52:1 66:21 79:19 80:1 100:12 120:16 133:22 142:5 158:4</p> <p>argues (2) 15:19 164:6</p> <p>argument (32) 29:7 30:16</p>	<p>31:23 36:21 37:8 42:3 44:8 9:16 47:15 53:10 58:24 59:11,19 79:18 86:18 95:20 114:18 127:2 134:25 135:5 145:2 161:22 175:14,15,15 176:5 178:12 181:11 182:5 183:20 186:15</p> <p>arguments (3) 90:3 168:8 184:4</p> <p>arise (2) 136:9 140:16</p> <p>arisen (2) 167:2,13</p> <p>arises (3) 17:15 88:3 148:22</p> <p>arising (7) 51:7 137:25 171:20 173:9 175:9 176:20 177:2</p> <p>armed (1) 72:10</p> <p>arose (4) 46:23 77:19,20 135:20</p> <p>around (8) 8:25 13:18 30:2 36:16 105:12 132:21 186:8,11</p> <p>arthritic (2) 43:9,11</p> <p>article (6) 6:1 23:3,7 47:25 48:2 115:1</p> <p>artificial (4) 8:18 20:3 21:21 167:19</p> <p>ascertain (2) 25:8 139:2 ascertained (2) 25:1 72:18</p> <p>ascertaining (1) 168:3</p> <p>aside (1) 131:8</p> <p>ask (14) 3:3 39:21 58:8 133:8 148:5 149:12 150:6 151:24 156:3 171:2 176:23 178:8,10 179:17</p> <p>asked (4) 52:23 53:19 118:2 166:19</p> <p>asking (7) 3:7 19:21,24 20:1,2,8 34:4</p> <p>asks (3) 63:10 79:10 176:21</p> <p>aspect (4) 57:9,18 71:1 151:18</p> <p>aspects (5) 58:23 70:19,25 72:25 119:17</p> <p>assemblies (1) 185:12</p> <p>asserts (1) 60:12</p> <p>assessed (2) 50:12 94:2</p> <p>assist (3) 20:7 21:25 116:20</p> <p>assistance (4) 23:14 41:2,6 105:1</p> <p>associated (3) 51:12 71:4,6</p> <p>assume (1) 83:17</p> <p>assumed (4) 42:18 43:21,22 87:5</p> <p>assuming (1) 18:23</p> <p>assumption (1) 175:4</p> <p>atlas (1) 173:20</p> <p>attack (1) 81:1 157:18 160:12 164:23</p> <p>attacks (6) 73:4,20 79:14,15,21,25</p> <p>attempt (1) 153:16</p> <p>attempts (3) 5:7,8 29:4 attend (7) 76:8 100:23 103:18 107:19 109:12,14 112:13</p> <p>attendance (1) 75:24</p> <p>attending (9) 76:3,6,7,20 107:3 109:16 112:12 123:11 133:15</p> <p>attention (10) 22:13 118:3 119:12 121:6 133:17 137:6 171:9 178:9,11 179:22</p> <p>attraction (2) 136:16 142:23</p> <p>attributable (7) 42:2,16 44:18 45:11,14 68:10 75:5 28:20 53:5</p> <p>authorities (13) 5:23 6:12 9:18,19 26:19 38:10 40:23 41:9 53:4 114:8 133:25 161:14 173:13</p> <p>authority (43) 1:14 10:25 11:3,14,14 39:1 72:9 74:10,12 83:2,14 91:9 99:4</p>	<p>101:17 102:19 114:19 116:9,14 118:22 133:8,10 144:8 145:6 147:7,8,12,25 148:25 150:1 153:6,17,22 154:24 161:16 163:18 165:21,24 168:25 171:21 172:18 173:3,3,11</p> <p>authorities (1) 91:18</p> <p>authors (1) 82:24</p> <p>automatic (1) 174:23</p> <p>available (4) 11:11,15 149:4 188:5</p> <p>aviation (1) 117:5</p> <p>avoid (1) 104:5</p> <p>avoidance (1) 181:7</p> <p>avowedly (1) 34:5</p> <p>award (2) 46:9 49:13</p> <p>awarded (1) 118:23</p> <p>away (22) 7:7 8:9 21:13 28:22 33:4 38:16,17 59:9 78:16,25 79:1 97:23 110:25 126:24 127:19,22,23 131:20 164:4 169:8 174:13 185:18</p> <p>B</p> <p>b (9) 28:11 78:23 126:20 129:20 155:17,24 156:1 164:20 171:3</p> <p>b1066 (1) 95:16</p> <p>b131 (1) 171:4</p> <p>b132 (1) 174:18</p> <p>b1327 (1) 171:5</p> <p>b1331 (1) 171:14</p> <p>b1332 (1) 172:3</p> <p>b1333 (1) 172:12</p> <p>b1428 (1) 64:19</p> <p>b1498 (1) 65:3</p> <p>b1612 (1) 65:9</p> <p>b1616 (1) 123:23</p> <p>b1616 (1) 171:14</p> <p>b1622 (1) 65:10</p> <p>b166 (1) 65:6</p> <p>b1736 (2) 125:8 128:12</p> <p>b1851 (1) 128:15</p> <p>b1938 (1) 130:16</p> <p>b1986 (1) 130:19</p> <p>b1993 (2) 129:11 131:2</p> <p>b2023 (2) 132:1 182:4</p> <p>b2029 (2) 133:3 182:15</p> <p>b2300 (1) 184:10</p> <p>b2035 (1) 132:16</p> <p>b207 (1) 132:5</p> <p>b2151 (1) 114:4</p> <p>b236 (1) 99:2</p> <p>b445 (1) 76:25</p> <p>b640 (1) 159:4</p> <p>b641 (5) 135:22 146:23 157:18 160:12 164:23</p> <p>b642 (6) 144:6,16 147:8 150:3 162:8 164:12</p> <p>b644 (2) 159:22 166:3</p> <p>b645 (2) 158:7 166:8</p> <p>back (49) 9:13,15,22 13:13 14:6 15:21 26:24 42:25 43:20 44:2 50:17 51:18 54:12,14,16 60:6 66:4 69:16 72:22 74:21 76:22 82:9 84:6 88:10 94:24 123:6,16 127:12 128:8,12 129:10,12 130:15 131:2 132:5 133:2,10 134:24 135:20 138:19 144:15,24 145:18 147:7 149:14 150:3 164:23 183:2 186:14</p> <p>background (1) 185:14</p> <p>backing (1) 158:24</p> <p>bad (1) 154:24</p> <p>balance (2) 32:20 118:1</p> <p>bandwagon (2) 1:10 4:20</p> <p>bang (1) 30:22</p> <p>banning (1) 185:11</p> <p>banquet (1) 142:9</p>
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139:3,11 basement (2) 119:25 120:6 basic (5) 104:9 111:9 112:8 113:3 169:20 basis (15) 23:14 47:1 84:6 85:24 88:23 115:16 118:17 119:8 121:19 122:3,10 129:21,25 182:25 183:25 battle (2) 4:8,9 bear (3) 68:6 115:2 146:17 bearing (2) 43:6 168:7 beast (1) 179:7 become (1) 10:4 becoming (1) 179:9 before (33) 2:7,8 4:13,15 19:6 22:9 33:19 36:16 47:15 49:6 53:11 65:8 75:2,6,17,23,25 79:4 90:1 91:25 92:18 94:12 95:12 96:4 98:15 138:15 143:24 156:3,18 167:25 180:10 181:6 187:22 beg (1) 55:20 beginning (3) 41:15 52:16 77:17 behalf (7) 156:19 178:23 180:12 181:22 186:18 187:6 188:23 behaviour (2) 76:23 77:17 behind (1) 189:1 being (36) 24:10 25:10 26:20 30:12 40:10 42:10 51:1,15 53:20 63:8 70:11 74:19,23 84:11 85:12,12 94:24 99:9 100:3 109:20 122:13 124:13 130:17 133:6 142:11 145:7,25 149:2 161:9 164:17 166:19 172:9 173:1 176:10,18 179:4 believe (2) 46:13 123:17 believed (1) 20:21 belief (5) 13:8 14:2 52:1 158:9 167:9 benchmark (1) 75:18 benefit (2) 14:25 107:10 berkeley (1) 86:21 best (3) 13:6 14:13 188:10 better (2) 87:21 127:14 between (19) 2:24 23:9 42:13 46:19 68:17 89:8 93:1 117:3,15 134:22 160:1 162:14 166:17 168:17 175:23 176:10,12 177:5 178:25 beyond (7) 27:15 31:25 112:1 161:13 163:25 164:1 184:14 bi (7) 70:14 169:20 172:9 173:8,10 174:20,22 bienville (2) 116:23 117:1 big (1) 14:25 bind (1) 188:6 binding (1) 188:3 bis (1) 131:11 bit (9) 6:17 7:24 8:14 12:3 40:25 57:18 81:9,18 98:12 bits (2) 39:1 129:24 bizarre (1) 121:8 blackburn (1) 41:10 blob (1) 8:9 blobs (2) 8:8 9:11 blocked (1) 107:2 blocks (1) 105:12 bluntly (1) 34:12 bolter (1) 50:2 bones (1) 43:12 book (3) 28:22,24 69:22 bookings (1) 73:9 borough (1) 181:16 both (31) 35:5 49:24 54:21 55:6,7 58:24 60:18 61:15,16 67:21 69:4 76:13,15 86:5 89:4,5 99:23 114:5 123:3 125:19 138:13 145:3 158:16 159:1,20 160:10 162:21,21 163:4,8	188:11 bottom (14) 8:2,7 10:21,24 14:8 50:19 67:12 68:4 72:4 121:2 130:22 138:10 166:3 172:4 bought (1) 121:17 bound (2) 46:14 73:18 boundaries (1) 30:14 boundary (2) 31:20,20 boxes (1) 12:25 breach (6) 58:18 59:2,7,12 86:14 87:22 break (6) 34:13 48:25 119:25 141:1 143:22 144:1 brief (1) 95:12 briefly (9) 41:9 103:17 116:21 118:6 155:6,10 158:22 164:3 184:23 bright (2) 26:15,16 bring (9) 14:2,2 70:20,23 99:1 101:19 104:7 114:3,6 bringing (1) 14:10 brings (1) 158:20 broad (2) 15:8 114:19 broader (1) 139:20 broadest (1) 164:10 broadly (2) 48:16 113:5 broken (1) 44:11 bromarin (1) 167:13 brought (4) 7:18 8:17 14:25 92:5 bs (2) 63:17,18 build (1) 122:17 building (5) 64:22 119:19 120:19 121:11,24 buildings (1) 135:1 bulb (1) 111:11 bundle (4) 7:16 133:18 171:3 182:15 burden (3) 92:21 178:23 187:15 buried (1) 174:13 burn (1) 87:4 burns (2) 87:18,23 burying (1) 21:16 business (133) 1:24 3:8 17:19 19:9,12,22 20:1 38:25 40:21 50:11 51:5,7 54:20 56:24 63:10,14,25 64:8,18,20,24 65:9,21,24 66:8,11 68:19 72:16 75:17 81:11 94:15 97:8,13,22 99:12,13,14,17,18 100:2,4,9,10,11 101:3 103:4,9 104:15,17,18 106:1,6,13,15,22 107:7,12,18,23,24 108:12,19,22 109:2,10,18,20,23,24,25 110:8,11 111:9 112:7 115:6 119:5,18,19 120:23 121:13,19 122:1,3,6,8,9,10,18,20,21,24 123:5 132:7 136:5 137:22,24,25 138:6,15,22 139:7,10,13,14 140:8,12,15,21 141:2,8,17 142:10,17 143:3,16 146:15 156:22 157:16 158:7 159:1,2 166:4,6,10,13 171:5,8,11,19 172:2 176:17 177:21 183:3 businesses (23) 99:9 100:18 103:20 104:2 105:3,8,19 107:22 108:4,22 109:11 110:16,21,24 111:7,8,17,19,21 122:22 133:13 butcher (23) 5:3,4 25:21,24 26:2 34:15,23 35:1,19,23 52:3 54:5,10 57:23 65:17 69:23 84:9 86:19 90:7 141:9 155:5 162:25 188:24 butchers (2) 60:24 101:12 butters (1) 174:11 buy (2) 111:11,12	bv (1) 182:18 C c (3) 78:23 148:24 164:20 c136 (2) 14:18,23 c137 (1) 14:21 c2060 (1) 179:21 c2103 (1) 12:12 c2105 (1) 12:22 c2119 (1) 13:4 c2125 (1) 13:15 c2145 (1) 14:7 c2146 (1) 14:14 c2278 (1) 13:23 c269 (1) 179:24 c53 (1) 11:8 c6392 (1) 10:13 c6393 (1) 10:20 c6407 (1) 10:23 c6596 (1) 11:1 cackhanded (1) 129:23 caf (1) 110:1 caims (1) 20:20 calculate (1) 124:8 calculated (1) 75:19 calculation (2) 68:24 124:10 call (2) 64:10 84:14 callaghan (1) 86:24 called (4) 4:20 35:5 119:13 136:24 came (3) 88:10 108:10 118:3 cameras (1) 34:11 canadian (2) 136:24 139:21 canard (1) 21:23 cancellation (2) 117:4,11 cannot (15) 3:23 8:11 17:1 44:17 48:15 52:17 101:1 103:11 114:19 134:7 142:7 146:14 163:15,22 169:18 cant (35) 4:5,22 9:5,5 16:19,24 21:3,14 31:23 32:16 34:9 38:14 39:12 48:16 59:7 60:17,18,19 61:18 76:11,12 79:2 80:6,14,16 101:7 108:25 109:12 111:11 122:22 134:19 144:24 148:6 168:11 170:7 capable (14) 43:6 54:21,22,24 55:2 56:14 61:4 73:8 76:16 106:5 130:17 133:6 145:21 164:16 capacity (2) 13:8 14:3 capitals (1) 130:1 captured (1) 147:15 care (4) 12:15 133:23 158:17,18 careful (1) 158:19 carefully (3) 156:21 159:18 179:18 carried (2) 99:18 147:11 carry (5) 9:8 99:14 110:12 115:4 147:18 carrying (1) 158:13 carve (1) 108:16 cases (60) 1:19 4:25 5:5,8,14,16,19 7:23 9:21 12:2,5,14,17 13:18,20 14:3 15:4,16 30:3,24 31:1,9 32:5,9,14,15,15,15 33:17 36:10,12,13 38:21 52:13,24 53:1 83:12 86:20 88:13 91:3 101:14 116:11,15,21 117:16,25 124:20,21 138:8,13 139:19 155:9 176:19 179:10,10 181:8,16,17 183:22 casting (1) 65:8 catastrophe (1) 109:6 catching (1) 87:15 categories (7) 91:22 100:9 103:19,20 104:16,19 122:6 categorise (1) 84:15 category (25) 90:12,21 91:3,11 93:18 105:3,8,19	108:5,7 109:9,10 110:18,21,24 111:4,7,8,16,19,21 113:4,5,22 169:7 catering (1) 142:9 caught (4) 33:2,5 162:19 163:16 causa (1) 44:20 causal (22) 22:6,18,20,24 24:2,4 29:16 32:24,24 33:15,24,25 35:21,24 42:13 60:15 98:8,9 176:2,18 177:2 178:25 causally (1) 177:24 causation (77) 1:5,9,20 2:1,14,19 3:12 4:1,14,16,23 5:23 6:3,5,5 7:1,4 16:24 17:1,15 19:5,6 20:10 22:3,4,15 23:6 25:13 26:6,10 27:8,21,23,24 28:8,13,17,24 34:3,5 37:6 39:9,11 41:16 42:10 45:9 46:10 47:6,22 48:4,13 51:23 52:7 53:8 57:19 75:20 80:21,21 85:7 86:12,16 88:5,14 98:25 115:13 134:24 154:12 166:20 169:6,12 174:4 175:23 177:3,9,10,18 184:6 causative (6) 7:12 32:20 35:18 44:3 124:24 177:19 cause (154) 2:19 3:13,16 4:7,9,17,25 6:14,21,22,24 7:6,7 9:19 16:20 17:23 18:1,9,24 19:5,7 20:9,11,12,14,15,21,23 23:2 24:7,7,9,10,25 25:9,14 26:8 27:3,11,20 29:1,7 30:8 31:17 32:16,17,17,18,20 33:7,9,16 34:6,20 35:2,9 36:5,20,21,23,25 37:6,7,7,11,11 38:5 39:3,15 41:16,19,22 42:4,8 45:23 46:1,2,4,16,19,25 47:7,25 48:3 49:15,21 50:15 51:9,11,15 52:14 53:21,22,23 54:2,3,4,5 56:5,18,23 59:16 61:9,10,11,17,18 62:1 65:4 66:9,25 69:7 70:15,23 71:20 73:6,15,16 74:1,4 75:10 76:6,9 81:22 82:20 83:23 84:4,15,16,18,19,21,21,21,23 85:5,9,25 86:1 87:22 88:17 90:23 91:13 95:25 97:3 132:14 156:15 175:22 176:1,16,16 178:4,17 184:2 caused (51) 1:24 2:22 18:12,16 20:4 30:8 45:10,20 46:24 47:17 49:18,24 51:2,13,14 55:10,16 56:22 60:13 62:4,20,20,21 64:2,12 73:19 82:2,5 83:20 84:1,7,11,12 85:2 86:4 96:11 97:4 101:23 136:19 139:16 150:1 151:3 158:1 164:2 171:10 172:17,18 173:11,12 177:14 185:7 causes (35) 6:15 7:10,10 20:19 34:17 35:4,6 36:10,22 49:22 50:25 52:21 54:21 61:3,9 63:8 68:10 69:17 73:3,5,14 74:19,20 82:21,25 83:1 84:13,14,22 86:5 95:21 132:7,11 150:11 causing (9) 54:22,24 55:2,5 59:14 61:4 76:16 81:1 121:12 caution (1) 101:18 cease (2) 100:4 101:4	ceased (2) 159:1,3 ceasing (1) 100:11 center (2) 73:4 79:15 central (4) 1:6 2:15 57:14 181:13 centre (2) 27:1 30:21 century (1) 166:20 certain (1) 100:9 cessation (12) 121:12 137:23 138:6,15 140:15 143:5 158:5,16 159:20 160:10,10 161:3 cetera (5) 2:17 105:2,24 150:2 162:18 chadwick (1) 167:13 chain (5) 81:8 150:5,5 151:1,2 challenge (1) 110:19 challenged (1) 110:20 change (4) 29:24 77:17 109:23,24 changed (1) 29:20 characterisations (1) 174:11 charlies (1) 170:15 chartbrook (1) 128:20 charterers (3) 46:15,22 47:12 charters (1) 47:21 check (1) 142:1 checklist (1) 40:11 checkouts (1) 113:17 chef (3) 3:8 57:11,12 cherry picking (1) 149:23 chief (2) 27:9 28:14 choice (1) 105:9 chose (1) 61:20 chose (3) 59:22 105:8 108:14 chosen (3) 23:1 39:7 63:2 christopher (1) 173:19 church (16) 75:22,23 76:1,8,10,11,13,17,21 77:5,8,21,23 78:11 79:6 89:19 churches (4) 76:18 77:2 108:8,9 churchs (1) 108:12 circle (4) 8:25 30:2,5 31:9 circuit (1) 137:13 circulation (1) 187:21 circumscribe (1) 115:8 circumstance (1) 62:7 circumstances (29) 19:12,13 22:12 34:3 36:1 49:23 55:3 62:13 66:22 67:7,14 68:15,18 69:7,12 71:18 76:3 78:15,15 89:14 96:19 103:7 105:15 106:17 110:15 160:19 167:2,12 168:11 citation (1) 41:18 cite (2) 52:4 138:3 cited (11) 1:14 28:19,20 46:4 83:2 87:9 121:3 137:2 138:13 139:22 147:25 cities (2) 9:20 27:14 city (7) 30:21 49:16,25 55:11 105:12 119:16,19 civil (5) 72:10 114:18 118:9,21 172:17 civilised (1) 189:3 claimant (4) 120:5,18 122:4 153:21 claimants (7) 119:17 120:1,7,9,24 121:25 122:2 claimed (2) 18:10 26:24 claims (11) 18:11,11 89:12 105:18 141:8 169:7,8,14,17,20,21 clarke (1) 173:19 causing (130) 17:25 50:7,9,10,18 56:1,2 57:7,24 58:16 60:10,12 62:10,12 63:22 67:1 68:8,15,18,23 70:12,14,17,20 71:5,23 74:6 75:4,4 77:7 78:3,6,14	79:2,12 80:15 89:14 91:7,8,9,10,16,17,18,19 92:8,11,22,25 94:15,17,21 95:17 96:3,17,21 97:19 98:5 99:2,4,14 101:8 102:17,23,23 107:5 114:4,8,10 116:25 118:19 123:24,25 124:1 127:18 131:9,10,17 132:1,17 134:6,16 141:23 144:8,20 146:22 147:8,16 148:19 151:12 160:13,20,21,23,25 161:3,5 162:9,15 163:24 164:11,14,18,20,22 165:3,7,21,22,22,24 166:4,6 168:23,25 171:7,8,9,14,16 172:12 174:2,13 176:3,11,12,12,13 184:20 clauses (35) 18:25 19:15,21 50:17 55:22 58:17 59:2 60:21 61:20 88:20,24 89:1 90:5,19,20,21 91:4,6 94:23 101:19 102:24 116:24 130:22 142:19,22 160:17 161:2 164:19,24 165:6 174:6 175:4 176:7 182:14 184:24 clear (7) 47:5 113:16,25 120:10 149:24 164:24 182:14 clearcut (1) 47:4 clearly (1) 102:5 clerks (1) 23:14 clients (4) 170:19 174:20 181:13,22 clock (2) 48:22 143:23 close (16) 38:17 76:2 77:8 78:12 99:13,17,18 100:18,19 103:4 105:8 133:9 147:17 163:19 180:11 185:19 closed (14) 17:20 76:12,18,19 77:5 79:3 100:9 113:17 118:10,13,16 119:4 133:21,23 closing (1) 133:13 closure (22) 75:23 76:4,5,22 78:16 79:4,7 91:10 100:10 102:21,23 103:3,6 117:4,10 133:4,11,25 177:23 183:5 184:24 closures (2) 185:11,12 clothing (1) 162:20 clubs (1) 103:18 cluster (1) 145:23 clusters (1) 145:23 co (1) 137:8 coach (2) 78:7 135:14 codifying (2) 3:18 83:7 collect (1) 81:20 collection (2) 20:24 76:1 collections (4) 75:22,24 78:10 79:3 coloured (1) 9:14 column (20) 11:23 41:15 43:3 49:9 50:7 65:18,19 71:24 72:4 81:24 82:11,12 84:25 117:9 118:12 120:11 121:2,6 138:4 combination (1) 70:18 71:2,3,12,13,14,15 74:9 77:12 78:19 88:23 combined (1) 174:15 come (26) 9:5,22 13:4,13,15 15:8 19:17 51:18 54:12,14,16 70:18 77:21 78:2 79:6,8 105:20 123:6 127:12 143:6 145:18 148:15,19 149:14 156:24 167:25 comes (10) 3:6,20 24:19 31:7 37:19 57:1 86:13 110:12 132:9 175:23 coming (2) 41:3 169:1 comma (1) 125:17	commentators (1) 27:23 commercial (10) 46:12 48:12 66:25 68:2 81:13 96:16,21 105:17 143:17 167:24 committee (1) 154:22 committing (1) 116:2 common (26) 2:23 3:18,19 6:9,25 20:9 21:16 27:10,12,22 28:10,10,16,23 29:17 34:2 46:12 48:11,15 52:5 66:25 86:12 101:20 120:5 125:11,13 commonly (1) 14:5 commotion (1) 72:10 commstop (1) 116:22 community (1) 12:20 company (2) 118:8 121:4 comparator (1) 92:6 compare (2) 71:16 92:19 comparing (1) 71:18 comparisons (1) 101:13 compensable (1) 119:6 compensate (1) 57:4 competent (2) 72:9 114:7 competing (1) 95:24 competition (1) 69:2 complained (1) 47:6 complete (4) 64:13 143:5 159:20 161:8 completely (13) 8:19 10:11 18:3 19:25 34:14 49:20 74:20 105:10 118:13,16 133:22 161:1 167:2 compliance (2) 14:1 118:15 compiled (1) 147:13 comply (1) 111:22 component (2) 136:11,12 composite (1) 183:2 computer (1) 120:21 computers (4) 120:3 121:18 143:4,8 concede (1) 146:12 conceded (4) 31:14 134:18 147:3 178:3 concedes (2) 31:15 134:7 conceding (1) 146:10 concept (3) 25:14 67:18 123:10 conception (1) 28:16 concepts (2) 24:2 146:19 concern (3) 139:2 179:4,9 concerned (5) 2:12,13 40:25 54:20 189:5 concession (2) 133:5 183:17 concessions (2) 183:7 184:3 conclude (3) 45:22 81:25 177:9 concluded (1) 189:7 conclusion (5) 44:2 58:14 84:6 142:20 169:13 conclusive (1) 50:10 concur (1) 141:24 concurrent (20) 6:22 35:11 49:22 50:4,4,5,15 51:11 54:21 71:20 73:5,14 74:18 76:6,9 84:3,22 85:4 95:24 97:3 concurrently (2) 69:8 96:11 condition (12) 42:14,17,18 43:22 44:14,19,20,23 45:6,7 51:24 53:16 conditioning (1) 120:2 conditions (8) 40:12,12,14,15,18 69:1,6 130:7 conduct (1) 73:11 conference (1) 14:24 confess (2) 10:7 127:16 confine (1) 30:14 confined (1) 104:5 confirm (1) 131:3 confirmed (1) 30:24 conflict (1) 72:10 connected (3) 68:10 69:17 177:24
--	--	--	---	--	--	--

