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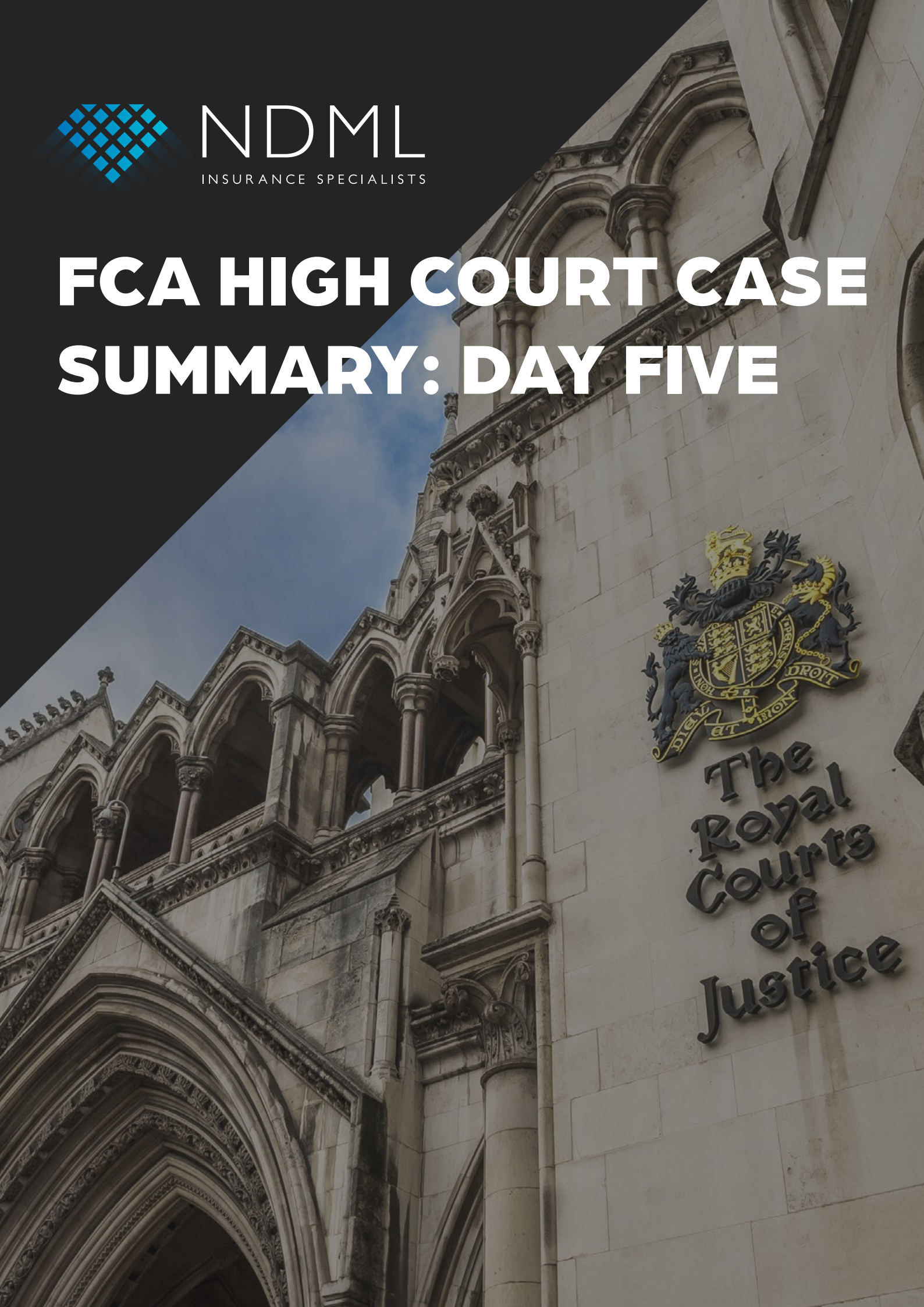
FCA HIGH COURT CASE SUMMARY: DAY FIVE



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Mr Gaisman began his submissions on behalf of Hiscox, noting that policyholders have invoked two areas of coverage under this policy, namely:

- Non-Damage Denial of Access
- Public Authority

Mr Gaisman began with the Public Authority section and sought to establish a causal sequence within this element of coverage:

A. An occurrence of a notifiable disease
B. Restrictions imposed by a Public Authority
C. The insured's inability to use their premises
D. An interruption to the business which is the sole and direct cause of the loss

It was suggested that the FCA had attempted to discount the modifying potential of each of these steps on the causal sequence, meaning in effect that, once you have 'A' causing 'B', 'C' and 'D' you only have to establish the consequences of 'A' for the calculation of the loss. Mr Gaisman posited that this could not be correct, as each step will have its own capacity for limiting the loss that can be claimed.

