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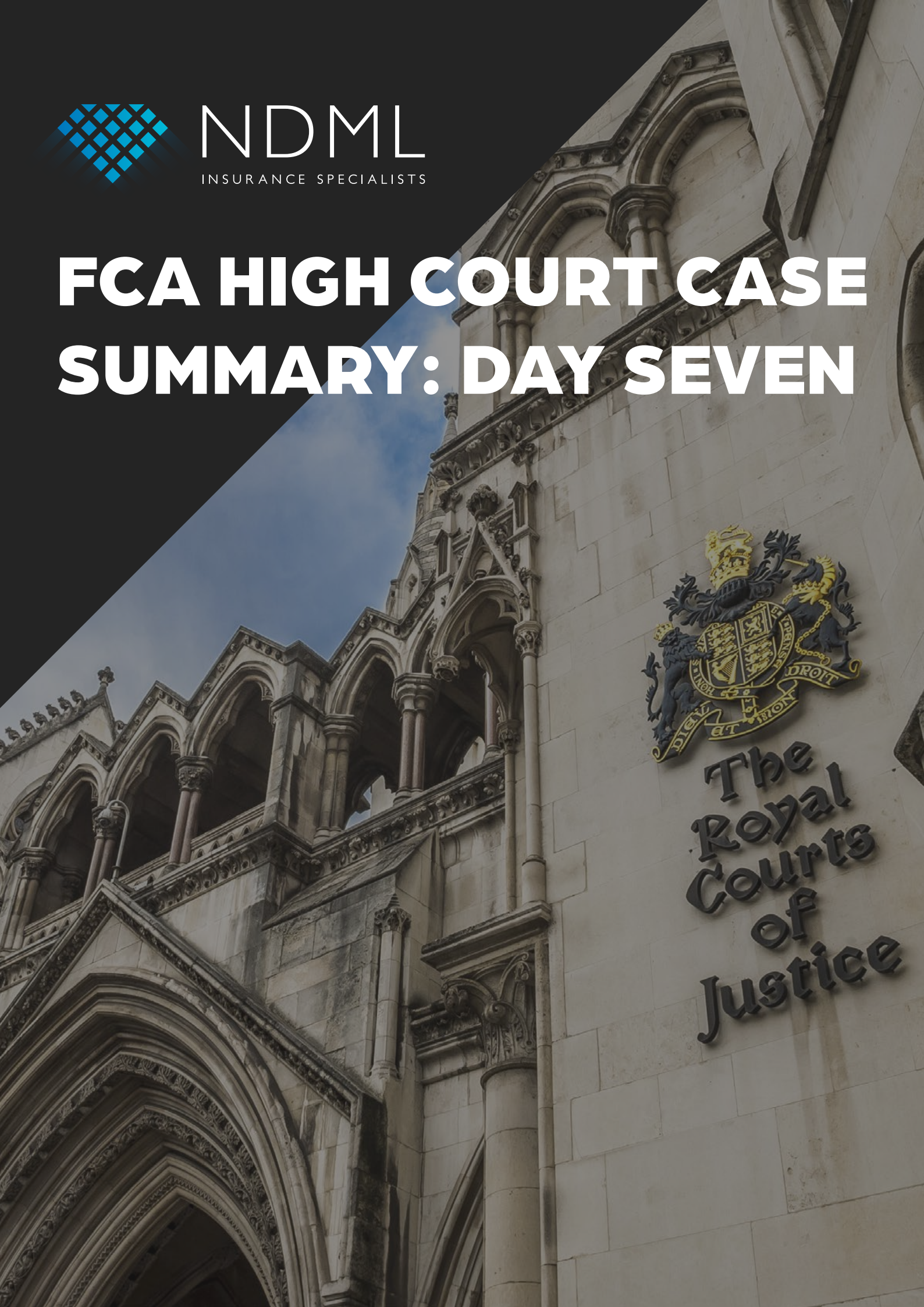
FCA HIGH COURT CASE SUMMARY: DAY SEVEN



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Mr Howard took over the defence in representing QBE's position and began by articulating the ways in which a notifiable disease could cause an interference with a client's business.