connection (6) 33:24,25 46:19 176:2 177:19 178:25	contract (16) 39:20,23 52:18 53:4 58:18 59:3,8 86:15,15 87:23 101:19 138:14,24 139:1 167:12 185:5 69:13 106:7 166:25	173:8,16 174:1,8,9,13,19,20 175:1 177:14,15 182:24 183:4,11,19,24 184:8,20	damages (4) 26:24 63:18,22 124:10	182:20	79:6,11 100:17,20 108:6 112:19,21 114:23 120:6 124:5 141:11 146:12 147:18 153:14 155:25 176:7	disservice (1) 89:22 dissuade (1) 153:20 distance (1) 185:18 distancing (5) 13:5,12 14:1 100:13 113:16
connotation (1) 145:11	contracts (1) 167:24	coverage (8) 137:23 138:15,17,18 139:8 140:16,20 142:4	danger (7) 91:12 114:13,20 115:1,7,9 161:20	defeat (3) 42:20 43:24 70:13	difference (6) 61:21 93:1 94:23 117:2 160:1 162:14	distant (3) 97:8,18 126:12
conscious (3) 170:14 186:20 188:11	contractual (2) 124:5 167:5	covered (34) 11:5 58:16 60:21 61:23 64:16 65:15 66:16 71:4,4 72:5 75:17 78:4 98:15 112:5 118:20 119:17,19 120:19 121:13 132:3,8 133:2 134:15 146:20 147:21 157:13,22 159:9 168:12 182:4,10,16,25 185:7	dangerous (1) 114:21	defendant (3) 28:2 120:16 153:23	differences (1) 22:18	distinct (1) 179:8
consequence (7) 2:16 68:5,8,17 69:15 177:4,5	contrary (5) 46:3 66:21	cover (2) 23:4 89:20	daniel (1) 153:10	defined (4) 54:6 63:9 122:21 148:19	different (32) 3:11,24 11:12,24 15:17 19:17 22:23,24 37:9 39:19 70:19 74:25 77:18 82:15 94:14 116:12,25 117:23 129:6 134:13 140:18 145:9 146:19 148:3,22 149:6 163:22 174:16,18 180:2 185:24	distinction (7) 117:15 165:10 166:14,17 168:16 176:10 177:5
consequences (4) 24:24 60:15 67:2 121:8	contrast (2) 23:4 89:20	covered (34) 11:5 58:16 60:21 61:23 64:16 65:15 66:16 71:4,4 72:5 75:17 78:4 98:15 112:5 118:20 119:17,19 120:19 121:13 132:3,8 133:2 134:15 146:20 147:21 157:13,22 159:9 168:12 182:4,10,16,25 185:7	daniels (3) 137:8,11 161:12	definite (1) 48:2	difficult (11) 8:14 16:2 17:9 20:16 24:3 31:11 117:19,21 124:8 143:3 175:13	distinguished (1) 137:8
consequent (1) 27:16	contrasted (1) 141:5	cover (2) 23:4 89:20	data (12) 11:9,10,16,19 12:23,24 119:17,20 120:3,9 158:24 180:4	definition (18) 37:22 63:4 65:1 86:6 90:17 130:16 132:15 145:7 163:14 182:3,10,24 184:11 185:23 186:4,7,9,13	difficulties (1) 22:18	distortion (1) 99:21
consequential (3) 64:10,12 66:2	contracts (1) 102:24	cover (2) 23:4 89:20	database (1) 10:16	definitions (1) 159:12	difficult (11) 8:14 16:2 17:9 20:16 24:3 31:11 117:19,21 124:8 143:3 175:13	distracted (1) 48:5
consider (2) 161:5 167:10	contribute (2) 7:13 181:9	cover (2) 23:4 89:20	datatab (4) 119:13 121:17,19,23	definitive (1) 27:7	difficulties (1) 22:18	district (4) 119:15,15 139:6,9
considerable (1) 54:6	contributed (2) 6:22 8:13	cover (2) 23:4 89:20	datatabs (2) 120:13 121:13	definitely (1) 140:10	difficulties (1) 22:18	divorce (1) 105:11
consideration (1) 102:25	contributing (2) 7:9,10	cover (2) 23:4 89:20	date (2) 13:24 89:17	defy (1) 29:17	difficulties (1) 22:18	divorced (1) 105:11
considerations (1) 28:6	contribution (3) 3:24 35:18 181:19	cover (2) 23:4 89:20	dates (1) 104:14	degeneration (8) 42:3,19,21 43:23,25 45:14,17,21	difficulties (1) 22:18	dixon (2) 28:14 181:12
considered (3) 16:4 26:20 130:25	control (1) 33:11	cover (2) 23:4 89:20	day (8) 11:11 12:1 13:18 149:16 158:3 159:17 165:9 170:15	degenerative (8) 42:18 43:9,12,18,22 44:13 45:7,11	difficulties (1) 22:18	dixson (1) 116:22
considering (5) 13:5,10 45:10 68:8 124:2	controversial (1) 7:24	cover (2) 23:4 89:20	day451 (1) 162:3	degraded (4) 42:20 43:25 44:13 161:10	difficulties (1) 22:18	diy (1) 111:12
considers (1) 173:16	convenient (3) 48:19 94:25 182:11	cover (2) 23:4 89:20	day4381 (1) 58:22	degree (4) 42:20 43:25 44:13 161:10	difficulties (1) 22:18	doctrine (1) 101:20
consistent (8) 81:13 151:8 159:19 160:8 161:1 165:6 176:17 186:8	conversion (1) 7:3	cover (2) 23:4 89:20	day4751 (1) 1:17	degenerative (8) 42:18 43:9,12,18,22 44:13 45:7,11	difficulties (1) 22:18	document (6) 7:15 11:17 92:11 111:13 152:11 153:15
consistently (1) 131:18	converse (1) 116:1	cover (2) 23:4 89:20	day510211 (1) 162:10	degraded (4) 42:20 43:25 44:13 161:10	difficulties (1) 22:18	documents (2) 170:21,22
constitute (2) 103:11 181:18	conversely (1) 44:24	cover (2) 23:4 89:20	day51111 (1) 2:5	delay (2) 14:9 61:4	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	convoluted (1) 169:19	cover (2) 23:4 89:20	day513520 (1) 163:1	delayed (1) 74:23	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	copies (1) 157:8	cover (2) 23:4 89:20	day514224 (1) 158:3	deliveroo (1) 108:3	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	copy (2) 141:10 171:2	cover (2) 23:4 89:20	day51481 (1) 135:19	demand (1) 13:8	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	cord (1) 104:20	cover (2) 23:4 89:20	day516921 (1) 159:18	demanding (1) 177:3	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	cordoning (1) 103:1	cover (2) 23:4 89:20	day52211 (1) 182:8	demonstrate (6) 7:3 29:13 87:8 138:13 156:25 157:15	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	corner (4) 8:2,7 46:10 137:5	cover (2) 23:4 89:20	day5331 (2) 134:8 183:11	demonstrated (2) 1:17 178:24	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	cornerstone (1) 88:18	cover (2) 23:4 89:20	day5451 (1) 149:13	demonstrates (2) 9:15 151:11	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	coronavirus (1) 179:20	cover (2) 23:4 89:20	day54715 (1) 169:4	demonstrating (1) 179:13	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	correct (5) 2:24 47:21 51:10 69:18 177:9	cover (2) 23:4 89:20	day5518 (1) 162:10	denial (7) 88:24 90:18,19 91:7 135:23 146:22 165:22	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	correctly (1) 139:12	cover (2) 23:4 89:20	day57610 (1) 167:1	deny (1) 60:19	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	corresponding (1) 92:16	cover (2) 23:4 89:20	day61481 (2) 100:3 101:12	department (1) 72:8	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	cost (3) 106:13 107:4 112:4	cover (2) 23:4 89:20	day715520 (1) 29:24	departure (1) 2:6	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	costs (6) 106:12 159:7,8,13,14,14	cover (2) 23:4 89:20	day715620 (1) 29:19	depend (2) 34:23 161:9	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	couldnt (7) 20:18 54:23 113:14,15 124:11 136:11 170:4	cover (2) 23:4 89:20	day72815 (1) 115:22	depending (1) 91:14	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	couldnt (7) 20:18 54:23 113:14,15 124:11 136:11 170:4	cover (2) 23:4 89:20	day781 (1) 175:20	depends (4) 18:17 97:19 180:3 187:12	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	count (4) 25:9,13 43:19 100:17	cover (2) 23:4 89:20	days (6) 13:21 118:11,16,18 133:19 178:2	derived (1) 111:20	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	countdown (1) 89:12	cover (2) 23:4 89:20	de (5) 107:13,16 108:12 109:1 133:20	described (3) 35:9 94:20 147:4	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	counted (2) 24:8 105:2	cover (2) 23:4 89:20	deal (28) 41:7,9 71:19 81:15 91:25 98:18,23 108:6,16 110:19 116:17 118:5 123:17,22 127:2 135:9 136:1,15,22,25 147:6 149:10 153:6,9,15 155:9 175:13 187:16	describes (1) 11:8	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	countdown (1) 89:12	cover (2) 23:4 89:20	deals (7) 23:19 44:5 47:3 123:12 149:9 155:20,20 dealt (10) 44:9 48:4 50:5,6 80:11 132:24 137:3 175:11 185:25 188:21	description (1) 45:7	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	counterfactual (7) 70:24 74:3 79:6,11,13 81:10 169:19	cover (2) 23:4 89:20	dealing (18) 1:5 7:23 21:25 39:14,18 56:3 67:5 116:12 124:9,18 132:13 145:13 152:11 163:2 167:4 184:23 187:8,25	descriptive (1) 132:21	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constitute (2) 103:11 181:18	counterfactuals (2) 98:12 149:12	cover (2) 23:4 89:20	deals (7) 23:19 44:5 47:3 123:12 149:9 155:20,20 dealt (10) 44:9 48:4 50:5,6 80:11 132:24 137:3 175:11 185:25 188:21	designated (1) 173:1	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
constraints (2) 48:17,18	country (18) 13:3 15:1,7,18,19 16:25 36:14 88:22 96:20 97:10 105:13 134:14 22:23 179:11,14 183:20,22	cover (2) 23:4 89:20	death (1) 43:8	designers (1) 105:24	difficulties (1) 22:18	does (24) 33:23 45:21 55:3 61:21 64:10 68:1 69:20 70:20 85:21 96:2,3,25 97:25,9,8 102:7 130:18 135:13 138:16 156:3 172:22 173:12 182:25
construction (28) 2:14 4:10 17:3,3,7 18:6 30:11 32:7 33:10 39:21 46:5 57:24 58:2 83:9,11 88:20 108:5 109:4 120:24 121:9 122:12 125:24 143:13 167:25 169:9 170:24 172:16 174:5	couple (4) 5:7 81:17,19 161:25	cover (2) 23:4 89:20				

154:9,10 182:19 183:23
draft (3) 162:12 187:21
 188:4
drafted (1) 145:8
draftsman (3) 126:21 128:21
 132:12
dramatic (1) 185:21
draw (8) 44:2 119:12 121:6
 133:16 137:6 168:16 171:8
 179:21
drawn (2) 7:20 176:10
driven (1) 22:22
drivers (1) 27:2
drop (2) 75:24 109:25
dropped (2) 76:1 114:18
due (8) 83:15 84:24
due (16) 47:17 51:6 68:14
 69:8 79:24 88:25 99:7
 102:18,19 103:1 118:9,21
 141:24 152:13 154:18
 180:11
dumped (1) 130:21
during (17) 19:22 34:13
 50:13 64:24 69:3 92:16
 93:1,2,16,23,25 94:11,16
 106:13,15 160:1,6

E

e (2) 128:22 164:20
earlier (7) 52:15 82:6 96:2
 144:12 164:13 169:12
 179:19
earned (6) 19:22 20:2
 93:16,25 94:3 160:3
earth (1) 80:7
easier (4) 7:5 33:18 102:6
 182:12
easiest (1) 171:3
easily (1) 1:16
eastern (1) 97:22
easy (6) 6:7 26:7 30:16
 31:10 73:24 163:18
eat in (1) 107:20
ecclesiastical (7) 40:18 77:1
 90:9 92:12,15 147:24
 148:5
ecclesiastics (1) 148:23
echo (1) 1:13
edelman (128) 1:3,4 3:1,4
 4:8 9:14 10:3 16:12 18:14
 19:2 25:23 26:1,5 31:2,13
 32:3 33:24 34:16,18,25
 35:7,19,22 36:2 37:14 40:9
 41:8 48:20 49:2,3
 53:17,22,25
 54:3,8,11,12,18
 55:12,15,18,22 58:1 63:1
 65:19 69:21 70:2,10
 80:9,13,15,19 84:10,17
 85:14,19,23 86:1,6 87:20
 88:2,8,15,18 90:8
 93:11,13,20 94:1,5
 95:1,2,7,8 115:10,14
 123:16,18,20,22 126:2,6
 127:11,13,17,20,24
 128:4,7,11 129:8
 137:16,19 141:10 143:6,10
 144:3,4 145:12,16
 152:3,8,16,21,24
 153:4,11,19 157:14 161:11
 163:5 164:13 169:11
 179:12,15,19 182:9
 183:11,16 186:1 187:1,3,4
 188:2 188 190:3,5,9
eday (3) 170:4,12 176:21
edeys (2) 175:7,11
edifice (1) 89:7
editors (1) 82:24
effect (26) 18:24 41:16 43:10
 60:15 67:6 69:4,9 72:16
 74:13 75:17 78:17 89:17
 94:17 95:14 96:5 101:9
 108:10 109:6 126:10,12
 133:13 144:21 173:21
 174:3 177:12 184:13

effective (30) 6:14,16,21
 20:15 27:19 30:7
 32:16,17,19 33:7 34:16
 35:9 36:5 37:7 46:18 48:3
 53:23 54:2,3,4 56:18
 61:10,11 75:10 82:20
 84:19,21,23,23 189:2
effectively (6) 85:24 102:12
 107:17 123:12 127:21
 178:3
effects (2) 62:14 97:7
efficacy (5) 7:12 20:19 35:5
 36:22 37:5
efforts (1) 154:11
efp (3) 140:19 141:4,11
eggery (1) 173:22
eight (1) 118:11
eighth (1) 137:13
either (19) 6:15 10:3 20:23
 21:12 29:5 36:21 42:2,16
 44:18 61:18 69:24 74:1
 80:21 113:10 133:6
 147:12,21 155:9 187:20
electronic (1) 158:24
element (4) 2:11 9:10 71:20
 150:4
elements (5) 23:22 70:16
 80:24 124:9 151:14
elevation (1) 182:22
eloquently (1) 157:5
else (12) 9:4 18:19 67:10
 74:7,8 81:7 130:10 156:3
 163:17 180:24 186:21
 188:17
elsewhere (2) 97:3 185:13
embankment (1) 75:9
embark (2) 46:17 48:1
embodies (1) 139:12
embraced (2) 42:19 43:23
emerged (1) 75:25
emergence (2) 29:11 93:7
emergency (29) 74:10,14
 77:3,11,14,19,20,22
 78:2,4,9,11,17 79:5,7
 88:25 89:3 102:20 107:6
 125:12,14,17,18,25
 126:3,10,11,15,16
emerging (7) 16:3 75:13
 77:22 89:18 94:18,20
 185:8
emphasis (1) 114:25
emphasise (7) 28:21 34:4
 48:15 76:9 86:23 97:5
 168:24
employed (1) 68:16
employee (1) 106:20
employees (16) 99:11
 100:22,25 104:16 106:1
 107:2 109:9 110:7 112:13
 113:15,18 115:21,22,25
 122:24 123:3
employs (1) 24:1
empty (1) 105:13
enable (1) 49:23
enamoured (1) 143:14
enclave (2) 169:2,8
encompass (2) 66:22 91:16
encompassed (1) 63:22
encompasses (2) 51:2 63:6
encompassing (2) 145:16
 160:10
encounter (1) 83:20
encouraged (1) 49:10
end (12) 45:3 77:6 86:2 92:3
 101:19 148:15,19 151:24
 152:4 153:11 170:14,15
endanger (4) 102:20 107:6
 125:15 126:4
endangers (1) 126:16
ending (1) 168:15
endorse (1) 179:15
endorsed (1) 6:2
endorsement (5) 140:12
 141:16,20,23 142:13
enforced (6) 91:10
 133:4,6,11 183:5 184:24

