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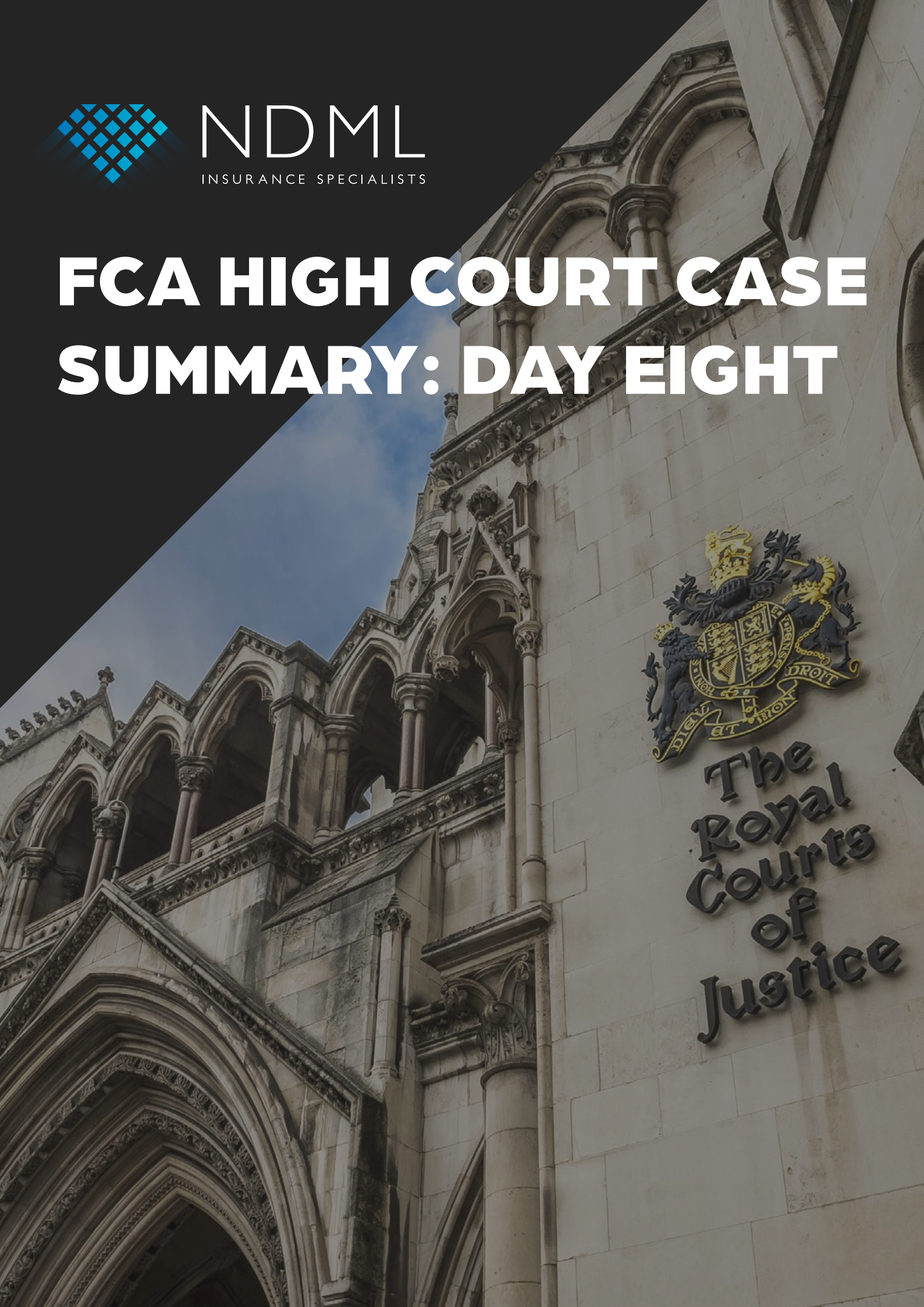
FCA HIGH COURT CASE SUMMARY: DAY EIGHT



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Mr Edelman began the final day of submissions by addressing the issue of causation. Lord Justice Flaux was keen to seek clarity on the issue of the 'but for' question and sought Mr Edelman's explanation as to how this principle could be linked to the question of causation. Lord Justice Flaux put the matter succinctly by stating that the two main issues requiring analysis for the purposes of causation are:

1. Construction. Do the variety of 'linking terms' such as "resulting from", "in consequence of", "following" etc mean the same thing, and are they the basis of each policy's understanding of 'proximate cause'?
2. Causal connection. What is the link between the insured peril and the loss? Has the loss been 'proximately caused' by the insured peril?