1. Staff or customers falling ill.
2. Suppliers being affected and unable to supply.
3. Public perception of risk.
4. Local, national or foreign government action, including travel restrictions, lockdown, hygiene advice etc.

Mr Howard advised that the QBE position was concerned with whether the action taken by the UK Government fell within the scope of the policy and if so how the losses stemming from this action could be calculated.

Mr Howard's assertion was that the action taken by the UK Government represented a 'national' response to the COVID-19 scenario and therefore it was not derived from a particular instance of disease within 25 miles of an insured premises. Mr Howard pointed out that the 'drivers' of the government decision were 'fear' and 'risk' and this explains the national approach to lockdown – fear and risk could be considered ubiquitous, regardless of the individual manifestations of the disease in any particular area. Given this is the case, Mr Howard argued that the QBE policy could not have responded to the pandemic because the losses sustained did not derive directly from the manifestation of disease within a certain area.

Mr Howard emphasised that the FCA's arguments divorced the manifestation of disease from the losses experienced by each policyholder. In his view, the FCA were seeking to suggest that merely the presence of disease within the delineated area, without it having any impact on the business, would be enough to trigger the QBE policy. Needless to say, Mr Howard took issue with this interpretation, suggesting that it fundamentally undermined the accepted insurance principle of a causative connection between the policy trigger and the losses claimed. In effect, Mr Howard was seeking to identify the FCA's argument with the 'post hoc' fallacy, a principle in logic which effectively points out the error in assuming that simply because one thing follows another they must be causally linked. The further implication is that the FCA's argument also exhibits another fallacy, namely that which seeks to connect 'correlation' with 'causation'. In short, Mr Howard sought to imply that the FCA case chose to see a cause-and-effect connection between a manifestation of COVID-19 and the closure of the business simply because there was an observed association between the two.

Mr Howard suggested that the FCA were seeking to draw conclusions as to the intentions of the parties to the contract without evidence for the same. The FCA have previously asserted that the inclusion of coverage for 'notifiable disease' implies an acceptance of potentially more widespread outbreaks that could affect a larger area than simply the 25-mile radius stipulated within the policy. As such, the FCA suggested, the manifestation of COVID-19 within the stipulated area would be a single cause that joined with an interdependent series of other causes to contribute to the wider picture (ie. lockdown).

Mr Howard's riposte to this assertion was to suggest that it is inconceivable that a policyholder and insurer would have understood the policy to be constructed in such a way, effectively deeming the issue of causation to be a minor consideration against the intended thrust of the policy as a whole. Mr Howard suggested that the FCA are really working backwards – conceiving of the result that they want and working out how the policy can be interpreted in order to achieve it.

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Mr Howard sought to use an example to illustrate his point about the lack of causal connection between the policyholder losses and the presence of COVID-19 within a 25-mile radius area:

> *"Assume an English insured manufactures goods. It obtains vital parts for those goods from a factory in China. Due to the outbreak of a notifiable disease in the supplier's town in China, and let's take SARS, to move away from the current crisis, the Chinese government orders a lockdown in that town. As a result, the English insured is unable to obtain his supplies and is therefore facing an interruption or interference to its business. Now, we ask, does the English insured have cover for the interruption or interference? QBE says plainly no. But, the FCA would say to the insured , if you can prove that by complete chance a person with SARS happened to come within 1 mile or 25 miles of your business, depending on which clause they had, you will then have cover. No doubt this would provoke the insured to put adverts in the papers to find anyone who had visited China and who might, whether they knew it or not, be infected with SARS and who had infected their policyholder area, inviting them to come forward. Should such a person be found, suddenly cover would be triggered, and the insured would be able to recover all of the loss suffered by reason of events occurring on the other side of the world"*

Mr Howard insisted that, were the QBE policy to operate in the manner suggested by the FCA, this would be 'perverse' and 'happenstance'. He further suggested that the FCA interpretation had the unintended consequence of invoking a 'postcode lottery', wherein those premises within 25 miles of a case of COVID-19 could obtain the benefit of cover by sheer coincidence, whilst those 26 miles away would not.