Mr Gaisman 'inflicted' a metaphor on the case in order to show why he believes only the composite elements of the Hiscox extension as a whole can be used to calculate a policyholder's potential loss.

> *"Imagine that the pandemic is a large bore pipeline through which liquid flows. The liquid is the loss which the pandemic causes people, businesses. We will call that pipeline A. At a certain point in the pipeline there is a flange at which several smaller bore pipelines lead off the main pipeline, each of them taking a small proportion of the liquid flowing through pipeline A. One of them, one of those smaller pipelines, is called public authority action, and we will call it pipeline B. In due course it leads to pipeline C and to pipeline D but we will leave those out of the equation for simplicity. Let us assume that pipeline B receives 25% of the total liquid. Other pipelines, which we will call X, Y and Z, take the other 75% of the liquid from A. The insurance here is against the loss caused by public authority action following or caused by among other things an occurrence of disease. It therefore only insures against the loss coming out of pipeline B".*

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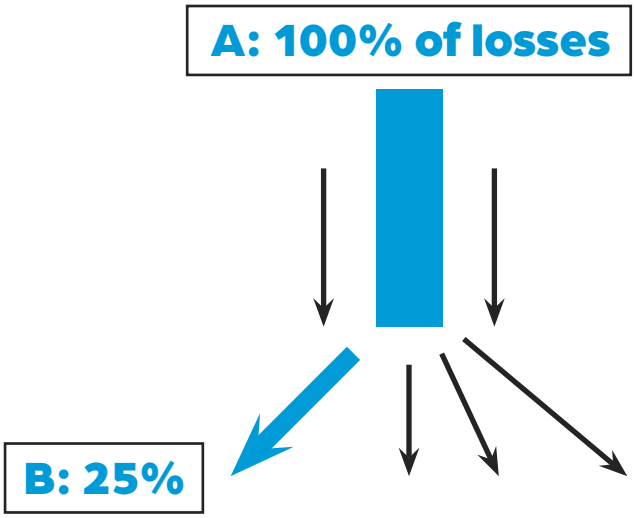
In effect, Mr Gaisman is suggesting the below:



Whilst this certainly appears a pertinent argument, it is interesting that Mr Gaisman, and in turn Hiscox, chose to lead on the ways in which a loss should be calculated, as opposed to the pure response of the policy itself.

Mr Gaisman took issue with the FCA's argument that losses occurring before lockdown should not be considered as part of the overarching trend of the business post-lockdown and should therefore not be used as a yardstick by which to measure the potential loss. This FCA argument is that of the 'approaching hurricane' – ie. guests may cancel reservations at a hotel in the week before the arrival of a hurricane, but one would not count this reduced turnover as a 'true' representation of what the insurance policy was designed to cover.

Mr Gaisman emphasised his point by making the judges aware of previous cases where a ruling has been passed down in apparent breach of legal principles, which has then had unintended consequences for other cases. In Mr Gaisman's view:

> *"The abandonment of principle by one court can create untold problems for future courts, and that in our commercial law above all is a course to be avoided."*

Mr Gaisman addressed the components of the Hiscox policy that are required for a claim to succeed, dwelling specifically on the meaning of the word 'occurrence'. The Hiscox wording requires there to have been *"an incident or an occurrence of a notifiable disease"*. Mr Gaisman sought to point out the singular article applied to each of these eventualities – ie. "an" occurrence (singular), not multiple occurrences. This assertion was supported by recourse to the case law of Axa v Field wherein Lord Mustill insisted that an event was something that happens:

> *"at a particular time, at a particular place, in a particular way".*

Mr Gaisman sought to differentiate between abstract terms such as 'danger' and 'emergency' and (in his view) the more concrete terms of 'incident' and 'occurrence'. Mr Gaisman sought to suggest that:

> *"Nobody could seriously argue or would seriously argue that they applied to a national or an international state of affairs."*

It should be noted that the above is solely Mr Gaisman's assertion, and it seems obvious that such an interpretation is open to some debate. Regardless, the logical conclusion to this position is that 'an occurrence' of COVID-19 was not what caused the Public Authority closures of businesses. Instead, it was the prevalent *future* danger from COVID-19 throughout the country that caused the UK Government to take steps to 'flatten the curve'. Mr Gaisman produced evidence from medical texts that asserted that failure to take 'suppressive measures' could have given rise to 500,000 deaths within the UK. As such, his argument ran, the closure of businesses was not due to 'an occurrence' of COVID-19, but instead the preventative actions of the UK Government adopted in *apprehension* of further infections.

