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Day Three commenced with Mr Edelman returning to the Hiscox policy and the wording of the same.

Mr Edelman pointed out that, under the 'Public Authority' extension, Hiscox were seeking to assess the potential loss for each client on the basis of a counterfactual that removed some, but not all, of the influencing factors. The operative wording states that this cover responds to: *"interruption to your business caused by your inability to use the venue due to restrictions imposed by a public authority during the period of insurance following an occurrence of a notifiable human disease"*.

Put simply, the Hiscox policy therefore invokes the below:

- **A.** Disease
- **B.** Restrictions
- **C.** Inability to Use
- **D.** Interruption

However Mr Edelman noted that Hiscox were seeking to consider a counterfactual scenario that removed B, C and D of the above but kept in A. If you remove the last three elements, why not the first? Neither disease nor restrictions are covered on their own – but together they form a composite risk that requires consideration of all elements in order to satisfactorily calculate the correct loss experienced by a policyholder.

Mr Edelman advised, and the point seemed to be agreed on by the Lord Justices, that whether the definition of 'occurrence' relates to a national or local occurrence is immaterial, as if it relates to a local event this would merely bring the scope of coverage within the same terms as those policies with a 1- or 25-mile radius. As has been noted previously, Lord Justice Flaux has indicated his provisional view that these radii are meaningless given that the pandemic was 'everywhere'.

On the subject of the trends clause, Lord Justice Flaux stated:

"A loss of income provision is…the difference between what you have actually made and what you would have made if none of this had happened."

The 'none of this' refers to the disease *and* the restrictions imposed, meaning that, by implication any calculation of a client's losses would have to involve the postulating of a scenario wherein the business was trading *under normal circumstances.*

Mr Edelman resumed his previous arguments regarding the operation of the policy and the 'start point' for calculating losses. Mr Edelman's view was that, in providing coverage for a notifiable disease, the insurers must inherently have contemplated a scenario wherein said disease was developing and, furthermore, wherein it had got so bad that the public authorities would have had to step in to close the premises. If this is the case, Mr Edelman's view was that it was unreasonable to use the downward trend of the business as it approached the date of policy response as a yardstick by which to measure the loss after this date. In his argument, the 'non-covered' downward trend caused by COVID-19 as one approached the date on which it was deemed a notifiable disease was an anomaly and therefore should not be included in a calculation of the policyholder's 'true' losses.

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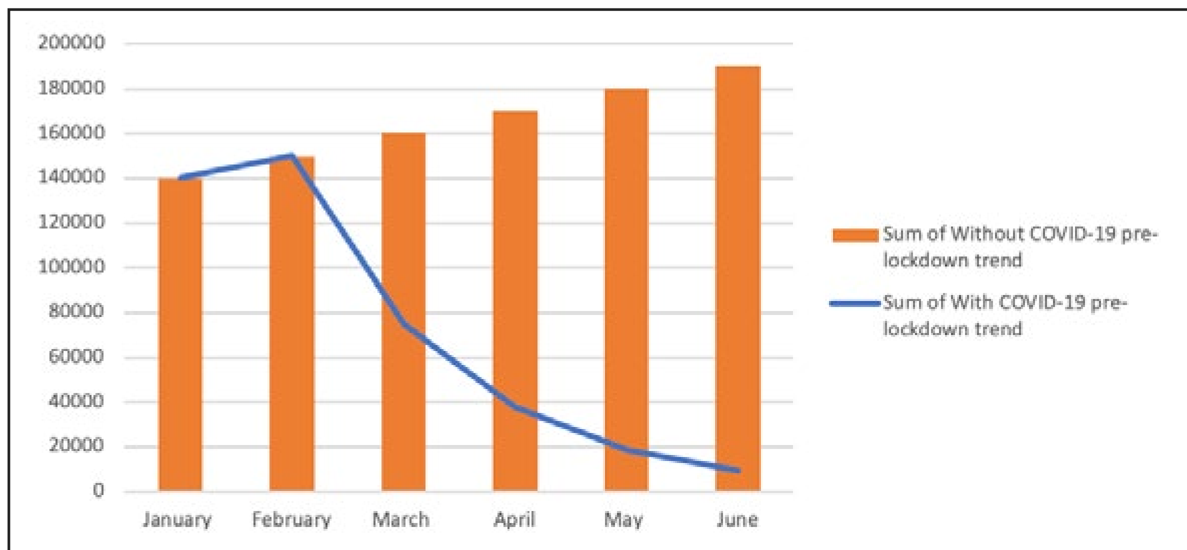

Figure 1 – Example comparison of difference in losses based on application of COVID-19 downward trend

Mr Edelman asserted that, calculating a client's losses on the basis of the pre-lockdown reduction in turnover could not possibly be the intention of a policy that insures notifiable disease, as once a policy did respond there would be very little for a policyholder to claim. See Figure 1 above, as an example of the vast differences that could be produced in calculation with and without the pre-lockdown downturn factored in.

It should be noted that the Lord Justices did not express their wholehearted agreement with Mr Edelman on this point, especially as it was noted that one of the RSA policies included a 'backdating' function to treat a disease as having been 'notifiable' from an earlier date.

Ms Mulcahy took up the argument in respect of the Arch policy and made the salient point that the level of economic modelling required to produce an accurate post-lockdown counterfactual would seem unreasonable for sub-limits under their policy, which are often no more than £25,000.

Mr Edelman returned for discussion of the QBE policy, pointing out that the insurer had sought to suggest that there could not be a business interruption loss due to an occurrence of COVID-19 if the policyholder or their customers were unaware of the manifestation of the same within their area. Mr Edelman advised that this was a moot point – if the government took action in part because there were inferred or actual cases within the applicable area then the resulting disruption is caused by the presence of the disease.