Mr Howard suggested that more appropriate examples of situations wherein coverage would respond might be:

- A meningitis outbreak at a university which causes a reduction in turnover of a music venue twenty miles away.
- An outbreak of Legionnaires Disease at a music festival which affects a hotel ten miles away.

These examples, he suggested, demonstrated the true intention of the policy and not the hue placed on it by the FCA.

Mr Howard again stressed how crucial the 25-mile radius condition was to the consideration of the counterfactual scenario and the subsequent calculation of losses. He suggested that the FCA were seeking to state that, as soon as one experiences a single instance of COVID-19 within an area, one then reverses out the entire pandemic from the counterfactual. This, he insisted, was fundamentally unsound reasoning and could lead to a situation wherein a narrow wording would be used to provide unlimited cover in the event of a pandemic.

A very long and detailed discussion was had over the 'but for' principle, ie. the thought-experiment whereby one removes the insured peril from the scenario to establish what losses might have been caused by the same. This principle can be exhibited as below:

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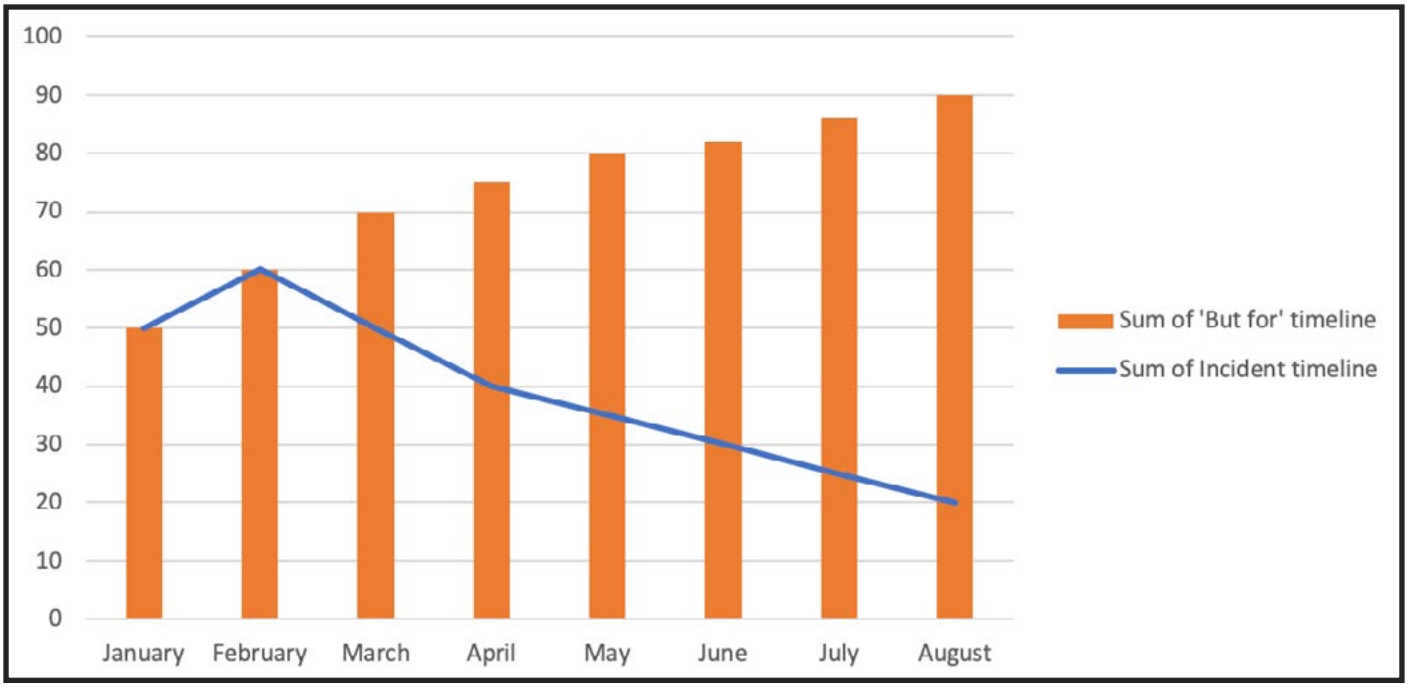