engage (1) 4:10
engaged (2) 92:23 99:16
engaging (1) 83:13
england (2) 8:22 97:10
enough (6) 32:21 37:22
 75:11 131:2 154:2 185:8
enquiry (2) 46:18 48:1
ensued (1) 119:3
enter (3) 39:22 105:16
 120:20
entering (2) 185:4,15
entire (3) 70:13 76:21
 138:25
entirely (7) 45:2 99:17 136:7
 154:13,16 187:23,24
entitled (4) 77:25 82:23
 153:18,24
entitles (1) 78:14
entrance (2) 106:20 107:1
environment (1) 162:18
envisage (1) 163:8
envisages (3) 159:1 162:21
 163:24
envisaging (1) 182:20
epidemic (6) 14:10 96:23
 129:16,17 130:11,17
equal (7) 20:19 34:17
 35:5,17 36:22 37:5 61:5
equally (5) 47:5,14 48:8
 121:16 122:5
equipment (5)
 120:4,13,17,22 122:2
equitas (1) 167:8
equivalence (1) 35:13
equivalent (2) 19:18 65:9
erect (1) 122:17
erroneous (2) 47:14 87:4
error (2) 63:3 128:22
escape (2) 60:25 184:8
esposue (2) 47:13 151:16
essence (5) 20:5 40:15 66:19
 101:21 133:21
essential (4) 104:25 106:7
 112:9 114:2
essentially (4) 3:25 21:2
 98:24 118:1
establish (1) 186:10
established (2) 2:18 83:25
estate (1) 109:11
estimate (1) 13:19
estimated (2) 93:24 160:2
et (5) 2:17 105:2,24 150:2
 162:18
euro (1) 176:24
even (44) 7:4 20:14 21:17
 38:8 44:14 45:6 59:5
 61:12,25 62:22 66:14
 69:11 73:17,20 75:16
 76:8,23 77:4 78:19 84:18
 85:9 87:24 89:11 96:22
 99:10,17 100:11 108:9
 109:13,25 113:24 114:20
 122:7,7 127:24 128:20
 131:8 143:15 151:8 154:14
 156:16 176:8 177:8 184:13
event (22) 1:21 49:16,23
 50:9 52:11 60:14 64:22
 65:13,15,20 80:11 101:17
 132:5,8,12,13 142:8
 154:14 158:12 164:25
 167:4,18
events (15) 49:16,18 65:7,9
 69:9 81:8 96:22 132:3
 165:3 182:4,6,10,25
 185:2,21
eventually (1) 15:14
ever (2) 10:13 53:2
every (7) 8:20 13:20
 35:14,15 36:16 71:14
 112:9
everybody (2) 136:6 188:12
everything (6) 14:12 67:10
 81:7 151:14,16 179:15
everywhere (3) 9:4 16:5
 184:17
evidence (4) 11:6 12:4 14:13

140:9
evince (1) 177:13
evolved (1) 101:20
exacerbated (1) 44:13
exactly (7) 23:21 85:19
 126:2,6 127:20 128:4
 147:16
examines (1) 23:17
example (47) 8:12 9:2 17:20
 30:20 32:14 37:20 57:10
 60:24,25 61:2 65:6 67:20
 69:2 74:21 75:13 76:24
 77:2 79:2 81:12 89:18
 95:18 98:4 105:19 106:6
 108:2 109:13 111:10
 117:20 121:9 123:12,14
 133:8 142:8 147:16 158:19
 159:17 160:20 162:10,24
 163:20 164:24 165:3
 168:20 169:3 181:10
 182:15 183:15
examples (4) 60:23 64:19
 135:19 142:12
except (8) 16:7 50:20,24,25
 63:7,8 94:13 111:8
exception (2) 58:8 88:12
exceptional (1) 62:9
exceptions (1) 82:15
excess (3) 128:10,13,17
excise (2) 17:18 129:19
excised (3) 129:14,17,18
exclude (3) 45:19 49:19
 173:12
excluded (12) 50:20,21,24,25
 55:13 61:24 63:7,8 65:5
 81:9 82:22 85:13
excludes (1) 95:20
excluding (1) 45:13
exclusion (38) 28:9 41:17,24
 42:2,6,17,19,19
 43:6,7,23,24 45:2,5 46:6
 85:12 96:9 126:19,23
 128:1 129:12,14,15,20,23
 130:3,10
 131:7,10,13,14,17,19
 148:4 172:12,16 173:10,25
exclusions (7) 131:4
 172:1,5,7,8,8 173:18
excuse (2) 104:8 161:24
excuses (1) 104:9
exercise (6) 17:17 57:21
 83:11,13 167:19,23
exercising (1) 153:14
exhortation (1) 96:18
exigencies (1) 57:16
exist (2) 22:9 71:14
existence (1) 79:14
existing (2) 35:24 36:3
exotic (1) 145:18
expect (3) 15:9 52:12 154:7
expectation (2) 185:16
 186:12
expectations (1) 135:14
expected (3) 69:25 136:21
 185:22
expedition (1) 188:21
expeditions (1) 105:1
expeditiously (1) 187:8
expenditure (2) 72:1,6
expense (7) 137:22,23
 138:15,17,18 139:8,15
experience (1) 46:13
explain (8) 11:21 24:2
 100:20,21 110:25
 129:15,18,25
explained (6) 11:19 114:9
 166:25 167:13 172:24
 185:24
explanatory (1) 110:22
explicit (1) 147:13
explosion (1) 121:10
exponential (1) 15:14
exposed (1) 98:5
express (21) 1:10 4:20 5:11
 19:25 40:24 41:6 48:21
 49:4 51:18 54:11 59:20

63:5 66:4 67:19 69:20 81:5
 87:7 88:13 89:5 111:3
 156:11
expressed (1) 51:17
expressing (1) 42:7
expression (2) 140:11,14
expressly (6) 82:22 101:8
 162:20,21 163:3 165:20
extend (2) 64:2 114:11
extending (1) 43:8
extends (3) 31:24 113:5
 136:2
extension (4) 66:19 174:9,25
 183:3
extensions (7) 60:1
 174:7,7,22 175:1,5,5
extent (8) 61:5 101:23 105:7
 157:14,21 161:7 168:18
 174:10
external (1) 97:14
extra (7) 98:11 137:23
 138:15,17,18 139:7,15
extrajudicial (1) 154:17
extraordinary (2) 71:25 72:6
extreme (8) 62:14 77:6
 135:11,12,17,19 146:9
 169:7
extremely (3) 40:7 127:18
 188:24
eye (1) 65:8

F

f (1) 125:14
faa (1) 117:13
faas (1) 117:10
façade (1) 187:25
facility (1) 142:10
factoring (2) 16:3 39:24
facets (2) 32:21 71:19
factsensitive (1) 110:9
factual (4) 1:20 30:4 31:3
 36:1
fail (5) 3:25 17:11,14 79:23
 88:23
failed (1) 127:1
failing (2) 149:19,22
failure (2) 62:4 142:25
fair (1) 56:10
fairchild (9) 5:24 6:1 22:1,3
 25:20 34:5,6 169:2,7
fairly (2) 35:20 166:21
fairness (1) 56:6
falling (1) 104:15
falls (1) 93:7
false (2) 14:20 49:15
familiar (3) 63:24 157:19
 158:2
families (1) 169:15
familyrum (1) 107:25
fanti (1) 87:6
far (13) 4:5 5:10 38:6 54:19
 67:17 101:16 108:12
 113:9,11 142:20 164:1
 173:11 189:4
fast (1) 14:17
faster (1) 186:17
favour (2) 83:18 121:4
favoured (1) 28:11
fca (13) 4:12 12:9 110:20
 149:17,18,21 152:13 153:7
 166:25 169:5 178:2,22
 187:6
fcas (3) 153:16 178:11,14
fear (1) 73:21
federal (4) 117:5
 137:14,17,20
fell (2) 45:6 104:19
few (12) 16:6 21:24 23:11
 24:13 77:16,18 91:24
 104:12 125:7 133:18 149:8
 174:21
fewer (2) 113:9,11
fiction (6) 10:7,9 86:25
 87:2,3,5
field (1) 45:11
fifth (1) 120:21

figures (4) 11:17 68:13 94:6
 165:12
fill (1) 8:22
filter (2) 25:15,18
final (12) 23:15,25 91:3
 149:10 151:23 168:16
 169:1 178:15 181:3,6
 186:3 187:13
finally (7) 91:11 123:6
 131:25 147:6 148:24 165:8
 184:23
financial (6) 94:12,16
 105:21,22,23 151:25
find (13) 16:1 21:15 24:3,17
 26:10 70:6,8 73:12 82:7
 84:12 110:2,15 174:12
finding (2) 43:17 106:4
finders (2) 4:16 17:11
finish (2) 54:17 152:1
finished (1) 151:22
fire (5) 57:11 87:15 119:13
 121:10 147:3
first (42) 1:22 2:21 3:25 4:22
 5:21 10:17 12:9 15:3 18:6
 20:8 22:10 24:6 25:8 41:10
 43:5 50:1 56:4 74:16 78:10
 92:11 93:12,15 96:18
 99:22 118:7,16 121:6,11
 123:23 126:20 135:21
 140:17 149:15 153:15
 156:5 157:11,12 166:9
 171:4 179:20 185:25 188:9
firstly (11) 22:1 31:14 32:25
 52:4 56:22 59:1 70:20 73:2
 92:10 95:14 136:14
fitzgerald (1) 28:15
five (3) 27:6 151:24 152:4
flag (3) 137:5 159:10 166:5
flatten (1) 14:10
flaux (102) 2:8 3:2 4:3 9:13
 10:1 16:10 18:4,17 30:16
 31:3,22 33:21 34:8,10
 36:19 40:6 41:5 48:19,22
 49:2 53:13,18,23 54:2,16
 55:9,13,16,20 69:20 78:0
 80:1,6,14 84:24
 85:15,21,24 86:2 87:17,21
 88:7,12,16 93:18,21
fair (1) 56:10
 94:2,25 95:3 96:15
 102:2,9 109:15 112:17,25
 113:6 123:20 125:23 126:3
 127:17,21,25 128:5,9
 129:4 137:12,18 142:22
 143:9,23 144:3 145:2,15
 152:1,6,14,17,23 153:1,19
 154:5,16 155:1,4,5,12
 156:2 160:16,20 162:12
 168:2 170:1,7 180:17,23
 181:4,23 186:20 187:1
 188:2,23
flauxs (3) 9:12 123:7 180:15
flaw (1) 58:24
flawed (2) 5:8 89:5
fletcher (2) 49:8 55:23
flexibility (2) 20:13 163:6
flexible (2) 142:20 146:1
flights (3) 9:6 117:5,11
flooding (1) 140:7
floor (2) 120:21 121:12
floors (3) 119:18 120:7
 121:11
focus (7) 1:7 37:16 53:11
 67:18 89:21,25 141:19
focused (1) 45:2
focusing (1) 18:21
follow (4) 31:10 86:17 143:4
 153:8
followed (6) 58:13 100:8
 101:9 103:22 114:13
 175:18
following (17) 2:17 10:6
 23:23 33:17,18,21 38:25
 44:4 77:24 91:13 121:20
 131:22,23 166:23 172:18
 173:11,13
food (8) 112:17,19,20

113:3,4,9,19,24
foot (1) 29:23
footballer (1) 41:12
footnote (1) 186:5
force (8) 69:2 101:13,16
 102:1 115:15 116:10
 147:12,14
forced (2) 120:2 125:16
forensic (3) 7:17 10:8 31:16
foreseeability (2) 47:18
 48:10
foreseeable (1) 47:16
forgot (1) 43:1
form (15) 10:16 11:16 34:20
 63:12 99:23 114:5 140:12
 147:1,16,18,20 142:13
 153:10 158:5 165:19
formula (1) 28:18
formulae (1) 54:7
formulate (1) 22:10
formulation (1) 107:14
forward (9) 11:1 14:10
 130:20 138:22 142:8
 154:18 171:13,15
found (4) 47:22 80:20 117:3
 140:9
foundation (2) 1:8 176:22
foundered (1) 85:10
four (6) 27:6 50:7 118:16,18

general (6) 52:5 69:5 93:21
111:12 114:13 172:8
generali (1) 60:12
generally (8) 21:8 22:4 51:24
52:20 100:3 104:1 112:5
145:24
generates (2) 64:14,15
geographic (1) 145:22
geographical (1) 168:22
geographically (1) 12:18
get (37) 3:13 4:14,15 8:14
17:16,16,17,22 18:23 19:6
20:8 25:15 33:4 37:24
40:21 55:1 57:17 60:22
74:16,17 77:12 78:9 86:7
95:13 123:4 124:6 128:14
133:10 144:24 149:15
151:19 154:8 156:10 166:5
176:19 178:12 179:23
gets (4) 8:14 55:24 62:25
92:2
getting (5) 55:24 58:1 80:19
84:17 117:12
give (21) 12:5 21:19 28:23
30:4 35:13 43:10 71:17
89:25 93:17 127:6 131:19
158:21 161:25 170:21
174:2 177:12 178:20
179:18 180:23 181:10
188:2
given (16) 15:9 27:24 49:24
62:16 89:6 100:7 102:13
125:1 126:22 128:1 129:4
139:5 141:21 152:7 156:17
161:17
givers (1) 133:23
gives (4) 89:20 127:18 138:8
162:15
giving (3) 1:13 64:13 140:4
global (2) 182:17 185:7
gloss (2) 100:19,21
goes (22) 4:25 10:10 14:6
15:13 21:8 24:13 45:3,16
47:9 52:4,13 56:9 60:6
64:7 67:12 82:9 84:5 132:5
143:17 161:13 166:7
184:13
going (5) 6:10 7:14 15:21
20:7 21:19,20 28:23 29:2
34:3 36:16 38:1,6,22 41:7
43:20 57:12,23 60:19
73:1,22 74:21 76:21,22
77:13 78:18 81:18 84:6
87:25 98:23 106:2 112:16
123:16 128:19 129:17
131:24 133:2 137:1,3
138:22 144:15 153:8 156:5
159:24 170:21 176:23
179:25 181:2,21 188:2,6
189:3,5
gone (7) 3:9 5:21 9:11 19:25
34:7 57:12 87:12
good (5) 45:19 87:1 173:22
189:3,5
governing (1) 149:5
government (6) 7:20 9:1
10:6,18 11:15,19 12:7,9
15:22,24 16:3,19,23 17:20
31:6 36:11 38:20 73:5,21
75:18 77:4,8,10,22
79:15,20 81:1 88:22,25
89:2 97:25 99:3,7,10,15,16
102:19 103:1,15 106:19
107:5 114:12,18 118:10
124:19 147:10,17
150:8,10,13,15 166:23
169:16 172:17 177:21
179:25 180:7 181:9 183:6
184:9,21
governmental (2) 173:13
177:16
governments (5) 10:16
113:10 179:20 184:15
185:10
governor (1) 119:3
governors (1) 118:15
graham (2) 26:15,16

grammer (1) 128:25
grammatical (1) 125:23
grateful (6) 49:3 93:14 95:8
181:5 186:25 188:25
great (4) 13:18 89:22 112:25
147:3
greater (1) 140:3
grinding (1) 143:7
gross (9) 69:1,4,10,15 94:9
159:7,24 160:4,5
ground (4) 2:23 120:5
125:11,13
growth (1) 14:17
guarantee (1) 148:8
guarantor (1) 148:13
guest (1) 30:20
guests (1) 117:11
guidance (1) 83:8
guidances (1) 111:23
gypsum (1) 27:14
H
hadnt (3) 73:21 78:11 127:3
half (7) 48:23 109:25 143:24
154:2,6,14 155:11
halfway (3) 43:4,21 84:25
hall (1) 142:9
halsbury (1) 82:24
halsburys (1) 82:17
halt (1) 143:7
hamblen (5) 5:12 51:20 52:2
53:14 58:7
hamblens (4) 4:21 58:25
60:4 81:5
hancock (1) 16:4
hancocks (1) 14:23
hand (7) 78:21 95:12 98:17
127:18 131:20 181:7,20
handed (1) 133:18
handful (1) 8:8
hands (1) 187:23
happen (7) 38:22 74:9 77:6
144:17 146:5 180:5 188:7
happened (4) 17:21 57:4
77:15 147:16
happening (6) 34:10 38:23
67:8 74:6,7,8
happens (3) 74:23 92:1
140:1
happenance (1) 109:3
happy (2) 10:12 54:3
hard (4) 141:10 156:9 157:8
171:2
harder (1) 123:12
hardly (1) 117:13
hardware (3) 111:10
113:11,22
harking (1) 134:24
harm (2) 137:24 139:14
harmless (6) 58:19
86:11,21,24 87:14,16
hartford (1) 118:7
hasnt (2) 16:12 153:22
haste (2) 43:1 135:22
havent (11) 5:9,21 11:7,7
18:5 31:4 40:4 87:24
144:22,24 152:14
having (19) 10:8 16:23 25:4
39:9 44:7,15 66:24 72:13
74:18 80:15 82:1 97:7
121:2 126:21 127:4 139:20
151:13 177:11 187:16
head (2) 3:8 57:12
headed (2) 41:16 172:13
heading (7) 41:14 131:5
132:6 137:20 138:21
157:21 159:23
headings (2) 130:24 172:15
headnote (1) 137:21
heads (3) 21:16 134:5 174:19
health (2) 173:4,6
hear (3) 34:9 170:6,7
hearing (4) 96:15 187:13
189:2,7
heart (2) 1:11 89:10
heavy (2) 182:3 187:15

height (1) 15:6
held (9) 5:17,20 27:4 43:5
52:18 120:24 121:23
133:24 139:13
help (6) 40:10 119:9 151:18
169:24 186:17 187:19
helpful (5) 7:15 8:21 40:7
153:25 170:2
helping (1) 40:11
hence (2) 64:16 76:23
herbert (1) 109:16
here (31) 7:8 9:7 20:23
23:24 25:17 35:10 38:20
40:10 54:19 19 56:21 73:1
101:15,15,22 110:19
116:12,21 122:24 125:9
129:7 142:15 145:2 155:6
157:21 163:7 167:6 168:14
169:13,14 170:5
hereafter (2) 51:1 63:8
herein (3) 50:20,24 63:8
hickmott (1) 64:7
higgs (11) 170:5,6,10,11
180:18,19 181:2,5,23
186:23 190:7
high (12) 6:1 13:25 26:11,22
27:5 28:19 44:5 53:5
105:24 125:3 154:24
173:23
higher (2) 13:24 59:24
highly (2) 135:11 185:16
himself (1) 42:7
hindcastle (1) 148:10
i132 (1) 92:10
i1322 (1) 165:14
i1323 (1) 165:16
i137 (1) 94:8
i1381 (1) 164:7
i1884 (1) 182:18
i218 (1) 185:1
i233 (1) 181:12
i253 (1) 181:15
i29 (1) 183:15
i33 (1) 168:20
ica (2) 46:14,24
idea (2) 10:7 179:7
identification (1) 175:7
identified (5) 1:23 48:14
71:5 82:6,6
identify (6) 6:6 27:19 81:6
92:7,8 163:22
identifying (1) 132:10
idle (1) 127:25
ie (6) 12:21 28:17 125:2
158:5,6 163:12
ignorance (1) 88:2
ignore (2) 101:11 186:1
ignoring (3) 132:17,18
149:24
ii (1) 182:19
illegal (2) 104:7 113:25
illness (1) 43:15
illuminating (1) 83:14
im (5) 11:5 69:22 95:8
149:14 155:13
imaginary (1) 67:7
imagine (5) 9:10 71:9 86:25
100:22 142:10
imd (1) 167:14
immediate (6) 19:20 83:23
114:22 126:11 176:15
180:6
immediately (13) 84:1 85:2
87:16 88:3 92:17
93:2,4,6,10 94:12 131:20
149:3 158:9
impact (11) 73:3 74:15
75:14 79:22 148:8 157:3
160:18 165:5 172:21
173:21 185:17
impacting (1) 73:8
impacts (2) 62:17 97:15
impeding (1) 123:10
implication (1) 142:2
implicit (1) 147:13
implicity (1) 62:24
implies (2) 28:11 115:7