Mr Edelman raised an important point drawn from the principle of QBE's 'radius' provision, namely that it implies that the disease will not be the direct cause (in the sense of the immediate cause) of interruption to the client's business. By contrast, the natural conclusion to draw from the wording is in fact that QBE are anticipating that the authorities will be doing something about it. If one proceeds from this assumption then it seems reasonable to conclude that the 'radius' principle is:

"Imposing a qualifying condition, saying that if there is [an] authority reaction to an outbreak of a disease, and that authority action impacts on you, you only have cover if that disease, whether it is elsewhere or not, is present within the defined radius from your premises."

Mr Edelman continued, suggesting that any local outbreak of COVID-19 (ie. within the prescribed radius) was merely a part of a larger whole that eventually caused the 'tipping point' of lockdown.

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Mr Edelman once again revisited the issue of the pre-lockdown downturn and whether it was justifiable to use this as a measure of business losses following closure. He used the example of the Orient Express case to consider a scenario wherein the hurricane had been forecast some time before and guests had cancelled their bookings as a result. Clearly the policy would not be triggered until such time as the hurricane itself caused damage to the hotel – however, would one be justified in saying that the 'true' loss of turnover was best calculated using the 'hurricane approach' figures or instead those from 12 months previous? Mr Edelman asserted that it should be the latter, although Lord Justice Flaux was non-committal in his view. In his words: *"We will think about it, don't you worry."* (!)

The RSA policy was discussed in relation to the definition of 'restrictions'. RSA have suggested that the Prime Minister's advice from the 16th March to stop all contact with others (which included avoiding pubs and restaurants) did not constitute 'restrictions' sufficient to invoke the policy. However Mr Edelman asserted that telling people not to go to a place can quite easily be construed as a 'restriction'. Indeed, Lord Justice Flaux seemed to concur with this assessment by stating that, had the government simply told a small group of people booked into a holiday cottage not to go there, this would constitute a restriction on the premises. The mere fact that the advice applied countrywide should not reduce the force of its instruction.

Mr Edelman also addressed how one might define 'vicinity', following its inclusion in the RSA wording. Mr Edelman proposed that a definition of this word could and should be construed as:

"an area surrounding or adjacent to an insured location in which events that occur within such area would be reasonably expected to have an impact on an insured or the insured's business".

Mr Edelman suggested therefore that 'vicinity' was a flexible concept, which is in keeping with previous assertions that the pandemic could be viewed as being 'everywhere'.

Mr Edelman then directed his attention to the Amlin policy, which includes wordings covered by Marsh/Linksmaster. It was confirmed that Amlin had accepted that the UK Government was covered by the reference to 'public authority', as well as the principle that governmental 'action' should be viewed as including advice and guidance.

Mr Edelman disputed Amlin's assertion that the term 'prevention of access' necessitated a technical legal prohibition, suggesting instead that the principle did in fact allow for someone to physically enter the premises, but not for them to operate said premises for the usual business operations. He asserted that the Amlin perspective was a 'lawyer's view' and not one that took into account the most likely situations upon which the policy would be called to respond.

Mr Edelman once again reiterated the FCA view that COVID-19 was everywhere and 'necessarily' in the vicinity of the premises. He also drew the agreement of the Lord Justices for his assertion that 'danger' does not necessarily mean a proven case of COVID-19 but simply the potential for someone to be carrying it. Lord Justice Faulx asserted that, whilst there were no cases of COVID-19 on the Scilly Isles, there was still a danger in this location.

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Mr Edelman addressed the apparent absurdity of the Amlin argument that the fact that cases of COVID-19 manifested themselves outside of a 25-mile radius meant that there should be no coverage for cases within the very same 25-mile radius. Effectively Amlin state that, had there been no COVID-19 cases within a 25-mile radius of a business, the business in question would still have been shut down – ignoring the fact that there were cases within said 25-mile radius. In the words of Mr Edelman:

"Nobody pays, even though the disease is everywhere, because they can always point to it being somewhere else as well."

Mr Edelman addressed the Ecclesiastical policy, repeating arguments made previously that the term 'competent local authority' is not synonymous with 'the UK government'. The Ecclesiastical policy covers action by the government, local authority or police in closing down a business, but excludes any closure due to disease by said 'competent local authority'. As such, the argument runs that closure due to disease is only excluded if it is enforced by the local authority – in the current situation the closure has followed from action by the UK Government and therefore cover should apply. This argument is further supported by the fact that the exclusion also makes reference to vermin, food and drink poisoning etc - scenarios which would most properly be dealt with by a local borough council. These arguments were greeted in a promising manner by the Lord Justices.

Mr Justice Butcher also appeared supportive of Mr Edelman's insistence that the triggering clauses within all the policies featured tended to 'composite' – ie. that they included two or more scenarios that were necessary for them to be satisfied. In the words of Mr Justice Butcher:

"Because it is a composite package, it is quite impossible to know which bit of it had what effect."

In essence this means that, when calculating a Business Interruption loss, an insurer should not remove the government legislation from their counterfactual scenario but leave COVID-19 within the consideration of the same.

Mr Edey then rose on behalf of certain 'interveners' to raise brief points at the end of the day. Firstly, he noted that 'pandemic' is not necessarily synonymous with 'notifiable disease', although he asserted that there was nothing within the QBE policy that stopped a pandemic scenario falling under their coverage.

Secondly Mr Edey asserted that any burden of proof in respect of a COVID-19 downturn must lie with the insurers themselves, not the policyholders.

Thirdly, Mr Edey reiterated Mr Edelman's earlier assertion that simply having cases outside of a specified radius does not mean that the cover should not apply. Indeed, he emphasised that, in the case of notifiable diseases especially, this made no logical sense.

You can follow the case live by visiting the FCA website, or by clicking here.