Figure 1 - 'But for' the incident, business turnover would have increased

In the above graphic, the insured peril occurs in February and turnover increases. 'But for' the incident, the turnover would have continued its upward trajectory unabated. If one takes the insured peril to be COVID-19, then one has to consider the losses that would have continued if the disease had never occurred within the 25-mile radius. It is QBE's contention that the lockdown would have occurred anyway, regardless of the individual cases within any 25-mile radius of the business in question.

Mr Howard suggested that the FCA had attempted to construe the current scenario as being similar to those cases under tort where there might be two or more wrongdoers – for example, if two people both shoot an individual at the same time they can not escape justice by suggesting that the other person undertook the murder, or that it would be too difficult to disentangle who caused the fatal shot. However Mr Howard averred that this is a sleight of hand by the FCA, because the current scenario does not involve parties competing over their responsibility for the proximate cause of the loss – instead, we are simply talking about one insurer and one client, and in turn each party's understanding of the terms of the contract.

A discussion was broached over whether it was appropriate to consider London as a special case in reviewing the application of the policy. Evidently in March the number of cases of COVID-19 in London was significantly higher than in the rest of the country and therefore an argument could be volunteered that these cases *did* lead to the lockdown, which in turn led to a reduction in business turnover. If a policyholder operated a bar in London that was forced to close because of a nationwide lockdown caused almost entirely because of the prevalence of COVID-19 in the capital, could you argue that the QBE policy should respond? Mr Howard suggested that this was not the case - aside from the fact that the FCA have not pleaded this as part of their submissions, the SAGE advice at that time was that action was taken because of modelling that incorporated the whole of the country. Furthermore Lord Justice Flaux was keen for the court not to venture into territory on which it had not been asked to rule and on which they did not have the requisite evidence for an appropriate assessment.

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Mr Howard countered the FCA's arguments regarding whether one should discount the 'apprehension' of an insured peril from the calculation of loss. This returned the discussion to the *Orient Express* case, wherein a hurricane caused damage to a hotel in New Orleans (as well as New Orleans itself). The FCA had suggested that the apprehension of the arrival of the hurricane in the week preceding landfall would have caused a drop in bookings, but that this downturn should not have been taken as indicative of the 'true' loss for the purposes of calculating the same. Mr Howard stated that the FCA's argument was unsound based on the fact that the Business Interruption loss that was covered by the hotel's insurer was inextricably linked to 'damage', not fear of an eventuality. In this sense, apprehension over COVID-19 could not be considered to be an insured risk and therefore any downturn that may have begun before it was declared a notifiable disease or before lockdown can not be considered 'excluded' from an assessment of the general trends. Mr Howard sought to rely upon the *New World Harbourview* case which was heard after an outbreak of SARS in 2003. In that scenario, before SARS became a notifiable disease there had been a downturn in business at the New World Harbourview hotel. The insurers of the hotel had sought to factor that downturn in to their consideration of the value of the hotel's claim, which became an insured peril at the point that SARS was deemed to be a notifiable disease. The hotel suggested that this was unfair, as the initial SARS-related downturn was not a true reflection of their 'normal' losses. Furthermore this downturn then crystallised into an insured peril, proving therefore that its cause was an 'abnormal' external factor which should not be built into the post-claim losses.