67:9 133:21,23 181:12
hoteliere (1) 133:20
hotels (2) 117:13,14
hour (2) 75:2,6
hours (1) 77:18
house (8) 30:20 83:17
87:3,15,18,23 148:9
154:23
houses (1) 108:20
howard (7) 46:7 47:10 48:8
60:25 174:8 175:11 176:5
howards (2) 170:23 174:11
however (11) 28:7 36:6
42:1,13 53:24 79:16
138:16 140:12 157:4 184:7
187:15
huge (1) 99:8
human (6) 144:10 145:4
171:20,20 172:22,23
humoured (1) 189:3
humdile (2) 3:25 4:17
hurricane (8) 50:20 51:14
55:4,10,11,17 56:23 67:8
hypothesis (1) 49:15
hypothetical (2) 32:13 67:7
I
i112 (3) 7:18 9:16 15:21
i1120 (1) 95:11
i121 (1) 8:16
i1267 (1) 178:13
i131 (1) 92:5
i132 (1) 92:10
i1322 (1) 165:14
i1323 (1) 165:16
i137 (1) 94:8
i1381 (1) 164:7
i1884 (1) 182:18
i218 (1) 185:1
i233 (1) 181:12
i253 (1) 181:15
i29 (1) 183:15
i33 (1) 168:20
ica (2) 46:14,24
idea (2) 10:7 179:7
identification (1) 175:7
identified (5) 1:23 48:14
71:5 82:6,6
identify (6) 6:6 27:19 81:6
92:7,8 163:22
identifying (1) 132:10
idle (1) 127:25
ie (6) 12:21 28:17 125:2
158:5,6 163:12
ignorance (1) 88:2
ignore (2) 101:11 186:1
ignoring (3) 132:17,18
149:24
ii (1) 182:19
illegal (2) 104:7 113:25
illness (1) 43:15
illuminating (1) 83:14
im (5) 11:5 69:22 95:8
149:14 155:13
imaginary (1) 67:7
imagine (5) 9:10 71:9 86:25
100:22 142:10
imd (1) 167:14
immediate (6) 19:20 83:23
114:22 126:11 176:15
180:6
immediately (13) 84:1 85:2
87:16 88:3 92:17
93:2,4,6,10 94:12 131:20
149:3 158:9
impact (11) 73:3 74:15
75:14 79:22 148:8 157:3
160:18 165:5 172:21
173:21 185:17
impacting (1) 73:8
impacts (2) 62:17 97:15
impeding (1) 123:10
implication (1) 142:2
implicit (1) 147:13
implicity (1) 62:24
implies (2) 28:11 115:7

imply (1) 28:11
importance (4) 79:1 157:15
170:18 174:21
important (21) 23:4 50:21
57:20 68:6 72:25 89:16,16
99:8 108:13 121:17 152:10
156:25 164:8 165:18 168:7
173:25 174:2 186:4 187:9
188:12,14
importantly (1) 177:23
impose (1) 111:2
imposed (10) 77:10 110:20
111:20 118:10 119:3 147:9
150:18 169:16 180:8
185:11
imposing (2) 40:19 91:1
impossibility (6) 101:14,21
102:3,7,8 146:10
impossible (3) 73:2 116:8
122:14
impression (2) 125:19 169:5
improved (1) 23:10
inability (14) 75:10 76:11
146:8,11,13,18,18 150:11
157:13 161:6,7,7,8,16
inappropriate (4) 5:17,20
52:19,25
incidence (2) 12:4 173:6
incident (16) 42:5
68:5,9,11,12,14,18
69:8,10,11,15,18
146:24,25 147:2,4
incidents (3) 37:4 134:5
179:13
include (8) 64:3 102:13
104:9 107:23 123:9 138:16
145:17 182:7
included (3) 104:24 165:19
179:3
includes (4) 30:2 101:8
110:18 146:25
including (10) 12:14 77:24
100:11 103:15 112:5
113:22 119:21 139:14
177:22 185:11
income (18) 71:25 72:2,6,7
76:1 92:25 93:1,23,24
94:16 136:17,21
159:7,23,25 160:1,2,6
inconsistency (1) 149:11
inconsistent (1) 141:22
inconsistently (1) 150:14
inconvenient (1) 143:8
incorporates (1) 83:5
incorrect (1) 63:13
incorrectly (1) 83:3
increase (1) 112:4
increased (6) 69:2 106:12
159:7,8,13,14
incredulity (1) 107:22
incurred (1) 72:1
indefinite (2) 47:25 115:1
indemnify (3) 88:3 97:7
171:18
indemnity (28) 19:10 57:1
59:3,5,13,23 62:2,12
64:2,13 67:22 68:6 74:2
75:19 80:5 87:18 88:19
92:17 93:2,23 101:23
106:14,14,16 129:1 159:14
160:2,6
independent (6) 49:21 67:14
70:22 71:20 74:19,21
independently (4) 54:22
55:2 73:20 76:15
index (1) 190:1
indian (1) 107:25
indicated (2) 152:2 153:11
indications (2) 124:16 182:13
indication (3) 109:7 180:15
188:3
indirect (2) 42:21 44:1
indirectly (6) 42:2,16 43:9
44:18 104:22 111:6
individual (8) 23:14 36:22
38:20 39:1 89:9 144:19

151:14 161:20
individually (1) 161:21
individuals (4) 11:25 111:7
123:3 133:14
indivisible (10) 10:4 20:23
34:19 35:2 36:20,21,23,25
37:11 39:3
inessential (1) 111:12
inevitably (1) 188:9
infect (1) 164:3
infected (2) 36:16 162:20
infecting (1) 36:17
infection (3) 12:16 163:20
173:7
infectious (11) 30:13 144:10
145:4,13 162:16 163:2,8
164:21 171:20 172:23
176:14
inferred (1) 73:12
influenced (1) 96:18
information (8) 7:17
10:15,18 11:15 12:8 16:23
124:19 134:1
ingredient (2) 70:23 71:15
ingredients (6)
71:2,3,5,8,9,10
inherent (2) 73:9 103:24
initial (2) 107:14 182:21
initially (1) 175:12
injury (8) 42:5,22 44:1,12
45:10,18,21 91:12
inoperative (1) 120:2
inserting (2) 96:4,9
inside (1) 114:11
insofar (9) 106:2 111:8
113:15 128:2
150:1,4,11,13,15
install (1) 111:24
instance (2) 43:5 131:14
instant (1) 82:14
instantly (2) 87:1 163:19
instead (2) 44:11 166:21
instinctively (1) 22:16
instructing (1) 115:17
instruction (2) 103:10,22
instructions (5) 49:8
100:13,16 104:22 106:4
insurance (51) 3:18,19
5:5,14,16,19 9:18 23:1
26:6 28:25 36:4 46:3
52:13,17,24 53:1,19 56:17
59:17,18 63:11,12,14
64:1,8,10,25 65:7,10
66:11,19,20 78:7,24 81:9
82:18 83:4 88:13 108:1
109:6 118:7 119:14 121:4
137:20 138:14,24 139:1
174:15,16 182:6 185:5
insure (4) 61:22 77:2,12
157:23
insured (108) 1:24 2:23,24
18:13,17
55:4,6,7,10,11,14,16,19,22
56:25 57:4 58:2,3,19,20,21
60:17 61:6,8,16,16,19
62:15,18 63:13,21
64:12,23,24 65:1,4,12
66:7,8,22
67:2,14,16,18,20,21
69:12,25 70:17,24
71:12,13,14,15 72:7,15
73:6 77:12 78:19 79:21
81:2,4,7 82:2,21,23
93:8,19 94:12 102:22
115:5 119:2,21 121:5,21
123:3,5 134:12 136:19,20
139:16 141:24 144:21,22
150:12 160:14
164:8,9,10,16,17 165:1,1,5
171:18 173:17 174:19,24
175:7,10 176:13,23 176:6
184:16 185:3,17 186:11
insureds (14) 69:10 73:8
97:9,12 104:24 108:14
129:4 134:17 137:24,25
139:14 168:17 174:25

177:21
insurer (18) 58:17,19 61:16
66:17 67:23 69:24 87:1,3
92:22 97:6,15 98:5,6 128:2
133:22 142:5,7 183:24
insurers (49) 1:11 3:20 4:1
5:3 10:14 16:14 25:17
29:6,18 32:6 39:10,12
45:19 59:21 62:6 68:24
71:11 74:25 75:16 77:9,25
78:8,21 79:11,19,23 87:24
88:18 89:7,10 94:7 96:6
97:21 98:1 99:10 107:9
112:10 114:14 135:5
149:11,18 150:9,14,17
151:1 158:17 178:2
187:7,9
insuring (19) 50:18 59:2
60:10,11 61:20 62:6 63:22
64:11 70:13,17 71:23 74:5
78:8,23 123:24 171:8
176:11 177:10 182:14
integral (2) 26:3 64:17
intend (1) 132:25
intended (14) 17:5 49:17
78:6 101:25 102:15 125:25
131:5,6,18 145:9 146:15
167:11,17 168:12
intensive (1) 12:14
intent (2) 139:3,12
intention (4) 73:12 167:20
177:13 182:13
intentionally (1) 146:2
intentions (5) 43:11 168:4,5
174:3 177:12
inter (1) 173:5
interdependent (1) 70:22
interested (2) 121:20 171:15
interesting (4) 54:13 58:23
84:24 135:4
interestingly (1) 82:24
interfered (4) 97:13 140:21
141:6,15
interference (27)
18:14,15,18,21 31:5 38:25
51:6,9,12,16 56:24 57:5
72:17 95:22,25 96:11 97:4
141:2 142:2,3 171:10,19
175:9,17 176:17 177:20
178:18
interlinked (3) 70:22 71:19
74:19
intermediate (1) 30:1
intermittently (1) 13:7
international (1) 180:4
internet (1) 143:1
interpose (1) 31:5
interposing (1) 19:6
interpret (1) 140:10
interpretation (10) 24:20
25:5 121:15 125:21
130:19,22 139:9 141:19
142:13 143:15
interpreted (1) 139:6
interpreting (1) 82:3
interrelated (1) 154:3
interrupted (3) 97:13 140:21
159:2
interruption (98) 1:24 3:7
18:14,15,18,21 19:10 30:8
31:4,7 38:24 40:21 50:11
51:5,6,9,12,15 54:20 56:23
57:5 59:14 63:11,14
64:1,8,18,20 65:10,21,24
66:8,11 68:20 69:3 72:17
81:12 95:22,25 96:10 97:4
99:5 106:12 109:7 118:21
119:20 132:7 135:9,12,25
136:5,13,19 137:22
138:6,22 139:7,10,13
140:8,11,24 141:1,8,17,22
142:1,7,17,21 143:2,12,17
144:5 156:22 157:12,16,25
158:4,16 159:20 160:9,19
161:3,15 162:1
171:6,10,19 172:2 173:9

175:8,16 176:16 177:14,20
178:17 183:4
interveners (13) 146:7 149:9
151:22 152:3 156:4,20
166:12 168:17,19,21
180:20 183:13 186:19
intervention (1) 12:9
interventions (1) 13:6
into (36) 3:13 8:18 9:3,5,6,6
11:23 17:16,21 19:24
26:24 27:24 39:23 40:5
41:22 47:14 57:1,17 60:22
62:2,14,22 70:20,24 75:12
108:10 123:4 130:21 147:1
149:2 151:12 166:5 176:19
179:6 185:5,15
intrainsuring (1) 176:3
introducing (1) 11:6
introduction (1) 27:17
introductory (2) 156:12,14
invent (1) 34:4
inventing (1) 35:20
investments (1) 167:14
invite (4) 16:1 110:2,15
157:7
invited (1) 157:5
invoked (1) 68:24
involve (2) 96:2,4
involved (2) 104:2 188:13
involves (5) 22:11 23:16 24:6
53:7 96:9
irreducibly (1) 96:24
irrelevant (3) 50:14 56:2
88:8
irrespective (2) 31:8 68:12
isles (3) 16:8,16,21
isnt (12) 10:10 15:11 33:11
37:1 55:10 57:10,25 80:22
93:22 101:6 130:10 151:7
isolate (1) 163:22
issues (7) 18:5 43:3 47:4
183:9 187:16 188:1,12
issuing (1) 79:16
italia (1) 87:7
item (3) 69:14 92:11,24
itemised (1) 120:11
items (1) 157:24
its (62) 5:6 6:4 7:17
15:8,12,15 20:2,11,22
21:10 26:7 35:17,18 37:1
38:1,19 39:8 54:24 56:3
58:1,13 59:14,18,20 60:15
63:13 65:25 66:11,12,25
67:5 77:18 78:12 81:2,11
82:11 83:19 87:2 94:23
95:10 101:8 103:9 107:25
108:21 114:3,17 115:4
119:17 121:19 122:2,2
123:2,25 130:20 138:5
139:5 145:16 147:18 164:6
174:21 178:23 181:14
itself (20) 5:25 30:14 46:21
55:1 59:25 64:6 72:19,20
73:8 77:7 85:13 95:23
99:13 101:5 106:6 110:13
124:13 126:10 165:21
176:15

J

j (2) 140:4,23
j10610 (1) 67:4
j1063 (2) 50:18 63:6
j1065 (1) 49:5
j1066 (1) 51:21
j1068 (1) 52:13
j1069 (2) 60:6 66:23
j1301 (1) 173:20
j1351 (1) 173:24
j14211 (1) 176:25
j14411 (1) 133:19
j14421 (1) 140:2
j144225 (1) 140:6
j144226 (1) 141:13
j1491 (1) 64:7
j1492 (1) 64:9
j15711 (1) 23:5

j15712 (1) 23:7
j15713 (1) 23:25
j164 (1) 104:7
j1761 (1) 144:13
j5711 (1) 119:14
j5712 (1) 119:24
j5713 (1) 121:1
j5721 (1) 118:8
j5722 (1) 118:12
j5723 (1) 118:19
j5724 (1) 118:25
j6610 (1) 81:22
j669 (1) 82:10
j901 (1) 71:22
j9029 (1) 72:23
j9111 (1) 137:16
j9115 (1) 138:19
j9116 (1) 138:23
j9117 (1) 138:3
j9118 (1) 138:12
jay (24) 6:11,11,14,14
20:13,13 32:19,19
36:6,7,7,7 39:13,13
54:1,1,16,16 83:10,11
84:20,20 85:13,13
jigsaw (8) 8:4 9:10,15 10:2
20:24 21:1,3,13
join (1) 187:7
joins (1) 43:12
jones (10) 170:5,12 180:11
181:7,20 182:1,2
186:22,25 190:8
judge (13) 24:15 44:21 67:16
87:11 140:9,14,19,24
141:5,14,22 154:22 173:23
judges (9) 23:9,11,12 24:3
42:9 142:6,12 143:15
154:20
judgment (24) 4:22 5:1,12
6:19 20:22 27:9 28:12
41:17 48:3 51:21 60:7 83:4
85:17 86:2,5 119:9 133:18
140:4,4 167:7 187:17,21
188:4,8
judgments (1) 28:7
judicial (1) 26:4
judiciary (1) 52:8
july (1) 1:1
jumping (2) 1:10 5:10
june (2) 92:19,20
justeat (1) 108:3
justify (1) 21:14

K

k1001 (2) 116:23 117:2
k1002 (1) 117:7
k10641 (1) 22:4
k1131 (1) 117:17
k1141 (1) 116:22
k1191 (2) 41:11 43:1
k1195 (1) 41:13
k1196 (2) 41:20 43:20
k1271 (1) 117:17
k1281 (1) 46:8
k1285 (1) 46:9
k1371 (1) 148:1
k1378 (1) 148:1
k1411 (1) 148:24
k1461 (1) 116:22
k17857 (1) 167:6
k20621 (1) 68:22
k2066 (1) 68:3
k21512 (1) 186:6
k80114 (1) 26:18
k80115 (1) 26:16
k811 (1) 116:23
k8611 (2) 136:25 137:2
k911 (1) 117:18
kall (1) 109:16
kamilla (1) 46:7
kealey (21) 1:5 40:13 45:24
52:23 59:8 63:11 66:6
86:11,17 88:9 147:25
148:25 149:7 153:7
154:8,8,19,20 155:2,6
174:6

kealeys (9) 1:8,17 4:14 10:9
44:6 58:16 60:2 62:25 81:4
keeping (1) 13:22
kershaw (1) 87:11
key (4) 111:1 122:18 162:16
170:22
kind (3) 25:15 31:11 154:1
kinds (3) 22:24 158:20
160:18
knew (4) 36:11 185:5,7,10
knock (2) 3:21 4:2
knocked (2) 75:3,7
knots (1) 21:21
know (30) 3:17 8:18 14:4
18:11 20:5,11,12,15 21:7
31:16 34:10 39:16 53:25
66:17 78:1,17 80:24 83:8
89:8 93:19 96:13 108:22
113:24 115:3 118:2 144:7
152:3 165:19 187:10,20
knowing (1) 133:9
knownunknown (1) 124:21
knows (3) 22:16 132:12,13
kramer (1) 89:23
kwik (1) 109:16

L

ladder (1) 122:18
landscape (1) 148:17
landsip (17) 60:24
61:6,14,23,25
62:7,8,15,19,20,24
67:21,24 74:21,24 75:2,5
language (21) 1:19 45:2 50:9
66:5,25 69:16 90:22,23
102:22 126:13 136:18
139:3,5,11 140:20,23
141:20 176:6 182:14
184:18 186:12
large (2) 38:8 183:19
largely (1) 189:3
last (11) 8:3 14:9 19:18
42:11 44:1 75:13 78:1,17
82:12 176:25 178:2
later (5) 7:14 9:23 37:24
51:19 163:1
latest (1) 181:1
latter (1) 71:1
lauwers (1) 140:4
lawton (1) 85:18
lawyers (1) 21:20
lays (1) 22:7
lead (7) 12:11 15:14
45:17,21 92:7 121:8
142:12
leading (1) 140:4
leads (1) 83:2
learned (7) 9:20 155:22
157:1 160:22 161:11
163:10 164:12
lease (2) 148:10,15
least (12) 2:2 3:16 34:16
35:4 36:10 44:19 86:20
113:19 158:22 160:10
187:22 189:4
leave (5) 57:13 77:11 78:16
104:8 126:7
leaves (2) 155:3,8
leaving (2) 101:4 114:11
left (6) 3:8 21:10 100:12
118:20 151:5 184:4
lefthand (8) 8:2 46:10 49:9
72:4 118:12 121:2 137:4
182:19
leg (1) 44:11
legal (24) 1:6 2:1 6:6
21:17,18,23 22:22
23:13,16 24:5,16,23
25:4,13 48:14,17,18 58:5
82:16 102:7 147:12,14
148:17 149:6
legally (4) 101:7 116:8
122:14 133:6
leggatt (1) 167:8
legionnaires (5) 38:15
162:23 163:1,13,21

legislation (1) 27:17
legislative (1) 148:20
leicester (13) 29:12,25
30:17,21,25 32:4,9 33:2
97:21 22:23,25 98:1
lengthy (1) 187:17
less (13) 1:20 7:6,12 96:23
97:20 98:5 102:2 121:20
135:22 158:17 160:9
166:24 176:17
lessor (3) 159:3,21 160:11
let (3) 54:18 118:2 128:14
lets (23) 9:22 12:8,11
30:18,19,23 31:2 32:3
41:13 54:16 60:6 61:4
64:19 68:2 75:23 76:18,25
77:1,20 114:6 137:16
150:3,9
letter (2) 26:20 149:1
level (5) 11:13,13 15:12,16
169:20
levels (1) 11:12
leyland (1) 6:12
liabilities (3) 148:11,13,14
liability (11) 22:8,19,21
27:19 45:20 63:21,23
65:23 148:9,18,21
liable (4) 27:4 45:17 58:18
162:17
lies (1) 1:11
life (7) 57:16 80:6 102:20
107:6 125:15 126:4,16
ligaments (1) 43:13
light (5) 111:11,11 166:22
167:15 180:14
like (29) 2:16 16:10 29:11
35:14 39:13,14 53:9
59:2,18 67:8,20 69:25
71:10 80:25 97:21
105:17,19 107:24 108:3
109:11 111:12 134:10
144:12,23 156:10,12
157:11 168:12 171:25
likely (11) 12:16 18:12 74:9
102:20 107:6 113:3 125:14
126:4 163:25 164:15
187:17
likewise (1) 108:16
limit (11) 40:17,20 59:22,24
67:22 80:5 112:11 115:4
125:18 129:1 164:14
limitation (2) 164:11 168:22
limitations (2) 172:4,7
limited (5) 93:18 104:19
109:17 123:11 180:24
line (17) 1:18 27:1 67:12
75:9 92:25 101:17 115:22
116:14 129:16 158:3
159:17 162:3,13 166:9
167:1 169:4 178:15
lines (4) 24:13 50:7 116:9
117:9
link (4) 2:24 68:17 176:18
177:2
linked (3) 136:21 144:20
162:23
linking (1) 2:15
list (2) 138:8 183:9
listening (1) 156:17
literally (1) 100:12
litigation (1) 102:25
little (6) 6:17 16:6,9 40:25
98:12 168:23
live (1) 108:19
livelihoods (1) 169:15
lives (1) 14:12
living (1) 15:10
loa (5) 55:19,20 58:15
60:10,16
loaded (1) 76:15
local (30) 10:24 11:2,13,14
17:8 29:8,15 31:10 37:1
99:3 102:19 114:20 125:18
133:10 145:6 163:23
164:7,16,17,25 171:21
173:3,3 178:3,16