Justice Butcher pointed out in response that Public Authority action is always taken with at least half an eye on the reduction in the potential severity of an incident.

Mr Gaisman responded, albeit with a certain amount of discomfiture, that the current situation was different because of the *"many extraneous elements"* (of which kind he did not elaborate).

Moving onto more minor points, Mr Gaisman attempted to state that, as the Public Authority clause is an 'adjunct' of the Business Interruption policy, which is itself an 'adjunct' of the main Material Damage policy, it is somehow clear that the relevant extension must relate solely to the premises and solely to the client (ie. not misfortunes affecting the whole nation indefinitely). This seems a particularly specious point and one only has to consider a fire affecting an entire street to see that there is no limitation under any policy that restricts coverage when it affects multiple policyholders at the same time. Needless to say, this point would also extend to those houses in the street opposite who could not access their properties because of 'public authority restrictions'.

Mr Gaisman again sought to make a somewhat esoteric point, suggesting that the losses experienced by Hiscox policyholders should fall most appropriately under coverage for 'Loss of Attraction', although this extension actually requires physical damage in order to respond. As such he accused Hiscox policyholders of seeking to 'shoehorn' cover into another section of the policy relating to hindrance of access.

Mr Gaisman addressed the issue of the 'insured peril' under the Hiscox policy, making a point that, in his view, the policy makes clear that it covers Public Authority restrictions *only when they have been imposed following a notifiable disease*. He articulated that this interpretation is similar to, but subtly different from, an interpretation that suggests coverage is in place for notifiable disease *only when there are public authority restrictions*. This attempt to delineate the meaning of the insured peril seems to be crucial when assessing what to exclude from any counterfactual scenario on which a policyholder might base their loss. If it were the latter of the two interpretations, policyholders could reasonably state that the notifiable disease has to be removed from consideration of post-lockdown turnover. If the former, one must only 'reverse' the closure of the premises by the Public Authority, and nothing else.

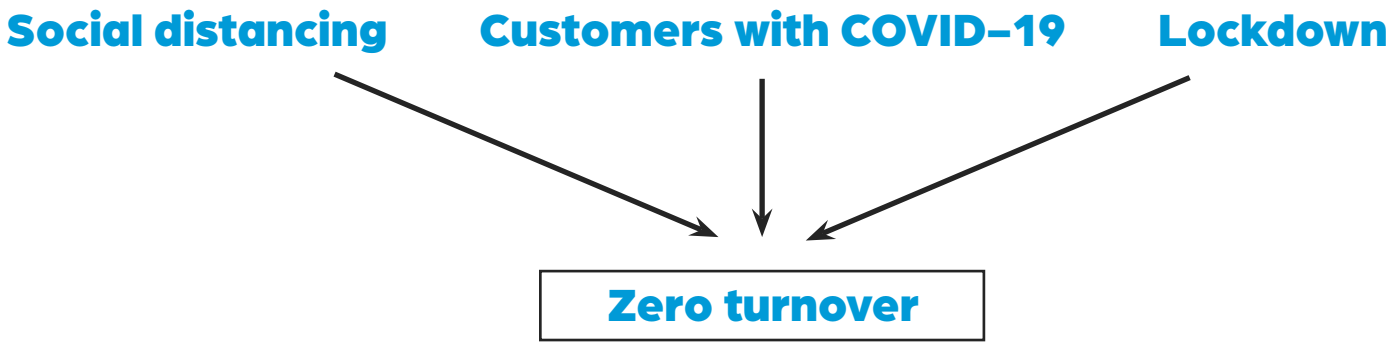
Mr Gaisman continued on the same point in relation to the Non-Damage Denial of Access. He asserted that coverage follows interruption caused by the imposition of a denial of access by the relevant authority, as long as it results from an incident within 1 mile (or in the vicinity) of the premises. Mr Gaisman specifically requested at this point that the transcript should be capitalised in order to make his point, stating that the correct interpretation of coverage is:

"NOT AN INCIDENT WITHIN A 1 MILE RADIUS OR THE VICINITY SO LONG AS IT CAUSES IMPOSITION OR THE DENIAL OF OR HINDRANCE IN ACCESS".

This is a subtle difference but, I feel, a crucial one.