This argument can be exhibited in a hypothetical sense as below:

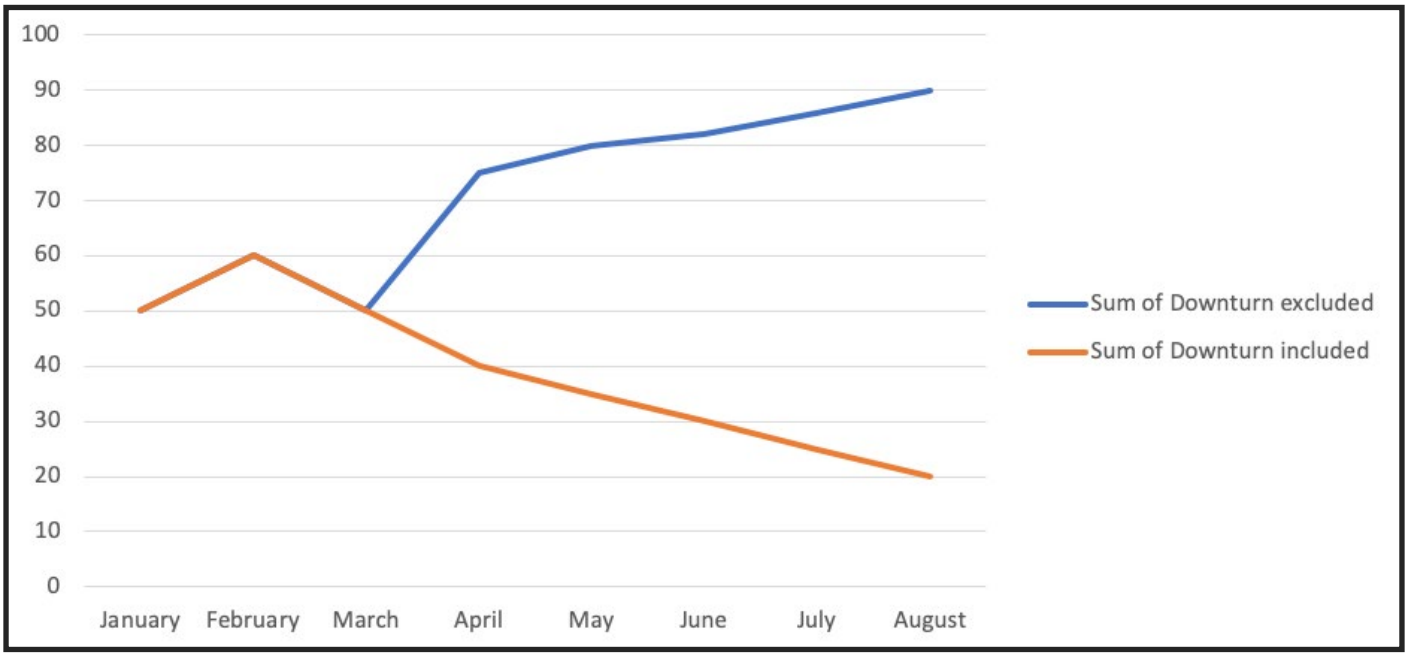

Figure 2 - Downturn used as a trend v Downturn treated as an anomaly

In the above graphic, the business begins to experience a downturn in February-March, before the disease is deemed notifiable. Once it becomes notifiable, and policy cover theoretically becomes available, by treating the initial downturn as material to the further calculation of loss, one follows the orange line. If however one treats the initial downturn as an anomaly then the turnover returns to the trajectory it had been on before said downturn (as shown by the blue line).

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The day concluded with Mr Edelman returning on behalf of the FCA, although the only point addressed was that above, namely whether the initial downturn (before COVID-19 became notifiable) should count towards an assessment of any losses that may be covered as part of the main part of the claim. Mr Edelman repeated his assertion that this downturn should not be factored into any calculations, and the judges advised that they would bear this point in mind.

The day finished on a less fractious note than the day before, with Lord Justice Flaux seeking to ensure that Mr Edelman did not feel he was being intemperate on the previous day regarding the issue of timings for submissions. He advised Mr Edelman that:

"We were all rather hot and tired".

This seems to be an apposite way to describe all of us with a vested interest in the case...