179:1,8,9,13 180:4
localised (1) 91:1
localising (2) 164:19 165:20
locality (2) 40:19 144:17
locally (3) 29:5 115:8 165:4
located (3) 119:18,22 121:15
location (7) 4:6 126:11
145:18 162:24 181:14
184:1 186:11
locations (7) 134:13
183:18,19,21,25 184:16
185:18
lock (2) 32:13 97:25
lockdown (18) 9:4 15:1,10
16:22 21:14 30:4,6
31:8,11,12 32:8 36:17
75:18 77:17 108:23 124:23
125:1 135:3
lockdowns (1) 185:11
locked (3) 30:22 88:22
183:23
lockey (6) 66:21 103:23
lockes (3) 100:5 107:11
108:25
logic (4) 59:19 79:18 86:18
108:25
logical (1) 58:13
logistics (1) 151:25
london (13) 8:25
9:2,4,5,6,6,7 15:2,7 16:4
147:3 181:13,16
long (10) 8:6 32:7,19 70:6
83:25 152:1 154:4 167:24
170:15,15
longer (4) 29:4 122:4,11
180:6
look (35) 2:4 5:9 8:15 12:8
16:21 18:25 29:19 34:18
35:2 50:21 68:2 71:22
73:10 76:14,25 77:1 80:16
95:15 105:3 127:7 137:13
142:24 143:13 144:12
145:1 148:6 149:13 154:18
160:12 168:8,9 176:21,24
186:4,12
looked (5) 10:14 11:7 29:21
49:6 82:15
looking (19) 15:23 32:1
34:21,24 35:3 36:14 39:20
51:8,11 67:13 85:6 93:4
96:20 101:22 104:1 144:16
164:18 165:24 170:25
looks (10) 5:22 10:12 14:16
16:10 29:20 63:4 82:11
83:8 113:16 142:18
lords (77) 1:4 3:17 9:11,17
14:4 21:25 24:13 39:16
40:3 61:2 63:24 67:20
74:21 78:25 79:8 81:15,16
83:17 86:10 91:14,22
92:13 95:15 98:23 102:17
123:16,24 124:3 125:7
133:16 135:6 136:4 143:21
146:21 148:9 149:8 151:18
152:5,7 153:5 154:15,23
155:2,3,8 156:12
170:11,14,17,20,23
171:7,13 172:19,24
173:8,25 175:6
176:5,9,14,19,24 177:8,18
178:1,5,8,19 180:7,10,13
181:12,17,20 182:2 188:20
114:14 117:11 168:19,21
169:2 171:17 174:20,25
178:19 187:9,11
mandatory (1) 101:7
manhattan (1) 119:16
manifest (1) 177:17
manifestation (1) 125:2
manifested (1) 171:22
manifesting (1) 124:13
manifestly (1) 44:17
manner (2) 146:14 182:24
many (27) 8:21,23 11:25
12:17 21:13 27:15 36:10
39:15 40:3,5 60:23 75:15
105:13 108:1,20 113:21
114:14 117:11 168:19,21
169:2 171:17 174:20,25
178:19 187:9,11
map (6) 8:7 12:10 34:19
35:14 125:4 181:14
maps (3) 13:13 29:13 179:13
march (31) 7:25 8:1,2,3
12:10,12,13 13:1,4,12,15
14:7 26:23 75:25 99:23,24
100:7,17 103:17 104:2,6
106:4 108:10 110:21
147:11 177:22,23 179:2,21
180:9 181:15
marigolds (1) 112:24

losing (1) 77:14
loss (99) 1:25 2:22,25 3:5 4:7
6:23 46:17,19,20,21,24,25
47:25 48:3 49:24
50:5 11:3 51:5 52:21
53:21 54:21,22,25 55:2
56:25 58:21 60:12 62:1,3
63:7,15 64:2,4,5,5,10,12
66:2 68:14 69:14 71:4,25
72:1,5,6,18,19,20
73:6,16,16,19 75:5 76:16
78:9 79:3 81:25 82:20
83:23 84:1 85:2 86:5
87:1,14,19 92:19,25 93:3,6
101:23 107:9 110:10
118:23 119:6,20 121:13
124:3,7,9 136:15 142:2,23
151:13 156:11
159:6,7,23,24,25 160:4
168:24 169:16 171:10
172:17 173:12 175:12,23
184:2
losses (5) 18:10 49:17,19
50:15 157:23
lost (7) 63:19 89:13 106:16
107:3 155:5 156:8 180:20
lot (3) 39:16 188:15 189:4
lots (1) 145:23
low (1) 169:20
lower (5) 11:2,14 59:22
67:22 130:2
lowering (2) 69:4,9
ltd (1) 167:14
ltia (1) 12:1
ltias (1) 11:24
lunch (1) 91:25
lynch (7) 156:5,7,8 168:6
170:1,3 190:6

M

m25 (1) 9:3
macdonald (1) 173:22
macgillivray (1) 41:18
machinery (1) 124:5
main (5) 60:10,11 99:5 100:5
164:11
maintaining (2) 106:13 112:2
majoure (4) 101:13,16 102:1
116:10
major (5) 4:19 38:6 89:10
135:8,9
majority (2) 134:22 168:23
makers (12) 17:9 33:18 57:7
63:3 125:21 128:23,24,25
154:12 158:15 161:18
164:21
making (6) 35:17 75:13
84:10 94:10 117:19 123:12
males (1) 177:1
mandatory (1) 101:7
manhattan (1) 119:16
manifest (1) 177:17
manifestation (1) 125:2
manifested (1) 171:22
manifesting (1) 124:13
manifestly (1) 44:17
manner (2) 146:14 182:24
many (27) 8:21,23 11:25
12:17 21:13 27:15 36:10
39:15 40:3,5 60:23 75:15
105:13 108:1,20 113:21
114:14 117:11 168:19,21
169:2 171:17 174:20,25
178:19 187:9,11
map (6) 8:7 12:10 34:19
35:14 125:4 181:14
maps (3) 13:13 29:13 179:13
march (31) 7:25 8:1,2,3
12:10,12,13 13:1,4,12,15
14:7 26:23 75:25 99:23,24
100:7,17 103:17 104:2,6
106:4 108:10 110:21
147:11 177:22,23 179:2,21
180:9 181:15
marigolds (1) 112:24

marine (5) 3:18 56:17 82:18
83:4 119:14
marked (1) 166:13
markings (2) 81:23 111:24
mason (1) 27:9
mass (4) 10:4 38:19 104:5
121:22
matches (1) 142:16
material (7) 50:19 64:17
65:21,23,25 66:12 110:4
materials (2) 111:12 152:13
matter (28) 2:17 4:18 20:25
22:21 24:20 26:9 28:16
31:6 37:9 62:10 68:2 77:15
86:6,22 100:24 101:10
103:23 107:8 124:22
125:19,23 126:13 147:5
149:5,10,20 161:10 167:21
matters (5) 81:16 132:10
151:23 152:4 161:16
maybe (9) 16:4 21:10 39:16
44:9 54:8,12 55:23 84:17
93:18
mcdonalds (1) 107:24
mean (21) 2:8,12 10:1,2,13
18:10 28:21 39:25 40:1
50:25 54:5 58:14 59:19
102:7 112:19 127:22
144:19 145:3,9 161:3,21
meaning (31) 37:21 42:17
43:7 44:10 89:9 91:21
99:6,21 106:18 114:10
115:10 123:7 130:25 132:3
135:11,13 139:20 140:11
141:21 142:20 157:12
158:14 159:20 160:9
161:18,18 163:6 164:5
165:8 184:22 186:2
meanings (1) 178:25
means (28) 8:9 25:14 33:10
60:9 65:4 67:24 92:16
95:20 108:3 110:14 116:8
125:9 126:8,9 132:21
133:7 136:11 139:14
144:11,18,19 158:5,16
161:6 162:16,18 165:12
186:7
meant (4) 2:15 54:25 55:23
87:8
measure (2) 63:18 173:22
measures (8) 14:11 15:1,10
133:12 147:10,10
177:22,23
mechanism (3) 3:15 33:11
92:22
medical (1) 105:1
meets (1) 100:6
members (3) 20:21 27:6
28:14
mentioned (5) 90:1 102:23
103:19 139:21 169:2
mercury (1) 117:18
merely (3) 43:16 63:15
182:11
merit (1) 176:7
merits (1) 153:16
message (1) 170:4
met (3) 1:21 103:14 107:21
metal (1) 121:22
michigan (1) 118:24
microphone (1) 1:12
middle (6) 30:22 118:14
121:5 130:21 158:8 188:5
midland (1) 137:8
midlands (2) 15:3 16:5
might (27) 7:15 34:14,23
36:6 39:24 53:18 61:10
69:23 70:6 79:16 97:24
103:22 107:23,24 117:20
125:25 128:5 141:18 142:3
146:5 147:14 156:15
158:12 160:19 170:16
174:10 180:5
mile (24) 8:12
30:19,21,23,24 32:4,5,6,9
33:4,4 90:24 91:16

97:19,23 98:2,5 103:1
165:10,17 166:15
181:8,13,18
miles (14) 30:19 38:16,18
90:24 91:17 18
95:20,24 96:8 97:1,12
164:3 169:8
military (1) 172:18
million (3) 72:3 80:4 169:8
mind (6) 5:10 25:1 68:6
146:17 153:14 168:7
mines (1) 27:14
minimis (4) 107:13,16
108:12 109:1
minimise (3) 14:11,19 142:1
minister (3) 14:6 99:24 100:7
ministers (1) 100:16
minnesota (1) 137:19
minute (1) 31:14
minutes (16) 12:12 13:22
48:22 91:24 143:23 146:6
149:8 151:19,24 152:4
179:15,17 180:10,20,21
187:5
miraculously (1) 8:25
misleading (3) 22:15 66:6
151:11
misread (2) 93:13 152:21
miss (12) 6:11,14 20:13
32:19 36:6,7 39:13 54:1,16
83:10 84:20 85:13
missed (3) 79:19 81:19 157:1
misstated (1) 152:9
mistake (1) 110:25
mists (1) 70:3
misunderstand (1) 66:10
misunderstanding (1) 152:18
misunderstood (2) 63:1
152:22
model (1) 180:5
modest (1) 129:2
moment (8) 6:17 13:14,23
38:23 48:19 87:23 94:25
157:4
money (3) 77:13 122:20,22
monitor (1) 180:4
monitoring (2) 10:6 13:2
months (3) 19:19 69:10
92:17
moorebeck (2) 42:12 43:5
more (68) 6:17 8:14 10:9
13:8 15:3,7,8 21:6 26:12
29:3 31:11 33:3 34:21 36:5
37:10 38:11 39:16,16
40:12,25 41:2 48:10 51:18
55:6 64:13 82:19 83:1
97:23 98:12,16 100:3
101:3 104:1,5 107:12
109:1 111:15
113:3,5,21,23 115:4,12
117:19,21 120:25 123:2
124:15 126:12,14 131:24
132:25 135:22 139:25
142:20 145:24 147:23
156:16 157:3,5 166:24
180:25 181:16 185:12
186:10,23 188:8,22
morison (1) 47:3
morning (8) 77:20,21 78:1
79:3,4 118:4 179:13,16
mornings (2) 78:10 89:19
most (11) 1:16 37:18 62:7
99:18 104:24 109:20
116:21 134:23 135:16
168:19 177:22
move (9) 11:1,2 23:24 59:17
98:14 135:7 146:8,21
161:23
moved (1) 160:24
movement (7) 9:3 99:22
100:14 104:21,23 106:9
111:5
moving (2) 15:1,2
ms (35) 57:8 58:12 95:13
98:18,22,23 102:5,17
112:24 113:3,13 123:21

153:14 170:5,6,10,11,12
180:11,18,19
181:2,5,7,20,23 182:1,2
186:22,23,25 190:4,7,8
much (18) 4:11,21 7:14
23:10 28:9 29:3 31:11
37:10 60:23 97:20 101:2
110:11 113:5 154:6 159:22
161:20 170:1 185:19
mulcahy (12) 95:13
98:18,22,23 102:5,17
112:24 113:3,13 123:21
153:14 190:4
mulcahy (2) 57:8 58:12
multitude (2) 7:10 145:16
murder (1) 23:22
murray (2) 26:16,17
muscles (1) 43:12
must (51) 22:10 27:12 30:11
32:22,25 37:17 38:13,24
50:25 59:4 61:19 68:12,23
71:2 73:12 78:25 83:10
96:18 100:9 101:7,14
103:6 109:5 114:21
115:7,15 121:3 122:25
123:2 129:14 130:13
131:18 138:25 139:2
141:19 144:17 145:5
149:17 151:14 152:7
153:17 163:5,7,8,11 165:2
167:16 175:25 179:6 182:5
184:20
mustnt (2) 40:16 57:19
mute (1) 155:4
muted (1) 34:9
myself (3) 3:3 40:8 188:24
N
nail (3) 4:12,13 21:23
name (1) 131:8
narrow (3) 67:18 147:5 158:5
narrower (2) 91:21 126:9
narrowly (1) 121:7
nasty (1) 75:8
nation (2) 10:19 14:7
national (14) 7:11 10:4
11:13 13:11 21:4 29:15
31:12 35:17 37:1 108:19
133:21 179:1 180:4,8
nationally (2) 12:18 13:7
nationwide (6) 150:16,20,22
151:8,9 184:17
natural (5) 24:22 62:20
114:10 126:18 161:18
naturally (2) 146:25 187:10
nature (20) 37:16 38:2,19
39:4,10,11,23,25 40:1 62:6
73:9,10 74:15 86:14,21
92:8 103:24 115:8 124:25
152:8
navios (1) 173:20
nay (1) 87:25
ndda (1) 165:22
near (1) 30:20
necessarily (14) 7:8 8:24 9:1
19:4 30:13 38:13 53:25
54:24 59:9 71:2 73:6
140:13 143:4,6
necessary (9) 1:7,9 25:5,25
51:24 53:15 123:2 125:20
140:11
necessities (4) 104:10 112:8
113:25 114:1
necessity (2) 111:9 113:4
need (39) 2:4 12:6 14:15
20:6 22:13 23:24 27:19
29:19 40:24 53:11 58:4
71:21 81:20 86:8 90:1
91:22 93:9 94:5,6 95:11,13
127:6 129:11,11 131:21
133:19 135:18 138:19
141:9 143:3 144:6 150:6
151:23 153:20 154:14
161:8,12 164:25 173:15
needed (5) 14:1 107:16
125:12 149:15 167:22

needing (1) 4:13
neednt (1) 41:22
needs (6) 1:21 21:15 136:7
146:17 180:11 188:14
negative (1) 137:5
negligence (2) 27:2 28:3
negligently (1) 63:17
neither (8) 5:22 58:14 59:5,6
61:17 84:22 101:15 129:7
ness (2) 24:25 25:11
net (2) 72:18 118:23
never (5) 1:20 52:25 106:8
122:14 176:15
nevertheless (3) 83:22
167:10 183:20
newly (1) 185:8
next (22) 10:20 14:14,21
27:18 29:21 30:7 41:20
45:16 47:20 49:4 73:22
78:12 118:19 124:12
128:14 129:9 132:11
138:22 141:9,13 175:6
180:5
nexus (2) 42:13 44:3
179:4,7
nhs (5) 13:8 14:3 15:15
179:4,7
nicety (1) 21:17
nighttime (1) 118:10
nobody (1) 55:1
non (1) 44:20
nonaccess (1) 101:10
nondamage (3) 135:23
146:22 184:10
none (9) 5:19 7:11,21 82:22
88:13 134:25 150:23
166:12 183:21
nonessential (1) 104:3
nonetheless (3) 6:22 102:6
187:19
nonexcluded (1) 51:3
nonfunctioning (1) 121:22
nonmarine (1) 83:12
nonpoint (2) 165:12 166:1
nonpoints (1) 165:9
nor (5) 23:13 58:15 101:15
129:7 177:15
normal (18) 19:12,13,23
42:19,20 43:16,23,24
45:15,17,20 51:22 62:13
76:22 121:19 122:3,9
125:23
normality (1) 71:17
normally (7) 9:8 19:22,24
20:2 120:23 128:18 146:15
north (5) 16:10,14,16,17,21
nosocomial (1) 12:21
notably (1) 164:5
note (16) 69:16 110:22
146:24 153:25 155:10,12
157:4 159:5 164:19
172:6,14 174:17 175:18
178:14 181:2,6
noted (1) 168:19
notes (5) 5:10 9:17 40:3
82:8 169:1
nothing (23) 17:25 19:4,5
45:12,25 80:21 88:4 95:18
99:20 125:13 129:3 132:14
142:6 147:23 165:4
166:24,24 167:3 170:16
182:12 184:17 186:10
188:22
notifiable (13) 37:19 95:17
96:7 130:12,16 134:5
173:2,9,14 175:9 182:22
185:8,9
notification (1) 158:15
notifications (1) 173:5
notified (3) 145:5 171:22
173:3
notify (2) 158:11 173:4
notion (2) 10:5 27:20
nowadays (1) 108:21
nowhere (1) 102:23
number (26) 11:11 12:19
13:20,25 14:2,4,5,22

15:4,16 54:6 75:16 82:25
112:1,6,11 125:3,14
130:21 134:3 135:23
156:18 157:1 165:6 166:19
174:15
numbers (3) 29:24 99:8
165:18
O
oasis (1) 9:7
objective (3) 14:9 168:3,3
objectively (1) 168:10
obligation (2) 87:22 88:3
obligations (3) 158:9,24
obliged (2) 155:13 173:4
obscure (1) 145:19
observations (2) 140:17
154:13
observed (1) 109:15
observer (1) 147:15
obstinately (1) 154:20
obstructing (1) 123:10
103:21 104:9 111:9
obvious (8) 13:2 36:23 53:19
62:7 128:21,22 166:17
172:20
obviously (29) 1:11 3:5,17
8:6 13:10 17:2 19:15 30:18
37:18 38:16,17 49:10
50:16 57:3 72:20 73:25
74:14 77:3 94:2 95:22
103:21 112:22 121:16
127:10 134:1 142:14 143:7
158:14 188:3
occasions (2) 144:14 166:19
occupants (1) 105:15
occupies (1) 10:25
occur (2) 62:8 87:13
occurred (12) 29:3 31:8 42:5
47:17 50:13 57:5 71:9
78:20 84:3 85:4 96:19
139:15
occurrence (32) 4:6 27:11
30:5 33:14 37:20,21,23
40:19 90:11 91:20 124:15
144:6,9,11,15,16,18,25
145:4,8,11,20,22,23
161:23 162:7,14
163:7,11,14 164:5 165:8
occurrences (3) 37:5 125:2
178:3
occurs (3) 81:9 89:17 158:10
oclock (1) 95:3
odd (3) 36:6 39:4 145:17
oddities (2) 53:13 80:3
oeh (4) 51:22 52:17 66:24
67:4
offence (1) 116:3
offer (2) 149:1 184:7
office (5) 100:23 105:12
109:12,17 143:7
offices (1) 220:7
often (5) 22:19 92:1 141:18
149:21 166:23
oh (1) 144:16
oil (1) 122:15
oilfield (2) 136:24 138:10
oldfashioned (1) 170:25
omitted (1) 147:6
once (9) 1:23 3:14 13:8,14
17:23 20:10 35:16 48:13
71:12
oneoff (1) 146:3
onepage (1) 152:11
onerous (1) 188:8
ones (4) 37:18 91:5 102:11
174:24
oneself (2) 39:21 63:10
online (1) 112:20
onscreen (1) 111:14
ontario (1) 140:4
onwards (3) 177:22,23 179:2
open (7) 61:15 79:10,13
111:5,18 112:18 133:23
opened (1) 118:17

photos (1) 105:21
phrase (8) 42:1 54:4 68:17
84:7 138:5 139:6,10 176:3
physical (10) 50:23 63:7
64:4 101:4 102:7
120:8,13,16 121:25 122:8
physically (5) 116:8 120:20
121:21 122:13 165:4
pick (2) 81:17 125:7
picked (1) 155:19
picking (1) 167:9
pictorial (1) 35:13
picture (17) 7:11,13,25
8:1,1,3,16,20 15:24 16:3
20:25 21:2,5,9 29:15 32:12
35:17
pictures (1) 21:12
piece (3) 7:17 21:1 162:20
piecemeal (2) 29:9 81:19
pieces (3) 20:24 21:3,13
pin (2) 35:15,17
pins (2) 35:14,16
pitfield (2) 140:23 141:11
place (13) 5:22 69:11 90:3
111:15 115:18 119:5 128:5
134:2 135:22 152:7 154:25
182:23 186:8
placed (1) 182:3
places (4) 28:8 29:11 118:11
119:4
placing (2) 155:23,25
plain (2) 36:14 139:5
plainly (6) 67:15 100:24
114:21 131:5 175:14
177:24
plaintiff (1) 26:23
plaintiffs (6) 117:13
118:13,15,22 119:5,6
plan (1) 179:20
planned (1) 186:17
planning (1) 187:20
plants (1) 137:24
play (6) 28:7,13 57:2 70:20
134:8,19
played (3) 28:3 42:21 43:25
player (3) 44:11,22,24
playing (1) 45:11
pleaded (1) 127:3
pleading (1) 127:11
pleadings (1) 178:7
please (5) 1:18 7:19 8:17
10:23 14:18 15:21 21:10
22:4 23:5 25:12 26:17 30:7
65:6 68:21 92:5 123:23
132:1,17 137:2 138:12
141:13 143:24 148:1
157:7,9,18 158:7,23
159:4,6,22 160:12 161:5
162:1,8 164:23 166:7
167:6 171:2,13 172:11
175:3 176:24
178:8,11,12,14
179:17,18,22 186:24
plus (3) 78:23,23,23
pm (13) 95:4,6 98:21 123:19
143:25 144:2 156:6 170:9
181:1,24 186:24 187:2
189:6
poa (3) 58:15 60:10,16
pointed (2) 83:22 166:18
points (19) 31:13 40:11
81:17,19 95:12 114:23
116:5 125:8 126:19 147:21
154:3 156:10,13,25 157:2
158:20 169:25 170:19
177:4
police (1) 103:4
policies (40) 17:4,13
18:19,22 31:18
37:12,13,17 38:24 40:17
59:19 64:21 89:24,25
90:2,25 92:7 95:13
98:14,20 102:4,5,13 112:5
131:23 132:24 135:21
149:9,15 156:18,21
157:6,8 158:20 166:15