Lord Justice Flaux seemed uncertain as to how the 'but for' question, discussed at length on the previous day, would necessarily come into discussions regarding the above. Mr Edelman advised that it was in fact the defendants who had sought to introduce the 'but for' question into most of their submissions, which, he insisted, was actually introducing a question of quantification into a discussion about something entirely different, namely the triggering of the policy. Mr Edelman asserted that the 'but for' question was being utilised by the defendants as a means of inserting a hurdle for policyholders to overcome even before the question of proximate cause could be addressed. This hurdle consists of an attempt to say that 'but for' the disease in a specific area the lockdown would have occurred anyway – therefore (in theory) any further discussion of proximate cause is moot. Mr Edelman described this approach, disparagingly, as a *"snap fingers test"* whilst also noting that the defendants were unable to point to any previous insurance cases wherein the 'but for' principle was used as part of its reasoning.

Mr Edelman suggested that the FCA argument had always been that the case should be viewed through the prism of proximate cause. However in this case the issue is complicated by the multitude of contributing causes, with a national picture built up of a 'jigsaw' of cases, none of which was of less causative efficacy than the other. Mr Edelman drew the court's attention to the UK Government's expressed reasons for the gradual accumulation of lockdown measures throughout March, illustrating that SAGE and the Cabinet were united in their 'national' view of the pandemic. As a result, their approach to the 'jigsaw' of cases was to impose a national lockdown, as opposed to anything more local, precisely because of the widespread prevalence of the disease. Regardless of the clustering of cases within London, the government were evidently of the view that the disease was, in effect, everywhere.

Mr Edelman suggested that the arguments over the prevalence of cases of COVID-19 within a 25-mile radius required a common-sense approach. If one takes out a single area from the 'jigsaw' then the defendants state that there would still have been a lockdown. However Mr Edelman stated that if you were to remove each piece from the jigsaw then one would have no lockdown at all – the jigsaw itself is only a jigsaw due to its being constituted by its pieces. In the same way, the national lockdown was only imposed because of the prevalence of these 25-mile radius concentrations.

Mr Edelman emphasised his assertion that the issue of proximate cause is the crucial element in reaching a judgement on the potential policy responses. According to Mr Edelman, the insurers were attempting to insert an additional stage to the causation process, between establishing the facts of the case and whether they conform to the tenets of the policy. This extra stage is, in effect, a 'filter' which introduces the 'but for' test into a consideration of the loss. However, as Mr Edelman has asserted previously, the 'but for' test is not held to be a part of any analysis of legal causation and is actually only a tool for the quantification of losses. Mr Edelman sought to exhibit this point by

suggesting that the 'but for' question would not have come into play for issues of causation had the disease progressed through the country more slowly, with the assumption being that any lockdown would have been on a more local or regional basis if that had been the case. In that scenario each 'mini-lockdown' would have been able to be tied more closely to individual cases of COVID-19, meaning that any causation-based 'but for' argument would have failed.

Mr Edelman posited a scenario in Leicester, which is experiencing a local lockdown at present. A hotel has coverage for notifiable disease within a 1-mile radius. Within that 1-mile radius there are 200 cases of COVID-19. Outside that 1-mile radius there are another 200 cases of COVID-19. Mr Edelman stated that any decision to lock down the whole of Leicester in this scenario would be based on their being 400 cases, 200 of which fall within a 1-mile radius of the client's business. Therefore these 200 cases are an *effective cause* – they are not perhaps the *dominant cause*, but they nonetheless clear the proximate cause test as established by previous case law. In essence, therefore, each instance of disease within the 'jigsaw' is an *effective* cause of the lockdown and consequently satisfies the conditions for policy response.

Lord Justice Flaux asked Mr Edelman to elaborate on his interpretation of the 'but for' test in relation to the Orient Express case because, in his words:

> *"We are certainly going to have to deal with it".*

Mr Edelman averred that this case was erroneous in allowing the 'but for' test to enter into discussions on causation. He suggested that certain authorities for this position were cited during the *Orient Express* case but that they had in fact been derived from opinions involving tort (ie. negligence, not insured damage) and that, furthermore, these authorities had derived their position from academic arguments that had not been adopted by the courts. The *Orient Express* case, according to Mr Edelman, did not correctly apply the principles of proximate cause that, ever since the drafting of the Marine Insurance Act, have been viewed as integral to an assessment of causation. In Mr Edelman's view the damage to the hotel was an *effective cause* of the loss and therefore there was a justification for considering that the policy should respond to the claim submitted. The 'but for' test, as mentioned previously, is applicable only to an assessment of trends and a calculation of each policyholder's potential loss. In Mr Edelman's view, the *Orient Express* case misguidedly conflated the principles of causation and quantification in reaching its final decision.