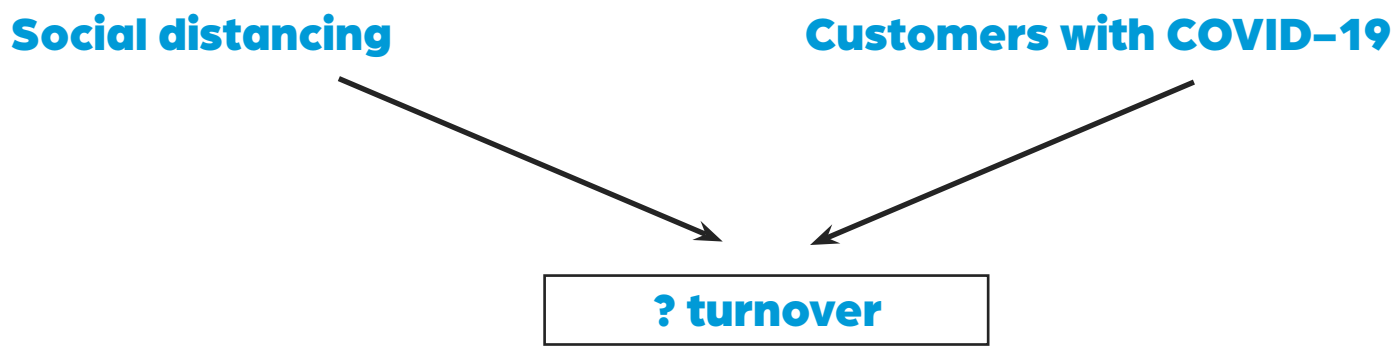
Mr Gaisman then sought to address the issue of what could be construed to be 'mandatory' regulations for the purposes of policy response. The relevant section of the Hiscox policy requires public authority restrictions to be 'imposed' and Mr Gaisman took that to mean 'mandatory', a term that he then asserted was synonymous with 'compulsory', and which he finally sought to define as having 'the force of law'. In essence, Mr Gaisman wished to connect the restrictions that might be a trigger to the policy to the full force of legal regulations and not, as had been suggested by the FCA barrister, to mere *"fiat, pronouncement, advice [or] ukase*[1]*"*. From this assertion followed Mr Gaisman's logical conclusion, namely that issues of social distancing etc could not be removed from the counterfactual position as they were not contributory influences on the policy trigger and therefore did not fall under the purview of the 'but for' test. This can be exhibited as below:

The average business following imposition of lockdown



By virtue of Mr Gaisman's assertion that *only the lockdown conformed to the requirements of the policy trigger*, one then has to consider below:

What would the business have taken as turnover without the lockdown?



[1] *'Ukase' is a decree with the force of law whose derivation is from the language of Tsarist Russia.*

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Mr Gaisman continued with his assertions regarding defined terms within the policy, turning to the notion of what might reasonably be considered to be 'an incident'. In his view the closure of businesses was, as mentioned previously, the result of 'future causes' – ie. the government's consideration of what would happen if the country did not enter lockdown. As such, he sought to suggest that the lockdown had not been caused by anything in existence at that time, but instead the nebulous speculations put forward by competing models of virulence drawn up by government experts.

Mr Gaisman also sought to suggest that, regardless of the above, a set of incidents is not itself an incident. This seems unconvincing, especially in light of multifarious terrorist incidents that have occurred over the world in the past twenty years. One would, for example, describe the attacks in London on the 7th July 2005 as 'an incident' even though the separate events were geographically spread out. Mr Gaisman attempted to support his assertion by recourse to Russell's paradox, a problem encountered by the early twentieth-century British philosopher Bertrand Russell. In its most famous iteration it posits the following scenario: "in a village, a barber shaves only those men who do not shave themselves". From which follows the paradox – who shaves the barber? The barber cannot shave himself as he only shaves those who do not shave themselves. Conversely, if the barber does not shave himself, then he fits into the group of people who would be shaved by the barber, and thus, as the barber, he must shave himself. The purpose of the illustration is to say that a 'set' (ie. all of the incidents of COVID-19) can not be a member of itself (ie. the conglomeration of incidents is not, itself, an incident of COVID-19). The 'barber' in our scenario is the group of incidents of COVID-19, which, by the above logic, must inherently stand apart from being an 'incident' itself.

