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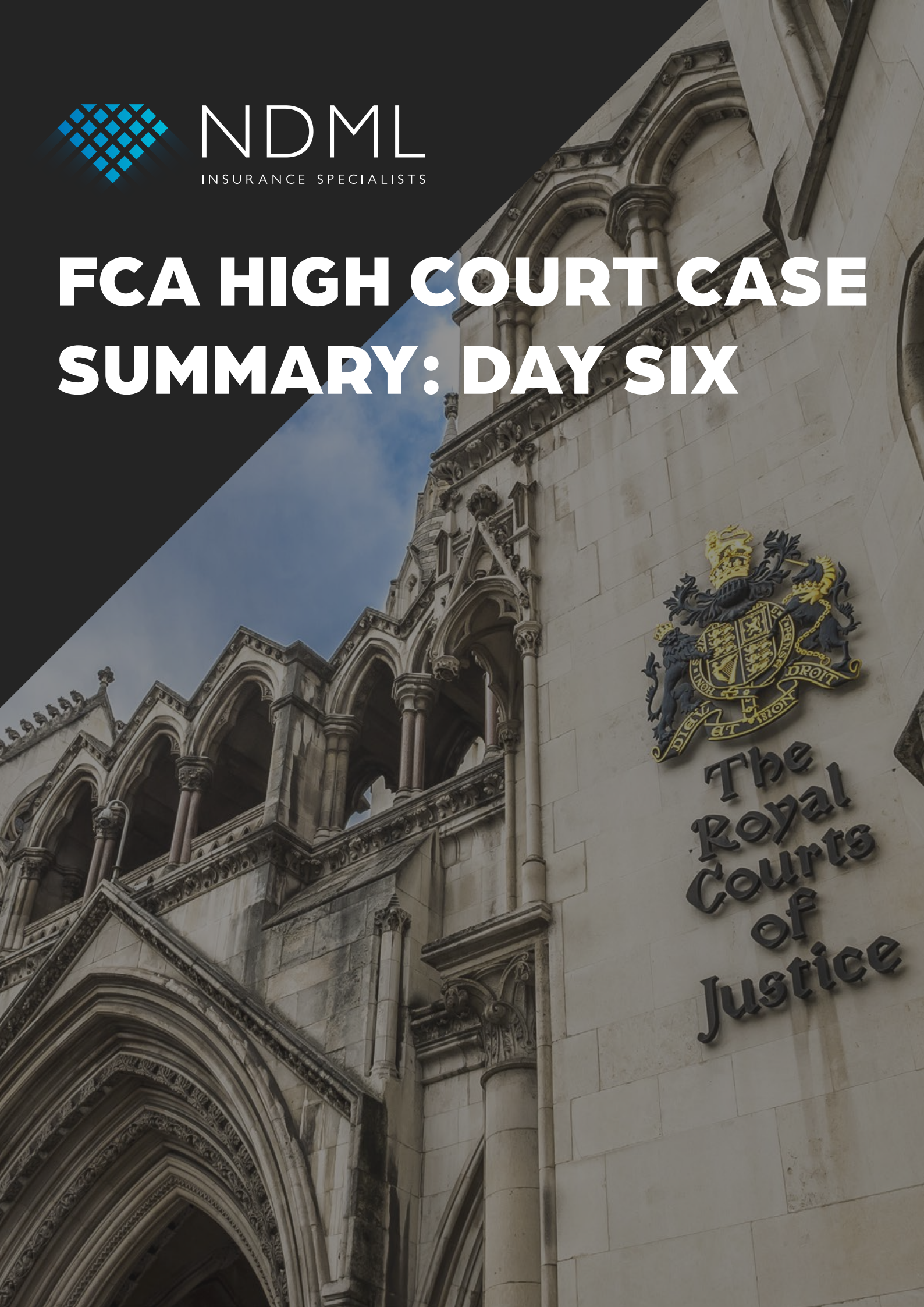
FCA HIGH COURT CASE SUMMARY: DAY SIX



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Mr Gaisman began Day Six by briefly countering certain additional elements of the FCA case. The key points can be articulated as below:

- The 'trade-off'. Mr Gaisman asserted that it seemed incomprehensible for Hiscox (or any insurer) to have placed parameters on their coverage, (ie. narrowing the policy trigger to a composite peril built up of specific 'steps') only to allow the argument of causation to undermine all of this careful construction. In essence, Mr Gaisman's argument is that one must only strip out the final 'triggering' step from any counterfactual scenario, not all of the elements that have led to its being produced.
- The difficulty of proof. Mr Gaisman asserted that it was not sufficient for the FCA to suggest that it was too difficult to extricate 'pure' COVID-19 losses from those incurred as a result of lockdown (and by implication suggest that they should not therefore be untangled for the purposes of the calculation of loss). Mr Gaisman suggested that it is a well-established fact that Business Interruption claims are complex, but that is no reason to avoid the task.
- The indivisibility argument. Mr Gaisman suggested that the FCA had asserted that all elements of the operative peril were indivisible and in extracting one of these elements for the purposes of creating a counterfactual, one is obliged to undertake the extraction of them all. Mr Gaisman insisted that no such thing was required – if you have coverage for closure by a Public Authority, but only if there is a notifiable disease, when calculating the loss one can 'reverse out' the closure without any difficulty whilst keeping in play the losses stemming directly from the disease. The relative merits of 'slicing' the perils in this way will be considered by the judges, but Mr Gaisman certainly asserted that such a task would not be so difficult that it would be rendered virtually impossible.

Mr Gaisman then handed over to Mr Kealey, representing MS Amlin and Ecclesiastical.

Mr Kealey began by drawing attention to the similarity in wording between the Specified Disease extension within the Ecclesiastical policy and that within the Prevention of Access section. Both of these make reference to *"restrictions in the use of the premises on the order or advice of the competent local authority"*, whilst the 'specified disease' section makes additional reference to coverage being extended to include occurrences within a 25-mile radius. Mr Kealey asserted that this was evidence that Ecclesiastical had had no intention of providing wide, pandemic-level coverage following the manifestation of a disease, regardless of which section of the policy was deemed to operate.

Mr Kealey addressed the key element issue of the Ecclesiastical wording, namely its limiting of the exclusion within its Prevention of Access coverage to closure on the orders of the 'competent local authority'. In Mr Kealey's view, 'competent local authority' has a legal basis for being viewed as synonymous with senior ministers of the Crown, including the Prime Minister and any of her principal Secretaries of State. Mr Kealey argued that any party to Ecclesiastical's policy contract would be obliged to view its principles in light of the general application of the common law, an assertion which led him to consider the legislative background to the terminology being used. The Civil Contingencies Act 2004 provides guidance on 'local arrangements for civil protection' and defines an 'emergency' as *"an event or situation which threatens serious damage to human welfare in a place in the United Kingdom"*. Following on from this definition, the Act then elaborates who has the power to act in response to just such an emergency, namely *"Her Majesty in council"* (ie. the Government).

If one takes the above argument as correct, then the reference to 'competent local authority' within the Ecclesiastical wording must, by definition, extend to the UK Government because they are the authority vested with powers to respond to local emergencies. This does, however, implicitly expect a

policyholder to be familiar with the distinctions drawn in the Civil Contingencies Act 2004 and it could be reasonably argued that this is an unduly onerous requirement for a layperson. Indeed, the point made by Mr Kealey would seem to violate the principles of *noscitur a sociis*, where the meaning of a term is derived from those around it. The Ecclesiastical policy imparts a clear delineation between the notions of 'local authority' and 'government' and therefore it would seem illogical to include these as discrete terms when, by Mr Kealey's estimation, they were both meant to mean the same thing.

Mr Kealey sought to explain the presence of the word 'competent' before 'local authority' to signify the appropriate authoritative body with jurisdiction in the area for the particular emergency encountered. In this way, Mr Kealey suggested that the UK Government is a 'competent local authority' because its 'competence' is required nationally (and in turn, locally) in the event of a pandemic.

Mr Justice Butcher pointedly asked whether the wording could not just have said 'competent authority' – a suggestion that Mr Kealey accepted was entirely justified:

> *"It would make my task much easier had it done so".*

Lord Justice Flaux commented in response that the Ecclesiastical policy *"is very badly drafted".*

Mr Kealey addressed the issue of causation in a similar manner to his colleague Mr Gaisman, namely suggesting that the elements that go to building the 'insured peril' (ie. restrictions on premises, orders by the local authority, presence of an emergency etc) should not be considered as *widening* the coverage but instead *narrowing* it. Mr Kealey suggested that the various building-block elements of the peril are not to be viewed as adding to the coverage, each of them bringing their own type of sub-peril to the insurance provided; instead he suggested that each of these contributory factors should be viewed as a filtering of the coverage, closing off avenues for losses until one arrives at a very specific scenario that is insured.