174:14,15 176:9 177:13
188:1
policy (106) 3:15,22,23
9:21,23 16:20 17:4,6,12
18:7,13 28:6 30:15 32:22
33:1,11,15 36:24 38:9
40:17 49:17 55:5,11,25
56:19 57:21 58:11 63:21
64:18 66:8,16 72:5 80:25
81:7,12,14 82:14,22,23
84:2 85:3 88:5 90:8,9,14
91:2 95:16 96:10 97:17,18
102:10 106:11 119:7,17
121:18 122:21 125:3,4
129:5,5,6 130:7,14,15
131:1,7 132:9,15 133:3
134:3,15,16 138:16,24
139:1,4,11 140:20 143:17
144:23 145:8 148:5,23
157:9,16 158:25 161:15,19
163:3 168:15 169:10,23
170:25 171:3 172:14,15
173:8 177:15,17,25
182:6,16 183:2 185:6,15
polycholders (10) 75:15
89:11 135:14 165:13,15,17
169:14 178:23 187:9,10
policies (1) 50:18
pollution (4) 129:22 130:1
131:10,11
pools (1) 176:24
poor (1) 35:12
portion (2) 110:7,7
pose (2) 74:3 75:1
posed (4) 5:1,3,4,12
posing (2) 56:3,4
position (15) 2:7 12:11 13:1
26:25 76:23 82:16 107:11
108:15,25 112:17 138:5
146:10 155:22 183:14
186:10
positive (1) 11:25
possible (13) 11:24 13:17
38:4 68:14 88:12 103:16
104:11 115:20,24 116:3
129:19 146:5 187:11
possibly (5) 21:14 104:4
105:14 164:1,3
postulated (1) 44:21
pot (1) 58:4
potential (2) 115:5 147:12
potentially (2) 13:7 35:25
practicable (1) 142:1
practical (5) 46:16 47:24
48:12 75:12 123:2
practice (1) 64:9
preamble (1) 135:24
preceding (2) 68:16 93:10
precipitated (1) 125:1
precisely (1) 48:4
preclude (2) 111:7 177:15
precondition (2) 45:12 46:2
predates (1) 69:22
preemptively (1) 153:12
preexisting (7) 44:13,19,23
45:6 73:7 107:13 108:21
prefaced (2) 136:17,18
preliminary (3) 22:14 41:1
43:18
premise (2) 42:13 71:3
premises (53) 30:2 64:23
74:11,12,13 97:9,12 98:3
100:2,9 102:18,22 103:3,8
104:15,17 105:5,5
106:3,25 110:9 113:14
115:6,21,23 117:22 119:22
120:15,18 121:10,14
122:7,13,19,20 123:4
125:25 126:4,17 128:16
133:15 134:13 136:20
144:21,22 150:12,16 151:3
163:19,20 164:1 171:23
172:13
prepare (1) 92:6
prepared (4) 9:17 83:17
131:3 154:1

prerestriction (1) 168:24
prescribes (1) 28:22
presence (1) 96:11
present (8) 31:6 42:1 81:25
83:5 115:8 125:6 161:14
168:10
presented (1) 52:2
presenting (1) 29:15
press (1) 14:23
pressed (1) 107:15
pressure (1) 161:20
presumably (3) 85:12 136:9
162:23
presuming (1) 169:4
pretend (1) 71:8
pretty (1) 149:24
prevalence (2) 12:4 36:13
prevent (18) 9:2 29:11
72:1,6 97:2 117:22 119:23
123:8,9,14 133:15 153:16
158:12,14,18 179:4,9
184:9
preventative (1) 124:24
prevented (17) 101:1 105:25
106:2,19 107:2,7 109:20
110:16 115:21,23 116:4
117:11 122:3,10 123:1
126:25 128:16
preventing (4) 99:15 100:6
103:12 119:4
prevention (68) 18:20
99:6,12,21,25
100:1,4,15,19,25
101:3,23,24 102:7,8,11,18
103:8,9,11,14,21,24
104:14 105:4
106:5,11,23,24 107:13,20
108:9 109:5,14,19
110:3,4,5,6,10,13 112:14
113:1,8,14,18,20
115:14,15 116:7
117:6,16,21 121:23
122:6,12 123:15 125:14
126:22 127:5 128:19 134:6
136:21 155:21 158:6,6
183:5 184:10
prevents (4) 96:1 104:21
115:18 160:14
previous (8) 14:21 26:17
29:22,23 82:9 94:4,6
146:23
previously (3) 13:25 113:9
153:23
prices (1) 69:3
primarily (3) 89:8 127:3
138:7
primary (6) 3:12 58:8
66:1,12 132:22 179:4
prime (4) 14:6 99:24
100:7,16
principle (8) 2:3,18 52:20
62:2,12 74:2 83:5 128:6
principles (9) 2:1,2 36:3 39:9
64:8 82:12,16 166:21
168:2
prior (9) 19:19,20 27:17 36:6
76:4 77:17 93:2,4,6
probably (9) 8:10 16:17 20:6
34:21 36:17 42:25 89:3
98:14 171:2
problem (10) 21:25 39:23,25
61:2 74:1,18,22 89:18
139:16 167:22
proceed (1) 71:2
proceeded (2) 42:12 47:1
process (11) 23:21
24:6,17,23,24 25:6,8 26:4
43:16 53:7 187:18
processing (3) 119:18,20
120:3
produced (1) 160:5
produces (2) 10:18 109:4
producing (1) 28:3
product (1) 92:23
profertem (4) 128:6
129:10 131:16 186:16

professional (1) 41:12
professor (1) 24:12
profit (12) 63:15,19 64:5,15
69:1,4,10,15 94:9 159:7
160:4,6
profitearning (3) 63:17 64:1
66:20
profits (6) 124:9 140:12
141:15,20 142:13 159:24
progressed (1) 29:9
progression (1) 13:3
prohibited (1) 117:13
prohibition (7) 101:6 104:21
111:14 117:3,16 118:21
119:11
prohibitions (1) 117:23
prohibits (1) 116:24
projection (1) 19:11
projections (1) 7:24
prominent (1) 28:6
promise (2) 87:15,17
promised (1) 155:15
promises (1) 87:3
promising (2) 87:12,13
prompted (1) 73:21
prompting (1) 74:12
promptly (1) 158:11
prompts (1) 95:21
proper (7) 43:10 45:9 57:24
58:1 68:19 169:9 175:6
properly (5) 82:1 159:18
166:5 169:22 175:10
properties (1) 134:17
property (29) 63:18,19,23
64:2,3,4,6,14,22 65:7,12
66:3,18,20 119:22,23
120:6 121:15 122:15
125:15,17 126:5,17 136:9
138:1 171:7,12 172:8
174:9
proportion (1) 110:6
propose (1) 153:6
proposition (1) 22:14
protected (1) 98:3
protection (2) 98:7 173:4
protects (2) 97:6,15
provable (1) 16:22
prove (8) 3:23 16:19,24 17:1
79:21 127:4 183:21 184:1
proved (1) 34:12
provided (10) 59:3 78:23
104:12 155:11,12,14
172:15 174:15 177:14
182:25
provided (8) 46:15 47:23
106:7 140:20 164:11
172:10 174:1 188:19
provides (7) 37:12 159:25
160:4 171:9 172:14 182:6
183:15
providing (6) 27:18 59:4
66:2 136:16 173:6 183:3
provision (2) 148:20 182:20
provisions (5) 69:13 124:1
142:24 182:12 183:4
provoked (2) 47:14 62:15
provoking (1) 74:10
proximate (83) 2:19 3:12,15
4:7,9,14,16,25 6:24 7:3,6,7
9:19 17:23 18:1,9,24
19:5,7 20:9,11,12,14 23:1
26:8 28:25 31:17 32:18,24
33:16 34:6 35:6 37:6
41:16,19,22 42:4,8
46:1,2,4 47:7 51:9,15
52:14,21 53:21,22 54:5
56:5,23 59:15 61:9,17 62:1
70:15 73:15,16 74:1,4,20
80:20,21 81:22 82:19
84:13,14,14,16,18 85:9,25
86:1,5 88:16 90:23 91:13
175:22,22 176:1 177:10
178:4,17
proximately (8) 2:22
18:12,16 82:2,5 84:7,11,12
proximity (2) 115:4 185:20

pub (1) 100:23
public (19) 38:25 74:10,12
91:9,18 104:10 111:15
133:8 144:8 147:7,8 150:1
152:8 163:18 165:21,24
168:25 173:6,11
publications (1) 23:12
published (1) 152:12
pubs (1) 103:18
pumps (1) 120:1
purchase (2) 174:21,25
purchases (3) 105:1
174:20,24
pure (2) 91:4,5
purport (1) 37:13
purpose (19) 19:11 62:11
64:23 66:10,24 68:15
70:12,13 76:21 81:14
95:16 96:16,21 104:18
109:17 111:9 143:18
146:16 173:5
purposes (20) 17:18 19:14
24:9 25:13 31:6 36:5 40:5
46:3 48:11 60:11 73:14
81:10 103:24 104:18
109:21 114:2 115:24
122:19 132:9 161:14
pushed (1) 155:6
putative (1) 24:7
puts (3) 85:24 89:20 168:13
90:13 131:8 169:6
putting (6) 16:18 31:19 50:1
90:13 131:8 169:6
puzzled (1) 2:9
Q
qbe (5) 64:21 147:23 170:11
174:14 177:13
qbe1 (2) 90:24 171:3
qbe2 (3) 90:24 174:22
qua (1) 44:20
qualified (2) 68:7 73:15
qualify (1) 125:25
quality (2) 136:24 138:10
quantification (20) 3:6,13,14
17:17 19:3 41:4 56:3
57:15,21 58:11 70:16
72:15 74:2 77:13 80:2,23
89:1 107:9 151:13 182:12
quantified (1) 72:21
quantifying (1) 3:5
quantum (2) 56:25 62:1
quarters (1) 126:23
query (1) 111:1
question (77) 3:11,12
5:2,3,13 17:2,15,22
18:8,9,23 19:13,23
20:10,16,22
22:6,10,11,14,15,17,17
24:4 25:2,4,6
27:11,15,16,16,21,24
28:1,6,17 30:4 32:1
33:19,23 36:24 46:23 51:8
52:22 53:19 56:4,7,8
57:3,14,23 58:10 74:25
78:5 83:18 84:15 93:5
94:15 99:22 100:1 105:5
110:9,11,13,14 114:12
115:4 116:13 125:9
148:18,21 155:21 162:13
176:2,4 185:21,24
questions (4) 18:3 27:24
81:16 92:2
queue (1) 112:21
queues (1) 112:3
quick (3) 71:22 80:16 162:1
quickly (1) 175:6
quirk (1) 55:6
quite (21) 8:6,21 13:1 22:19
30:15 32:11 35:20 36:2
38:17 47:3 54:13 55:12,13
59:15 75:14 84:9 93:14
127:9 143:19 164:1 169:17
178:4,17
quoted (5) 80:17,18 95:10
152:16 155:18
quotes (1) 140:22
quoting (1) 49:13

R
r (4) 14:5 15:13 36:15 125:3
racecourse (1) 30:20
radical (2) 2:6 185:12
radius (21) 8:12,15,20
30:23,25 32:4,5,6,10,16
33:4 38:11 88:21 96:7
97:1,11 134:14 135:2
171:23 181:9,14
radiuses (2) 8:22 134:21
radley (2) 183:13,18
radleys (1) 183:25
rage (1) 90:9
rails (1) 20:1
railway (5) 62:17 67:20
75:9,21 76:24
rainfall (1) 62:9
raise (1) 180:15
raised (3) 2:10 3:4 183:16
raises (1) 41:24
ran (1) 26:24
random (1) 94:11
75:9,21 76:24
range (5) 38:6 48:18 142:19
146:5 147:5
rapid (1) 96:23
rapidly (2) 29:14 135:7
rare (3) 144:13,14 157:4
rate (4) 68:25 69:4 94:8
160:5
rates (2) 14:1 36:15
rather (18) 28:8 40:10 74:4
75:21 92:24 113:1 126:21
127:1 129:5,22 130:20
135:10 139:24,25 154:23
159:11 168:4 186:21
rational (1) 43:6
rationalisation (1) 60:5
rationalise (1) 59:11
reach (2) 90:16 120:6
reached (1) 142:14
reaches (1) 142:19
reaching (2) 121:11 173:12
react (1) 38:10
reacting (2) 15:25 38:20
reaction (3) 32:6 38:5 39:1
reactions (1) 29:9
read (16) 72:24 85:8 93:9
96:6 110:23 140:23
152:14,19,19 154:5
156:21,22 157:6 159:6
178:7 179:17
reader (1) 103:13
readers (1) 23:11
readily (2) 149:4 163:22
reading (3) 126:18 141:10
182:25
reads (1) 128:18
ready (3) 49:2 95:7 144:3
real (11) 40:20 46:23 67:6
78:5 89:10 109:18,25
169:14,14,15,15
realise (1) 43:1
realistic (1) 34:21
realistically (2) 31:20 38:23
reality (1) 105:11
really (21) 2:12,14 3:3 15:5
18:4 20:5 25:8 33:20 57:23
61:1 68:1 78:6 81:13 93:9
94:13 114:23 129:15
135:16 142:17 146:24
161:16
reason (10) 5:9 8:11 45:19
80:17 101:13,24 103:10
106:17 119:12 124:10
39:22 56:11 103:13 104:8
120:25 147:15 167:11
185:15 186:12
reasonableness (1) 56:6
reasonably (6) 47:16 104:11
115:20,24 141:25 185:22
reasoning (2) 5:6 138:20
reasons (6) 53:10 76:12 89:5
124:25 138:9 179:2
rebuilt (1) 66:18

recall (1) 110:22
received (1) 180:25
recent (1) 26:22
recession (1) 69:5
recites (1) 24:12
recognise (2) 38:3 187:15
recognised (2) 36:7,8
recognition (2) 22:23 134:9
recoil (1) 156:16
recollect (1) 86:19
recollection (2) 43:16 85:17
recommend (1) 103:6
recommends (1) 103:3
record (2) 152:7 154:17
records (1) 158:23
recover (5) 49:23 61:8 78:12
82:23 108:25
recoverable (2) 72:20 73:17
recovery (1) 60:9
reduce (4) 13:8 68:25 98:4
112:6
reduced (2) 75:6 112:14
reduces (1) 76:2
reduction (6) 28:18 68:7,9
69:7 113:23 160:6
12:12 12:6 28:4 70:2,3
117:25 118:1 120:20
144:13 155:9 162:2
186:6,14
reference (23) 2:5 14:20
43:11 50:12 94:3 95:9
127:12 128:14 130:2,24
131:10,12 151:13
155:14,17 158:21 159:4,10
160:21,25 166:6 185:1,2
169:25 177:4 185:10
162:1 170:21 178:6,19
179:19
referred (23) 10:8 14:5 46:7
47:10 68:15 70:4 86:22
91:5 109:10 116:9,10,14
122:1 127:4 132:3 140:18
142:22,23 153:6,23 155:18
174:6,7
referring (4) 12:24 43:13
82:7 116:21
refers (8) 12:22 26:19 29:24
54:14 69:16 83:14 153:21
160:23
reflect (1) 68:13
reflected (1) 57:8
refuge (1) 136:23
refusal (1) 88:19
refused (2) 133:10 154:21
regard (8) 39:9 40:9 58:10
66:24 120:20 133:16
147:15 177:11
regarded (2) 43:14 175:10
regarding (1) 72:9
regardless (1) 44:23
regards (2) 74:2 104:1
region (1) 10:21
regional (4) 11:13 13:11
29:9 30:3
regionally (2) 13:7 29:6
regret (2) 156:11,20
regular (1) 23:11
regulation (7) 99:24 104:6
106:5 111:2,6,15 116:2
regulations (14) 30:9 99:25
100:8 104:22 108:10,17,24
110:21,23 111:20,21
113:11 147:18 172:25
reid (1) 27:14
reinforced (1) 27:20
reiterate (1) 147:9
reject (1) 183:24
rejected (1) 67:15
rejecting (1) 53:10
related (2) 18:8 172:8
relates (3) 62:5 82:17 99:6
relating (6) 49:22 83:4
100:13 101:18 119:20
162:22
relation (19) 46:23 50:7
99:1,18 102:1 110:18