Mr Gaisman then addressed the issue of whether the pandemic was 'everywhere', as asserted by the FCA. In his view this is simply a figure of speech for the ease of reference of the government and other authorities when discussing the general prevalence of the disease. However, in his view, suggesting that the disease was 'everywhere' would be akin to stating that *"World War II was in a library in Newcastle on the second Tuesday in January in 1943"*. Mr Gaisman advised that the insertion of terms regarding geographical limits was clearly intended to limit the insurer's exposure to local events, otherwise these terms would be rendered meaningless.

In considering the meaning of 'Denial of Access', Mr Gaisman emphasised the defence's case that this principle must be tied wholly to the inability of an individual to enter the premises. In his view it would be nonsensical to say that someone who attempted to go to work but whose bus was cancelled had been hindered in their access to the premises. This seems like a potentially specious argument, not least because the more appropriately comparable scenario would be the government telling the person waiting for the bus not to go work. This latter scenario seems much more like a 'denial of access' than the example given by Mr Gaisman.

Mr Gaisman noted in other parts of the Hiscox policy that the Denial of Access principle makes reference to a denial specifically of *"your access"* – ie. the inability of the policyholder themselves to access the premises. The Non-Damage Denial of Access section, however, eschews the pronoun and simply refers to "access" in general. Mr Gaisman's conclusion was that the Non-Damage Denial of Access clause must therefore imagine a broader hindering of access to the premises, to include the general public as well. This scenario clearly applies when considering a bomb scare or a gas leak, but Mr Gaisman considered that it did have the same application during a pandemic.

It should be stated that the above point seems overly nuanced. If the owner of a business could not utilise their premises and the public could not attend them, then surely it could be argued that this represented a denial of access?

Mr Gaisman sought to clarify the operation of the word 'outbreak' in the Hiscox policy wording, insisting that it had no more lexicological power than referring to a mere manifestation of disease. Whilst others have interpreted 'outbreak' to be synonymous with 'large-scale pandemic', Mr Gaisman asserted that in fact the term could apply to the presence of two people in a room having the same disease. In this way, one could describe 'outbreaks' of other diseases at schools or hotels without necessarily drawing the conclusion that they automatically formed part of a national pandemic.

Mr Gaisman made an unusual point in support of his argument regarding the above, citing the 'cyber-attack' coverage that is referenced in certain Hiscox wordings. Within said wordings the coverage contains an exclusion for:

> *"any virus which indiscriminately replicates itself and is automatically disseminated on a global or national scale or to an identifiable class or sector of use unless created by a hacker".*

Somehow Mr Gaisman sought to hold this up as evidence that Hiscox had never intended to provide coverage for risks of such global breadth as the COVID-19 pandemic.

Mr Gaisman continued to a discussion of the principle of *noscitur a sociis*, which seeks to interpret words and phrases within a contract by their context. It was Mr Gaisman's assertion that the wording used by Hiscox elsewhere in the policy makes it clear that the risks covered under the Public Authority section would only have been conceived as relating to the premises or in the vicinity of the same.

Mr Gaisman then turned to the issue of what might constitute 'use' of a premises. The Hiscox wording refers to *"your [ie. the policyholder's] inability to use the premises"*. This was noted as being a different construction to what might be implied by lockdown, which is a *customer's* inability to use the premises. If the business owner is able to use part of their premises then, for Mr Gaisman, this means that they are using their premises, as the policy makes no differentiation on partial or total inability to utilise said premises. Mr Gaisman pointed out that simply because he only uses 20% of his iPhone's capacity this does not mean that he is not using his iPhone. Equally, if one is having to queue outside Waitrose this does not constitute an 'inability to use' simply on the basis that it is a different way of operating.

Mr Gaisman addressed the FCA's argument that the restrictions on movement imposed by the UK Government could be taken to be synonymous with an authority creating an inability on the part of the policyholder to use their premises. Needless to say, he disagreed wholeheartedly with this contention and suggested that this could not conceivably have been the intention of the contracting parties at the time the policy was incepted. In his view, the FCA were leaning too heavily on hindsight as part of their submissions.

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Mr Gaisman once again sought to suggest that the word "interruption" required the complete cessation of business activities and that it was not sufficient for turnover to be 'partially interrupted' (a phrase that he described as a contradiction in terms). Whilst Mr Gaiman insisted that there was no case law in support of 'partial business interruption' in this scenario (ie. without physical damage) this nonetheless seems to run contrary to accepted claims-handling scenarios, wherein even a minor interruption to a part of the business due to an operating clause is able to be considered without issue. Nevertheless, this seems like an point that is more focussed on those businesses that were able to stay open, albeit in a reduced capacity away from the office (ie. accountants, solicitors, consultants etc).

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

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