Mr Kealey discussed the manner in which losses should be calculated under the Ecclesiastical policy, taking the example of a church which had to close. This scenario proposed a situation wherein a wealthy parishioner regularly made contributions to said church. However this parishioner also ran a restaurant which was forced to close, meaning that he no longer had any money to make donations to the church. In this example, the church's contributions would have decreased due to the lockdown but not because the church was closed. As such, it is argued, this particular loss could not be argued as being recoverable under the policy.

Both Justice Butcher and Lord Justice Flaux were very keen to press Mr Kealey regarding whose responsibility it might be to provide evidence of the 'claimable' element of a particular policyholder's downturn in turnover. In the view of the judges it seemed clear that the insurers were those with the responsibility to provide counterevidence in the face of a justifiable submission on the part of a policyholder.

It is the FCA's contention that, because the actual Ecclesiastical policy mentions both 'emergency' and 'prevention of access', one has to remove both these when calculating a client's losses. However, by way of a counterargument to this proposal, Mr Kealey asked the court to conceive of a very broad policy that was worded in such a way so as to respond to closure due to any government action, without the necessary trigger of an 'emergency'. However if an emergency were indeed to give rise to closure of a premises due to government action, then, Mr Kealey insisted, one could only logically remove the government action from the calculation process because the presence of an

'emergency' was not stipulated within the insuring clause. This would have the counterintuitive result of making a policy with fewer restrictions narrower in its capacity than a policy that included specific requirements for an 'emergency' in order for it to be triggered.

Mr Kealey then moved on to the MS Amlin policy. Many of the key elements within this policy seem to match across to those within the QBE policy and therefore very similar arguments were made by Mr Kealey in this regard. Specifically, he emphasised the point that, were one to imagine all cases of COVID-19 to be removed from within a 25-mile radius of a policyholder's business, this business would still have been closed as a result of the government-enforced lockdown. As such the suggested conclusion is that the cases of COVID-19 within the 25-mile radius were not contributory to the policyholder's loss.

Mr Justice Butcher took issue with this interpretation, suggesting a scenario wherein a large quantity of COVID-19 cases in a locality could have caused a lockdown to be imposed by the local council. However before that took place (he imagined) the UK government stepped in (because of all the other areas suffering from localised outbreaks of COVID-19) and shut down the entire country. As such it could be reasonable to suggest that the cases within the 25-mile radius *would* have given rise to a localised lockdown and, in turn, with a sufficient number of these '25-mile' areas one would encounter a situation wherein they were *all* contributory to the nationwide lockdown, which in turn gave rise to the policyholder's reduction in turnover.

Mr Kealey countered the above by suggesting that the Amlin clause denotes a causal connection, ie. a direct link from the manifestation of the disease to the reduction in turnover of the business.

Mr Kealey addressed the question of the Amlin clause relating to 'Action of Competent Authorities', which provides coverage for:

> *"Loss resulting from interruption or interference with the business following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises where access will be prevented ... "*

Mr Kealey made the point that, in other areas of the Amlin policy, reference is made to restrictions on use of the premises, which implies that the draftsman sought to make a delineation between 'use' and 'access'. As such, in his view, the only manner in which the 'Action of Competent Authorities' clause could respond would be in a scenario wherein a policyholder was met with the *impossibility* of physical access to their premises. This counters previous assertions by the FCA that a partial ability of the policyholder to use their premises would constitute a 'prevention of access'.

Mr Kealey also drew the judges' attention to the arguments run by Mr Gaisman in respect of the Hiscox Denial of Access coverage, suggesting that he would follow these *mutatis mutandis* (ie. applying the general points made to the different specifics of each policy's construction). Indeed, many of Mr Kealey's arguments in respect of causation were drawn from previous examples regarding the presence of independent causes of a policyholder's reduction in turnover. As has been emphasised before, Mr Kealey insisted that only the combination of circumstances that make up the policy trigger (ie. not simply the general presence of COVID-19 or associated social distancing advice) would give rise to coverage under the Amlin policy. This in turn would also apply to a calculation of trends, wherein one can only reverse out the phenomenon that is the *combination* of factors giving rise to the policy trigger and not the disparate contributory factors themselves.

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At the conclusion of the day Mr Edelman, on behalf of the FCA, voiced his frustration that the insurers were taking up considerable time in repeating the same arguments whenever a new insurer wording was brought to the fore. He also noted that the trends clauses especially were being addressed again and again despite it having been agreed that only Mr Kealey would present on these points. Mr Edelman was concerned that the FCA would not have additional time for their additional submissions following conclusion of the insurers' defences. The court agreed to allow some additional time to ensure that all warranted submissions could be made – although Lord Justice Flaux suggested that he was not 'overimpressed' with Mr Edelman's point.

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

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