On the issue of the trends clause, Mr Edelman sought to draw a delineation between 'other circumstances' that could have a bearing on a calculation of loss, and those elements that have contributed to the insuring clause being invoked. Mr Edelman noted that the usual application of an 'other circumstances' clause is to assess whether events such as a recession or extreme weather during the interruption period would have impacted on the turnover of the affected business. However he argued that it could not be considered reasonable to modify the post-incident loss by the very same elements that had given rise to the coverage itself being triggered. The combination of specific circumstances within an insuring clause implies that these circumstances will have an association and therefore it is unreasonable to accept their operation as a combinatory trigger for policy cover, only to remove certain less desirable elements for the purposes of calculating the ensuing loss. If the lockdown was entirely contingent on the manifestation of COVID-19, is it reasonable to reverse out only the lockdown when considering a policyholder's loss? Or is it more appropriate to discount COVID-19 as well to imagine a scenario wherein each business had experienced neither disease, social distancing, illness to staff or the lockdown as a whole?

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In reference to the *Silversea* case, Mr Edelman argued that insurers with clauses that are formed by combining specific circumstances must have contemplated occurrences that have a multifarious aspect. As such, the presiding judge in the *Silversea* case was correct in ignoring the 'but for' test and instead relying on the foundational principles of proximate cause in reaching a decision.

Mr Edelman also addressed the issue of an application of the pre-closure downward trend to a calculation of each policyholder's losses. To illustrate his point, Mr Edelman envisaged a scenario wherein the pre-closure downward trend might merely last a few hours. If a business suddenly started losing business on one morning due to an emergency, and were then closed by the local authority in the afternoon, would the insurers be entitled to use that morning's reduction in turnover as the 'base level' for calculation of the post-closure losses? Mr Edelman suggested that this could not justifiably be considered a reasonable application of the trends clause.

Mr Edelman moved onto addressing the assertions made by the defendants that 'interruption' to a business should mean 'complete cessation of activities. Quoting federal law in the United States:

> *"Business interruption, expense and extra expense coverage ... did not require cessation of business at insured's plants, but only harm to [an] insured's business"*

Mr Edelman therefore asserted that 'interruption' to a business, as covered by a 'Business Interruption' policy, should be viewed as capable of responding to the partial reduction of a policyholder's operations.

Mr Edelman addressed what he believed to be the correct interpretation of the word 'occurrence' in the Hiscox wording and quoted the dictionary definition of the word 'outbreak' (meaning *"a sudden occurrence"*) in support. Evidently, therefore, one should be able to view an 'outbreak' as merely a type of 'occurrence', which in turn would imbue the word 'occurrence' with a much wider meaning than that simply of a 'local manifestation' (as argued by Hiscox). Mr Edelman suggested that Hiscox had therefore sought to introduce a geographical restriction *"by the back door"*.

The question of what might constitute an 'incident' was considered, with Mr Edelman asserting that Mr Gaisman's previous insistence that only the individual occurrence of a disease could be termed an 'incident' was unsound. In Mr Edelman's view, both the disease and its spread constituted an 'incident', in the same way that The Great Fire of London was an 'incident' even though it may have encompassed many constituent elements of damage.

On the issue of what might be deemed to be a 'restriction imposed' by a 'Public Authority', Mr Edelman brought in the example of the closure of UK schools, which was undertaken on the instruction of the government without the necessity of the passing of legislation to enforce the same. As such, the argument would follow that other government advice prior to the formal lockdown should be construed as carrying sufficient weight to invoke this section of the policy.

Mr Edelman moved onto the Ecclesiastical policy, having nothing further to add to his submissions regarding QBE and Amlin. His brief focus was to dispute the validity of certain cases introduced in Mr Gaisman's earlier arguments, cases which Mr Edelman insisted derived from very different contexts than those relating to the current discussion.

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Mr Edelman addressed the application by the insurers of counterfactuals and their conflicting methods in this regard. Mr Edelman suggested that the insurers at certain points had sought to consider a counterfactual which would reverse out both the government restriction and the disease solely as they might have related to the premises. However on other occasions the insurers have instead suggested that one has to reverse out the entire national lockdown but keep in the disease. In the words of Mr Edelman:

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

The case concluded with all parties offering their thanks for the contributions of all those involved both in the court and behind the scenes. Lord Justice Flaux suggested that a judgement might be available by the middle of September, although this timescale could slip if a longer timescale enabled a more comprehensive assessment.

Finally, if you are reading this, and have been reading all these reviews, then I would like to thank you for sticking with it and to offer you my congratulations for making it to the end (!). As you will have seen, the case has been fascinating in parts, bad-tempered on occasion and very, very thorough.

However nothing has caused those of us representing policyholders to be disheartened and we await the judgement with cautious hope, as ever, mixed with a sense of realism. As one who has been immersed in every word of the case for some time, I would like to thank you for being part of this process.

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

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