111:16 116:6 123:7 134:3
145:25 153:24 163:11
167:17 182:2 183:10,16
184:5,8
relationship (2) 23:9 66:12
relevance (1) 29:16
relevant (39) 2:15 3:22,23
9:21,23 16:20 17:4,6,12
27:20 30:15 36:24 37:6
40:17 50:13 80:18 82:14
83:3 90:8,9,14 91:1 96:12
97:18 121:17 124:12
125:3,4 132:6 136:6
144:23 147:1,2 159:25
160:4 165:15 177:17
184:21 185:2
reliable (1) 21:19
reliance (5) 1:16 95:14
155:23,25 182:3
relied (7) 40:23 53:20 116:17
138:11 141:5,14 148:25
relies (3) 52:19 55:25 138:7
reluctance (1) 76:10
rely (8) 12:7,9 89:3,4 122:5
130:18 184:14 186:5
relying (1) 22:2
remain (4) 91:24 111:5
130:8 135:10
remainder (1) 186:13
remained (4) 105:6,14
112:18 148:14
remaining (2) 76:7 118:18
remains (3) 152:21,25
186:10
remarkably (1) 15:18
remarked (1) 28:15
remarks (2) 187:3 190:9
remedy (2) 86:14,21
remember (12) 12:3 13:13
41:12 58:12 80:6,14 83:10
125:22 134:4 140:1,6
145:12
remembering (1) 17:12
remind (5) 50:16 70:5
135:18 173:15 174:14
remote (9) 42:13 46:21
97:16,16 108:17,20 109:1
126:10 189:2
remotely (1) 110:12
remove (10)
150:4,10,12,14,18,19,19,21,23
151:2
removed (1) 150:7
removing (1) 151:2
remuneration (1) 123:5
render (1) 42:15
rendered (1) 120:1
renders (1) 102:12
repaired (1) 61:12
repeat (3) 116:5 137:1,3
repeatedly (1) 174:6
replaced (1) 63:20
replies (1) 115:11
reply (24) 1:3,4 40:9 92:1
98:22 116:17 123:18
124:13 127:2 151:20
153:7,9,22 156:4,7 169:25
170:10 182:1
190:3,4,5,6,7,8
report (1) 72:23
reported (13) 7:23 8:8
12:1,5 16:12,18 35:15,15
36:10,12,12 124:21 181:16
reporting (1) 13:2
represent (1) 22:22
represented (2) 2:6 64:4
reproduction (3) 13:25
14:2,4
request (3) 156:15,19,24
require (13) 22:24 66:15
77:4 96:25 99:5 100:17
106:12 110:4 137:23
138:14 147:19 161:2 177:2
required (15) 3:16 7:4 46:14
48:5 72:16 76:2 78:11
100:21 102:24 103:9 173:2
176:18 177:9,19 182:24
requirement (14) 18:1 22:24
32:24,25 90:22 91:4 100:6
102:21 103:5 124:16
138:17 158:15 165:25
175:22
requirements (12)
22:7,8 13:19,21 23:22
24:5,18,21,22 25:3 56:19
requires (16) 4:17 28:25
50:11 99:20 101:21 102:17
103:3 109:7 124:14,17
138:6 140:14 146:10
167:19 184:18 185:23
research (1) 23:13
resisting (1) 60:11
resolve (1) 33:22
resolved (3) 25:4 27:22
121:4
resolving (1) 28:13
respect (16) 45:24 48:8
51:25 52:10 63:23 68:7
86:17 96:10 126:20
138:17,18 152:8,9,10
157:2 166:12
respectful (2) 156:19 162:15
respectfully (5) 105:10,17
110:2 114:17 156:14
respecting (1) 132:19
respond (3) 13:9 153:24
169:23
responded (1) 154:14
responding (5) 81:16 107:5
153:17 170:5,23
responds (1) 18:7
response (12) 74:10 124:19
153:13 154:11 162:9,11,24
166:25 173:6 177:16 179:1
189:3
responsible (2) 28:2 55:5
responsive (1) 183:4
rest (2) 71:10 152:12
restaurant (7) 3:9 57:11
107:17,25 110:1 133:8,9
restaurants (1) 108:1
restoring (1) 62:13
restrict (2) 106:9 111:25
restricted (2) 118:17 119:8
restriction (17) 8:7 77:10
89:2 145:22
150:8,9,10,13,15,20,22
151:3,7,8,9 165:10,17,20
166:15
restrictions (18) 78:1 91:8
99:23 100:14 110:20,24
111:3,4,6,19,22 117:19
119:10 147:8 150:18
166:23 169:17 180:8
restrictive (1) 135:11
result (9) 8:10 20:18 113:10
119:21 124:3 169:16
177:21 179:10 184:3
resulted (1) 60:14
resulting (14) 2:16 33:21
43:8 45:18 49:18,19
72:8,18 110:10 136:20
157:24 171:11 176:10
177:6
results (2) 50:12 106:15
retreated (1) 146:9
retrospective (1) 182:20
return (2) 98:15,19
reveal (1) 58:24
revenue (11) 19:9 64:5,14
76:16 92:7,13,15,16
106:16 107:3 112:7
reverse (4) 52:22
149:17,19,22
reversed (1) 131:9
reversing (1) 149:25
review (2) 158:20 161:19
reviewed (1) 159:18
reviewing (1) 157:15
revisit (2) 15:22 72:12
rhetorically (2) 3:3 61:7
ride (2) 78:6 135:13
ridiculous (1) 16:15
righthand (9) 8:7 41:14 43:3
65:18,19 71:23 84:25
132:2 138:4
rightly (6) 30:15 31:15 32:12
66:17 103:23 166:18
rights (1) 148:12
riley (5) 68:3,3 70:7 81:11
95:9
ring (1) 9:3
riot (2) 119:2,3
riots (1) 118:9
rise (2) 15:14 30:4
risk (17) 37:16
39:4,8,8,10,12 62:6,24
72:3 73:9,11 77:1 91:12
97:20 98:4,6 137:9
risks (4) 50:19 61:16 65:5
132:6
rix (1) 80:10
road (3) 27:1 44:11 117:19
roadblocks (1) 89:10
roadworks (1) 123:13
rodan (1) 63:25
role (2) 66:1,12
room (1) 120:21
roughly (3) 34:17 35:5
165:14
round (2) 60:17 168:13
route (3) 87:12 130:9 184:8
rovers (1) 41:10
row (2) 14:22,23
rpa (5) 90:5,7,22 91:3,11
rsa (15) 65:6 115:11
123:22,25 125:16 128:7
131:15,25 135:6 162:2
176:24 182:16 184:4,7
186:5
rsa1 (1) 91:7
rsa2 (2) 125:7,13
rsa21 (3) 90:17,19 91:8
rsa3 (2) 91:17 129:12
rsa4 (8) 90:17 91:9 131:25
170:12 180:12 182:2,5
183:2
rsas (5) 182:2 183:7,10,20
184:12
rules (3) 22:9,25 23:16
run (3) 61:13 75:10 169:19
rush (1) 188:13

S

sa (2) 133:20,20
sadly (1) 108:12
safer (1) 98:14
sage (7) 12:11 13:2,5,22
14:16 179:14,17
salisbury (1) 112:23
salzedo (8) 29:18 30:15
31:15 32:11 96:25
152:7,18 153:1
same (36) 8:10,11 15:10
21:2,5 22:17 23:21 24:19
44:3 49:16 51:13 56:4
65:16,20 67:2 72:22 73:5
83:13 85:19,21 92:24
94:9,11,13 97:4 114:5
128:15 136:18 142:15
148:6 152:21 153:2 158:23
169:7 177:4 186:22
sars (3) 182:15,17 185:6
sartex (1) 87:9
satisfactorily (2) 35:8 129:15
satisfactory (2) 28:18 154:17
satisfied (11) 7:4 18:2 19:8
22:8 24:5 34:15 37:7 56:10
98:9 122:14 177:19
satisfies (1) 33:14
satisfy (6) 24:22 25:3 56:19
59:6,7 102:6
satisfying (1) 25:11
save (2) 14:12 114:24
saw (5) 131:17,19 139:18
140:22 152:14
saying (34) 3:21 6:3,13,20
19:7,16 25:21 26:2 33:12
35:20 53:6 57:9 58:20
61:1,8 67:19,23 75:16
80:24 84:13 85:8 87:12
88:21,24 89:12 101:14
107:17 108:18 109:4,5
114:19 130:9 152:19
168:11
scale (4) 21:6 40:1 122:18
180:2
scaled (1) 21:10
scenario (7) 18:25 39:19
79:9,17 100:24 101:25,25
scenes (1) 189:1
schaff (7) 4:23 5:1,13,13,16
51:25 52:12
schedule (4) 157:24 159:6
166:10,13
school (1) 185:11
schools (2) 147:17,17
scientific (1) 14:13
scilly (3) 16:8,16,21
scope (6) 67:5 90:15 126:9
130:11,12,13
screen (11) 7:18 14:19
21:8,9 92:14,14 95:11
114:4 171:4 178:13 179:23
screens (1) 111:24
screenshot (2) 12:5,6
scrupulously (1) 14:13
sc (1) 103:9
sea (6) 8:19 16:7 83:21 84:2
85:3,8
seal (1) 9:3
search (1) 69:21
seaworthiness (1) 83:20
seaworthy (1) 83:19
second (23) 1:23 2:21 8:1
14:14 15:14 28:5 29:11
49:12 57:3 89:3 90:12
92:25 96:13 106:10 117:8
118:20 119:13 120:11
130:6 142:5 161:23 162:7
186:1
secondly (6) 33:6 52:6 56:24
98:7 136:15 153:18
section (21) 46:8 51:5 56:16
64:17,20 65:24 66:13
70:14 82:4 83:9 106:20,21
131:4,4 148:12 158:11
171:6 172:2,5 173:10
174:23
sections (4) 65:22 131:7
151:12 156:22
seduced (1) 179:6
see (90) 2:13 4:12 5:1 6:19
8:6 10:19,20,23 11:2,8,24
12:11,23 15:23 19:16
22:18 26:15 29:10 32:19
40:4 41:14,17 45:12 46:9
51:21 52:14 56:13 63:5
65:15 66:4 71:23 80:16
81:23 82:10 92:12,15
94:19 95:16 98:4 102:18
105:23 111:14 114:7
118:12,20 119:1,24 120:10
121:1 123:24 124:3 127:16
130:22 132:6,11 135:23
137:4,21 138:3,10,21,23
140:17 141:11 144:9
148:3,25 149:13 150:5
154:3,10 158:8,23
159:4,6,22 160:12,16,17
163:20 164:24 165:13,24
166:3,8 167:8 170:7,8
180:10 182:15
seeing (3) 112:25 124:18
154:18
seek (3) 21:18 105:1 106:4
seeking (4) 57:3 107:25
114:16 174:2
seem (6) 39:4 40:4 45:19
82:25 105:16 145:10
seemed (1) 88:9
seems (4) 28:11 48:8 82:19
154:20
seen (13) 5:24 11:10 12:10
113:14 52:8 53:11 65:8,21
112:2 143:21 161:2 163:11
171:17
sees (3) 10:3 172:4 174:18
segregate (1) 113:17
seldom (1) 23:12
selects (1) 174:19
sell (3) 110:1 112:8 113:24
selling (2) 69:3 113:4
sends (1) 170:12
sense (46) 3:6 4:19 6:9,25
9:9,24 20:10 21:16 24:17
27:12,22 28:10,16,23
29:17 34:2 46:12,16 47:24
48:11,12,15,16 49:21 57:7
59:10 67:1 68:2 70:23
82:20 86:25 124:21 125:21
128:23,24,25 135:15 143:2
145:3 158:15,25 159:3
161:18 164:10,21 168:15
sensible (1) 105:17
sent (2) 149:2 152:14
sentence (5) 23:20 42:11
44:1 45:4 49:12
sentiment (1) 155:16
separate (8) 17:2,22 18:3
63:12 73:2 79:22 111:25
179:8
separately (3) 61:3 76:14,16
separation (2) 111:23 112:2
september (1) 188:5
sequence (1) 6:12
series (1) 172:19
serious (3) 77:7 185:8,16
service (3) 61:4 106:7 108:2
services (3) 104:10,12 143:1
set (8) 11:17 35:25 104:9
114:2 116:15 166:21
176:20 183:14
sets (3) 33:15 59:2 134:23
settings (1) 12:21
settled (1) 148:9
several (1) 179:2
severity (3) 43:14 62:16 77:3
shall (4) 22:18 141:24
154:15 171:22
shape (2) 15:5,8
shap (2) 147:25 148:2
ship (2) 73:23 85:9
shipping (1) 6:13
shop (3) 112:19 114:1
145:20
shops (7) 112:8,17
113:3,9,12,19,24
short (16) 48:25 95:5 99:20
116:20 117:8 144:1 147:24
153:10,15 156:9,13 158:22
170:20 174:5 182:9 186:21
shortcut (1) 188:14
shorter (1) 77:19
shortfall (4) 136:17,20
160:23 161:1
shortland (6) 90:5 127:10,25
128:22 129:24 182:11
shortish (1) 77:16
shortly (2) 47:3 115:11
shortness (1) 162:5
should (34) 14:20 24:2 28:12
35:2 44:9 50:6 54:8 58:9
62:22 65:2 66:22 67:1,9
79:19,22 80:17 81:12
83:12 92:22 103:6 125:10
129:1 130:24 132:23,23
133:12,16 135:21 151:15
160:24 167:11 169:23
175:3 180:15
shouldnt (1) 61:8
show (23) 4:5,24 5:8 6:10
7:15 9:18 17:8 21:18 23:5
26:11 32:8 35:4 37:24 43:1
54:12 64:19 81:21 92:22
96:3 116:2 166:10 171:25
176:1
showed (7) 4:24 29:13 63:5
125:5,5 176:11 179:12
showing (3) 8:21 21:9 181:14
107:12 111:12 118:5 124:7
126:12 130:17 132:4 145:9
146:3 158:16 159:21
160:9,11 168:12 186:23
sometimes (5) 10:20 22:19
29:24 73:10 87:4
somewhere (2) 16:10 115:18
soon (1) 187:11
sort (14) 2:9,9,11 18:11
29:10 71:20 77:18 142:15
143:16 149:6 169:19 179:7
188:3,15
sorting (1) 11:23
sorts (3) 39:5 57:16 188:7
sought (2) 110:25 136:23
sounded (1) 36:6
source (2) 163:19,23
south (2) 16:8,9
southern (1) 119:15
southward (2) 181:15,15
spaces (1) 104:5
spatial (1) 185:20
speak (1) 149:20
speaking (2) 40:8 188:11
special (3) 66:22 67:6 95:18
specific (16) 18:11 94:14
102:22 115:4 141:20
148:20 162:24 164:7,9,25
165:1 172:1,9 173:10
184:12,18
specifically (6) 37:19 38:20
50:11 67:4 103:20 165:4
specified (9) 74:13
104:23,25 132:7,10
136:2,3 142:23 157:24
specify (2) 69:14 111:3
spectrum (3) 38:3,5,6
speed (1) 135:22
spend (1) 20:7
spill (1) 122:15
spine (1) 44:12
split (1) 20:18
spot (2) 16:8,9
spots (1) 16:6
spotted (1) 127:15
spread (5) 12:18 29:8 146:25
163:25 173:7
spreadsheet (7) 10:17,17
11:2,16,18,23 125:5
square (2) 103:1 181:8
sq (6) 117:18 119:13
121:7,9,15,17
staff (1) 133:24
stage (16) 1:22,23 3:21 19:3
20:8 25:22 41:2,4 52:7
56:4 57:15 58:8 70:5 133:1
175:23 180:12
stages (3) 2:10 25:8 56:20
stair (1) 187:11
standard (5) 1:21 37:6 68:25
92:12,15
standing (1) 183:2
stands (1) 152:25
stapleton (1) 24:12
stapley (1) 27:14
stark (1) 89:20
start (17) 1:4 6:12 10:21
21:13 49:5,7 65:22
70:15,16 76:21 80:23
123:22 150:9 151:12
154:25 170:23 171:5
starting (2) 168:14 185:4
starts (4) 10:19 41:18,21
175:16
stated (3) 82:17 119:1
148:12
statement (5) 44:4 99:23
103:17 104:2 141:12
statements (1) 162:2
states (3) 83:3 141:23 182:7
statistics (1) 7:20
status (1) 182:22
statute (4) 6:7 82:3 83:7
84:8
statutory (4) 3:19 21:22
83:11 86:6

stay (1) 111:18
stayd (1) 133:23
stays (1) 161:3
steal (1) 149:8
stem (2) 164:12 165:2
sterling (1) 89:23
sticking (1) 35:14
still (22) 21:2,5 34:1 61:12
76:3,19 79:20 88:22 89:2
105:13 107:6,8,12 108:11
109:12 112:14 113:20
133:24 135:10 143:11
149:21 151:9
stipulated (1) 171:22
stood (2) 11:18 105:13
stop (7) 54:10 76:19,20,22
104:3,3 158:5
stopped (2) 9:6,7
stopping (1) 123:11
store (1) 111:10
stores (2) 113:21,22
storm (8)
62:4,15,17,18,20,22 75:2,8
storm (1) 75:8
straddled (1) 27:1
straddling (1) 72:14
straight (2) 25:2 159:24
straightforward (2) 31:17
166:22
strain (2) 114:16,17
strained (1) 121:16
strategy (1) 29:10
street (1) 105:24
stress (4) 47:24 48:2 158:14
169:13
strict (1) 102:1
strictly (1) 150:17
strife (1) 118:9
strip (2) 71:7 77:9
strips (1) 93:5
strong (2) 33:25 66:5
stronger (1) 76:24
struggled (1) 86:17
struggling (1) 95:9
stuart (1) 44:7
stuartsmith (1) 44:15
stuck (2) 35:16 74:4
studios (1) 105:20
subclauses (1) 165:21
subdivide (1) 27:23
subdivision (1) 57:18
subexclusion (3) 155:17,24
156:1
subject (3) 110:24 111:19,22
subjected (1) 16:21
subjective (1) 168:4
subjectively (1) 128:24
submit (1) 59:25
submit (16) 37:15 51:10
53:1 61:7 66:10 68:1 69:18
70:13 79:9 100:20 105:10
107:21 124:17 134:9
136:14 146:1
submits (1) 66:24
submitted (8) 49:17,21
66:17 67:11,15 96:2
152:10 178:22
subparagraph (1) 130:6
subsequent (1) 182:21
substantial (3) 107:15,23
110:5
substantially (2) 114:6
140:18
subtly (1) 22:20
succeed (1) 61:18
succeeded (1) 59:20
successfully (1) 83:21
succinctly (1) 51:19
sudden (2) 144:15 145:7
suffer (3) 44:12 87:14,19
suffered (7) 44:25 57:1 58:21
62:3 118:22 119:6 169:16
suffering (2) 14:12 72:19
suffers (1) 65:13
suffice (1) 142:3
suffices (1) 101:15

sufficient (11) 32:18 33:13
43:14 51:24 53:16 59:12
101:16 124:14 126:16
147:11 164:14
sufficiently (3) 30:6 177:24
188:14
suggest (5) 22:16 45:25
105:17 108:24 112:10
suggested (2) 125:11 175:12
suggesting (1) 8:19
suggestion (1) 4:13
suggests (4) 13:24 121:8
142:6 145:8
sum (2) 118:23 160:5
summarise (1) 179:3
summarised (1) 169:25
summary (1) 182:23
sunday (12) 77:20,21,23,24
78:1,10,13,18 79:2,4,4
89:19
supermarkets (1) 112:3
supplanted (1) 46:1
supplier (2) 136:10,10
suppliers (3) 136:3 137:25
142:24
supply (2) 139:17 142:25
support (4) 116:7 138:5
169:15 188:20
supports (1) 1:15
suppose (1) 83:3
supposed (1) 80:23
supreme (1) 27:4
sure (8) 10:13 39:17 65:21
69:22 84:9 98:15 187:6
188:11
surplusage (1) 102:15
surprise (1) 155:1
surprising (2) 52:24 174:12
surrounding (6) 54:25 55:18
132:18,20,20 186:9
surveillance (3) 12:14,23,24
susceptible (1) 28:17
suspect (2) 47:13 155:15
sustained (1) 42:15
sustaining (1) 42:4
swainstons (1) 80:10
swathe (1) 183:20
swiftly (1) 146:21
system (3) 118:4 120:2,9
systems (1) 119:20
syfy (1) 116:22
T
tab (1) 133:3
table (3) 12:22,23 92:6
tail (1) 170:14
takeaway (3) 107:18,24
108:2
takeaways (1) 110:1
taken (16) 2:18 7:21 11:17
33:7 37:17 62:22 69:11
71:15 92:2 94:24
105:18,21 140:13 161:11
167:11,17
takes (6) 57:21 119:16
127:19,22,22 149:2
taking (10) 10:11 31:15 40:6
62:14 67:17 94:10 95:17
101:6 151:16 170:24
talk (1) 154:12
talking (7) 37:20,25 39:5
86:15 109:11 144:8 164:21
talks (1) 69:17
tank (4) 20:16 36:8 61:24
82:15
tantamount (1) 169:6
target (1) 73:24
targeted (1) 133:14
task (6) 48:6 141:19
167:10,15 187:24 188:8
taxing (1) 136:4
teal (1) 86:20
technical (1) 188:20
technically (1) 69:24
telecommunications (1)
143:1

tells (3) 20:13 33:10 38:21
ten (2) 146:6 180:20
tendons (1) 43:13
tenuous (1) 46:20
term (1) 146:1
termed (1) 51:1
terminated (1) 148:10
terms (24) 2:13,24 15:3
18:25 37:11 39:6 42:7
50:17 53:15 72:17 75:20
85:6 88:14,16 114:17
119:6 130:7 138:24 155:18
159:19 165:17 167:5 180:6
184:4
terrorist (3) 72:10 81:1 103:2
terrorists (1) 73:24
test (100) 1:10,16 2:6,24
3:16,19,19 4:16 5:6,18,21
6:3,6,8 7:1 9:19 17:14,24
19:2,6 20:9,10 21:18,22,24
24:8,15,25 25:11,18
26:6,13,20 27:7,7
28:1,9,24 29:2 31:18
32:7,18 33:15 35:21,24
39:11 41:1 45:9,25 46:4,10
47:2,5,8,13,21
48:9,10,14,17,18 51:23
52:7,11,19 53:3,7,8,15
56:12,14 57:6,16 58:9
59:6,7,10 60:9 61:11
70:15,16 73:15 74:4 80:22
86:13 88:5,10 95:15 98:8,9
102:6 109:22 113:7 123:2
134:10 154:21,23 175:22
177:3,11
tested (1) 11:25
testing (1) 135:4
tests (1) 21:21
texas (1) 137:14
text (1) 141:22
textbooks (2) 52:4,6
thank (15) 26:18 123:17,21
144:4 154:7 155:2 156:2
170:1,3 181:23 186:25
187:7 188:18,20 189:5
thankfully (1) 117:7
thats (17) 4:19 8:11 11:1
14:20 19:25 39:4 56:2
75:11 76:15 86:7 111:13
131:11 136:9 150:20
152:16 165:5 168:13
theatre (1) 108:19
theatres (7) 103:19
108:17,19,20,23 118:13,16
themselves (7) 21:21 73:20
79:25 111:2,21 178:7
182:16
theory (4) 25:1,24 52:7
122:16
thereby (1) 121:12
therefore (9) 1:7 3:24 16:24
29:4 37:5 46:22 68:9 81:25
119:5
theres (3) 59:25 84:14 155:1
thing (11) 6:7 15:11 24:19
26:12 62:23 81:6 94:9
115:19 142:15 143:6
144:17
thinking (1) 21:13
thinks (1) 50:10
third (8) 8:1 18:23 67:12
90:21 120:12 129:10
131:14 148:13
thirdly (2) 25:11 183:10
though (20) 14:16 20:14
29:20 44:14 59:5 62:22
73:17 78:19 84:2,18 85:3,9
87:24 99:10,17 109:13
114:21 143:13 148:14
187:12
thought (8) 11:7 20:20
53:18 98:13 126:1 170:16
174:10 188:15
thousands (2) 12:16 105:12
threat (3) 103:2 147:13,18
three (12) 18:4 25:8 35:11

36:17 72:25 92:8 126:23
128:11 129:10 151:19
183:4 187:4
threshold (2) 33:8 110:14
through (30) 3:14 9:18 11:3
15:10 17:16,23 18:23 20:9
25:16 33:11 40:10 43:21
58:13 78:7 88:10 90:2 98:7
108:2 122:16 129:20,21
130:9 135:14 144:25
156:10 159:12 162:18
164:2 167:7 179:14
throughout (7) 10:16 96:15
105:6 112:18 165:6
179:10,14
throw (1) 59:9
throws (1) 28:22
thursday (1) 1:1
thus (3) 42:17 82:17 119:4
ticking (1) 40:13
tier (4) 10:24 11:2,13,14
time (39) 8:6 14:11 20:7
21:4,6 29:4 60:23 70:3
77:16 78:4 98:13
116:19 136:6,8 140:16
143:21 146:7 148:6
156:8,9,11 158:22 159:12
162:6 166:5 170:20 176:19
177:6 178:5,20
180:4,10,18 181:21 182:23
183:7 185:4,14
timeframe (3) 77:19
187:21,22
times (2) 169:2 171:17
timescale (1) 188:16
timing (1) 180:16
today (6) 14:15 153:11
160:17 164:13 169:3,12
together (6) 15:2,5,20 20:24
71:6 173:17
told (6) 36:13 99:9,10,13
116:11 122:25
tomlinson (1) 73:25
tomorrow (2) 181:1 186:24
too (11) 21:12 28:8 36:15
46:21 60:23,23 67:17 70:6
154:6 159:11 161:20
took (5) 8:9 10:8 27:6 58:11
179:14
topic (3) 135:8,8 149:14
topics (1) 133:2
total (10) 88:2 102:8 106:24
109:5,7 110:4 121:12
140:15 158:16 180:20
totally (3) 20:2 121:10
136:14
touch (1) 121:21
touching (1) 162:19
tough (1) 31:25
towards (1) 121:1
town (1) 97:21
track (1) 154:17
tracking (2) 12:23,24
trade (6) 69:5 73:4 79:15
107:13,20 113:23
trading (2) 93:12,15
tradition (1) 27:10
traditional (2) 2:1 169:11
traffic (1) 117:18
train (3) 60:25 61:4,13
trains (3) 9:5 74:22 75:10
transcribers (1) 188:19
transcript (6) 90:4 152:16,20
162:4,12 183:17
transient (1) 114:20
translate (1) 75:12
transmission (1) 12:20
transmissions (2) 108:21
109:2
transmitted (2) 162:17
163:13
trauma (1) 45:10
travel (5) 9:5 12:15 73:22
104:4,11
treated (10) 6:23 20:14
56:17 74:19 82:1 84:11,18

95:24 101:18 119:10
treating (2) 63:11 66:13
treatment (1) 137:5
trends (32) 17:24 18:24
19:21 50:7,9 56:1,2
57:7,24 62:10,11 66:25
67:6,13 70:12,20 75:1,4
78:3,5,14 79:2,12 80:15
88:25 94:15,17
166:4,6,10,13 168:23
trept (2) 139:22 140:25
trial (8) 140:9,14,19
141:5,14,21 142:6,12
tribunal (7) 46:11 49:8
50:3,5,6,10 56:8
trick (2) 79:19 130:5
tried (8) 4:24 60:25 79:23,24
108:16 129:25 132:2
136:16
trigger (13) 3:15 17:16,24
18:2 19:8 57:22 59:13
72:19 74:7,8 89:17 101:22
142:4
triggered (7) 30:3 33:1 36:25
88:6 99:15 101:19 107:5
triggering (1) 137:22
triggers (1) 185:3
trip (3) 104:18,19 112:9
troubled (1) 135:10
troubling (1) 96:14
truck (1) 26:24
true (5) 17:3 32:12 53:2 83:8
149:21
truly (4) 73:3,5 74:20 85:15
trust (1) 152:12
truth (1) 28:16
try (7) 34:13 39:12 75:12,20
112:20 125:18 153:20
trying (9) 3:20 7:3 17:18
25:18 35:13 54:8 81:15
113:7 136:1
turn (10) 2:7 48:20 112:16
120:2,18 125:7 158:7
172:3,11 188:7
turned (2) 40:4 117:2
turner (18) 124:4,14,23
125:11,16,22 126:8,20
127:11 129:13,25 131:3
133:5 134:6,18 155:14
156:2 162:2
turning (3) 106:10 114:3
177:18
turnover (7) 3:9 57:11
68:7,11,25 69:5,8
twometre (2) 111:23 113:16
twostage (9) 6:3
24:6,15,17,24 25:6 53:6
154:21,23
tying (1) 21:20
type (4) 10:19 92:11,24
167:14
types (3) 18:9 92:8 180:2
typical (1) 69:6
U
uk (10) 11:15 12:16
13:18,20,24 23:10 29:5
68:19 183:18 185:12
ultimately (2) 28:15 117:12
unable (1) 83:20
unaltered (1) 130:8
unambiguous (1) 139:5
uncertainly (1) 13:18
unclear (1) 103:5
uncommercial (1) 109:4
uncommerciality (1) 108:15
unconnected (1) 49:20
uncontroversial (1) 12:3
underlying (3) 11:16 164:25
165:3
understand (15) 24:3 30:17
31:22 35:19 36:19 37:3,8,9
113:6 151:6 153:7 155:21
165:12 169:17 187:24
56:17 74:19 82:1 84:11,18

understanding (2) 31:18
68:19
understood (3) 61:2 68:23
152:23
undertake (1) 167:24
underway (1) 12:20
underwriters (1) 83:18
undisputed (1) 36:4
undoubtedly (3) 83:24 113:8
184:15
undue (1) 114:25
unearthed (1) 137:11
unexpected (1) 167:4
unfolds (1) 180:3
unfortunate (2) 47:12 156:8
unfortunately (3) 1:13 20:6
29:22
unimpaired (1) 120:17
unimpeded (4) 101:4 120:14
122:1,8
unimpressive (1) 125:19
uninsured (1) 61:7
unique (4) 7:8 35:25 92:24
96:19
uniquely (1) 35:10
units (1) 12:15
unless (11) 15:15 17:7 22:13
44:19 69:11 104:18 151:18
153:19 158:11 169:24
186:17
unlikely (1) 163:13
unlikely (4) 45:22 95:23
102:14 127:18
unlocked (1) 100:12
unnecessarily (1) 40:7
unnecessary (1) 104:3
unplug (1) 34:12
unprecedented (1) 167:3
unpredicted (1) 167:3
unrealistic (3) 79:9,16
136:14
unreasonable (1) 45:13
unrestricted (1) 165:11
unsafe (1) 73:23
unseasonable (1) 69:6
unseaworthiness (6)
46:15,20,25 47:18,23
85:11
unseaworthy (1) 85:11
unsound (1) 44:17
unspecified (2) 136:2,3
unsurprisingly (1) 62:16
until (2) 63:19 187:13
unusual (3) 39:6 110:14
167:3
update (3) 12:13 29:22
109:12
uploaded (2) 118:3,4
upon (7) 40:23 46:17 48:1
53:20 138:11 148:25 180:3
upper (2) 10:24 11:13
upward (1) 14:17
urban (1) 108:1
used (16) 33:17 48:15,16
54:23 64:23 115:17 124:8
125:20 132:8 145:25
146:4,14,15 176:4,6
184:18
useful (3) 116:12 141:18
170:17
uses (3) 19:19 104:25 131:23
using (7) 4:1 25:22 66:5
70:15,16 75:21 131:12
usual (2) 105:15 156:16
usually (2) 45:21 66:14
utilise (2) 120:22 121:18
utla (1) 12:1
utlas (1) 11:24
utterings (1) 154:18
utterly (1) 88:8
V
v (16) 26:15,16 27:14 83:15
84:24 86:20,24 118:7
119:13 133:20 137:8

147:25 148:24 167:14
176:24
valiant (2) 5:7 126:21
valiantly (1) 1:4,4
validity (1) 134:10
value (4) 28:7,12 63:18
96:16
variations (3) 22:22 67:6,13
varies (1) 94:20
various (8) 2:10 103:14
138:9 152:4 157:10 159:16
164:9 178:1
vary (1) 22:19
vast (1) 134:21
vehicle (1) 157:15
venue (1) 140:7
version (1) 10:15
vessel (6) 39:14,15 46:16
47:23 83:18,23
vicinity (37) 58:15 60:14
90:15,16,18,25 91:1,20
114:13,21,22 115:3,7,11
125:9,12,15,24 126:4,8,17
132:16,22 136:19 160:14
183:19
184:5,13,14,16,19,22,23
185:2,23 186:2,7
video (3) 9:11,12 34:7
viewed (1) 185:14
virtue (1) 22:9
visit (2) 112:9,19
visited (1) 145:19
visiting (1) 111:8
vital (1) 68:18
vulnerable (1) 112:12
W
wade (1) 122:16
wait (1) 187:13
waitrose (1) 112:22
wall (1) 122:17
wants (3) 76:14 153:19
174:24
war (2) 72:9 81:1
warning (3) 72:9 81:2,2
warnings (7) 73:4,6,15,21
79:16,20,22
warrant (1) 69:1
wasnt (12) 50:20 55:13,14
56:9,10,10 78:4 80:1,2,18
87:10 147:13
water (2) 120:1,6
watermain (1) 119:25
watermark (1) 44:5
wave (1) 29:11
waves (1) 83:24
way (37) 6:9 7:3 11:3 24:1
34:21 35:3,25 40:12 48:5
51:25 52:1 53:13 54:13
55:8 57:25 59:11 60:17
81:16,20 85:20 21 86:9
89:11 101:7 110:16 115:9
120:12 124:24 129:19
134:11 135:4 151:20 164:3
168:13 180:18 182:15
186:23
wayne (4) 20:16 36:8 61:24
82:15
ways (4) 50:1 54:6 70:21
90:13
weather (1) 69:6
web (1) 105:24
website (4) 11:16,20 109:13
152:13
webster (1) 86:23
wedding (1) 140:7
week (3) 14:9 75:25 77:24
weeks (4) 77:16 156:17
170:16 188:16
weight (2) 28:9 134:2
welcome (1) 41:5
welles (1) 122:16
went (14) 4:4,5 15:7 50:3
58:7 80:7,8 104:22 110:22
112:22 113:9,11 114:5
116:3

werent (1) 127:9
 west (2) 16:8,9
 western (1) 97:23
 wetting (1) 47:17
 whatever (12) 2:20 18:20
 25:11 33:14,22 39:8 95:21
 98:9 112:23 177:18 180:21
 184:22
 whatsoever (2) 17:25 29:16
 whenever (1) 49:2
 whereas (3) 32:11 87:9
 101:22
 wherever (2) 103:16 112:22
 whilst (5) 109:22 111:3,20
 112:2 171:23
 whoever (1) 145:8
 whole (8) 15:1,7,19 16:25
 120:19 133:13 139:3,11
 wholly (2) 39:18 68:10
 whom (2) 12:15 112:9
 whose (1) 183:13
 wide (4) 38:14 183:3 184:4
 185:19
 wider (2) 123:10 145:10
 widespread (1) 172:20
 width (1) 113:7
 willing (2) 107:15 167:23
 wind (1) 83:24
 wish (4) 118:4 134:2
 180:13,24
 withdraw (1) 152:24
 wonky (1) 34:12
 wont (8) 34:13 76:14 87:4,13
 116:5 148:5 154:4 162:5
 wording (23) 80:16 93:21
 110:3 116:25 129:6 157:17
 160:13 161:5,6,19 162:20
 164:19 165:2,11,15
 168:8,9,15,22 170:12
 171:1,3 181:14
 wordings (8) 2:15 36:24
 157:20 166:22
 169:10,21,22 170:11
 work (21) 7:17 9:21 17:18
 19:8 31:23 34:3 68:22
 89:23 104:4,11,12 106:2
 110:11 115:20,24,25
 116:3,4 122:25 167:12
 188:15
 working (9) 100:14 103:16
 106:13 107:4 112:4
 159:8,8,13,14
 works (2) 28:4 52:6
 world (6) 71:10,13,16
 73:4,23 79:15
 worried (1) 79:5
 worry (2) 70:8 154:5
 worse (2) 16:5 87:21
 worth (2) 155:15,16
 wouldnt (2) 61:13 78:2
 write (1) 188:8
 writers (1) 23:10
 writing (5) 153:10,21 180:24
 186:23 187:17
 written (1) 114:24
 wrong (12) 4:18 14:22 23:24
 58:7 60:4 63:2 65:14 115:6
 127:11 168:9,13 175:14

X

x (1) 27:16

Y

y (1) 27:16
 yards (1) 38:17
 yea (1) 87:25
 year (8) 19:18 93:12,16
 94:12,16 96:20 176:25
 185:22
 years (3) 23:11 94:4,6
 yesterday (11) 4:4 9:25 10:5
 118:3,3 140:1 152:9
 175:11,20 176:8 178:22
 yet (7) 17:10 40:4 47:18
 77:9 152:15 164:18 170:7

york (4) 119:15,16,19 121:3
 youd (1) 15:9
 youre (1) 95:7

Z

zero (3) 75:6 76:2 107:4
 zone (1) 31:25
 zoomed (2) 21:7,11
 zurich (13) 98:19,24 105:7
 114:3,12,16 116:17 117:25
 153:13,14 155:3,8 175:19
 zurich1 (1) 91:18
 zurich2 (1) 114:5
 zurichs (2) 114:10 116:15

I

1 (36) 3:21 8:12 13:23 14:2
 30:19,21,23,24 32:4,5,6,9
 33:4 42:25 43:6 82:11
 90:10,24 91:6,16,19 92:25
 94:13 97:19 98:5 103:19
 120:11 157:9 165:10,17
 166:15 168:21 181:8,13,18
 190:3

10 (5) 12:12,13 13:1 84:6
 107:18

100 (2) 38:17 95:4
 10000 (5) 12:17
 128:10,13,17 129:2
 103 (1) 116:16
 105 (1) 116:16
 11 (6) 9:15 15:21 40:18 90:9
 142:25 160:21
 11000 (1) 118:22
 1122 (1) 48:24
 1130 (1) 49:1
 12 (8) 19:19 40:18 41:20
 50:18 90:10 92:12,15,17
 120 (1) 132:17
 123 (1) 190:5
 1235 (1) 181:11
 128 (1) 182:10
 129 (1) 186:1
 13 (8) 13:4,12 41:24 161:5
 162:9 164:11,18 165:7
 131 (1) 183:17
 13b (1) 144:9
 141 (1) 162:13
 142 (1) 158:3
 1433 (1) 176:21
 15 (2) 47:2 160:18
 150 (1) 135:19
 156 (1) 190:6
 159 (1) 167:9
 16 (19) 8:2 12:10 13:15 14:7
 42:9 43:20 75:25 99:23
 100:17 103:17 104:2 106:4
 147:11 167:1 174:18
 177:22 179:2 180:9 186:5
 169 (1) 159:17
 16th (1) 16:6
 17 (3) 44:10 132:1 154:9
 170 (1) 190:7
 1784b (1) 148:12
 18 (2) 44:5 143:23
 182 (1) 190:8
 1850 (1) 65:3
 187 (1) 190:9
 19 (5) 11:18 45:8 115:22
 135:2,3
 1a (1) 69:14

2

2 (22) 1:18 7:25 9:16 15:21
 40:20 43:7 50:7 90:10,24
 91:6,17,18,19 94:9 95:3
 103:19 120:11 129:16
 160:13 165:25 168:22
 183:8
 20 (10) 23:11 49:9,12 100:7
 134:13,13,17,22,25 177:23
 200 (8) 10:25 30:24 31:2,3
 32:4,5,9 95:6
 2011 (1) 154:12

2019 (1) 92:20
 2020 (2) 1:1 92:19
 203 (1) 183:8
 205 (1) 98:21
 21 (6) 20:19 51:21 53:16
 159:17 169:4 181:15
 22 (6) 48:22 90:17,19 91:8
 128:14 180:21
 23 (3) 8:3 100:7 132:6
 23rd (1) 16:7
 24 (2) 132:11 158:3
 241 (1) 123:19
 242 (1) 164:6
 25 (12) 30:19 38:16,18
 90:24,24 91:17,18
 95:20,24 96:8 97:1,12
 25mile (15) 8:14,20,21,25
 30:18 31:25 38:11,12
 88:21 98:6 123:25
 134:14,16,21 171:23
 26 (4) 99:24 104:6 108:10
 110:21
 27 (1) 142:11
 28 (2) 14:24 183:14
 29 (2) 52:16 72:23

3

3 (26) 13:4 40:20 43:10,18
 63:5 90:10 91:19,20 94:8
 110:18,21,24
 111:4,7,8,16,19,21 113:5
 120:11 135:24 162:13
 165:11,25 168:23 179:21
 30 (4) 1:1 42:11 44:2 183:14
 306 (1) 95:10
 31 (2) 171:16 182:17
 310 (2) 68:4 69:16
 31000 (1) 165:14
 311 (1) 64:21
 318 (1) 143:25
 328 (2) 68:21 144:2
 34 (4) 55:24 134:9 148:8
 173:20
 340 (2) 183:18,25
 348 (1) 156:6
 35 (2) 132:16,17
 3536 (1) 165:16
 36 (2) 56:7 149:3
 37 (1) 183:9
 38 (3) 56:12 179:23 180:1
 39 (1) 60:6

4

4 (14) 43:6,7 91:6,16 92:12
 109:10 120:11,12
 168:20,21,24 180:25
 182:18 183:9
 40 (4) 76:3,5,19 82:11
 400 (4) 32:14,15 181:1
 186:24
 407 (1) 10:22
 409 (1) 170:9
 41 (1) 58:22
 42 (1) 66:23
 426 (1) 181:24
 430 (2) 152:1 156:9
 432 (1) 187:2
 435 (1) 189:6
 45 (1) 149:16
 47 (1) 67:4
 48 (1) 67:11
 49ciil (1) 127:7

5

5 (17) 12:12 49:5 72:3 80:4
 92:24 105:3,8 107:18
 109:9 131:4 149:16 158:3
 159:17 160:23,25 161:3
 168:20
 50 (1) 127:22
 5000 (1) 12:17
 500010000 (1) 13:17
 511523 (1) 165:9
 52 (1) 22:5

531 (1) 178:9
 55 (3) 56:16 82:4 83:9
 56 (1) 13:20
 560 (1) 10:17
 58 (1) 162:4
 59 (1) 162:5
 596 (1) 11:4
 5th (3) 119:18 120:7 121:12

6

6 (10) 12:19 99:24 104:6
 106:5 111:6 116:2 131:4
 160:17 164:24 188:16
 60 (7) 75:24 76:1,7,8,20
 165:14 173:24
 65 (4) 165:16 173:24 178:9
 184:25
 66 (1) 140:6
 67 (2) 72:22,23
 68 (1) 178:10
 69 (3) 46:8 72:23,24
 6foot (1) 122:17
 6lane (1) 27:1
 6th (2) 119:18 120:7

7

7 (9) 13:15,16 94:8 108:7
 111:16 138:2 160:20 165:3
 173:22
 700000 (1) 36:22
 711 (2) 171:7 176:12
 72 (1) 155:18
 739 (3) 171:16 174:2 176:13
 74 (1) 172:5
 743 (1) 172:12
 75 (2) 31:1 127:19
 76 (1) 14:23
 78a (1) 127:8
 78b (1) 155:19
 79 (2) 186:6,14
 7f (1) 141:23

8

8 (4) 11:22 13:16 52:13
 162:3
 80 (1) 186:15
 822 (2) 178:11,14
 87ii (1) 184:11
 89 (1) 165:13

9

9 (4) 8:1 82:10 160:17
 164:24
 90 (1) 107:19
 95 (1) 107:19
 952 (1) 11:4
 956 (1) 1:2
 98 (2) 65:2 190:4