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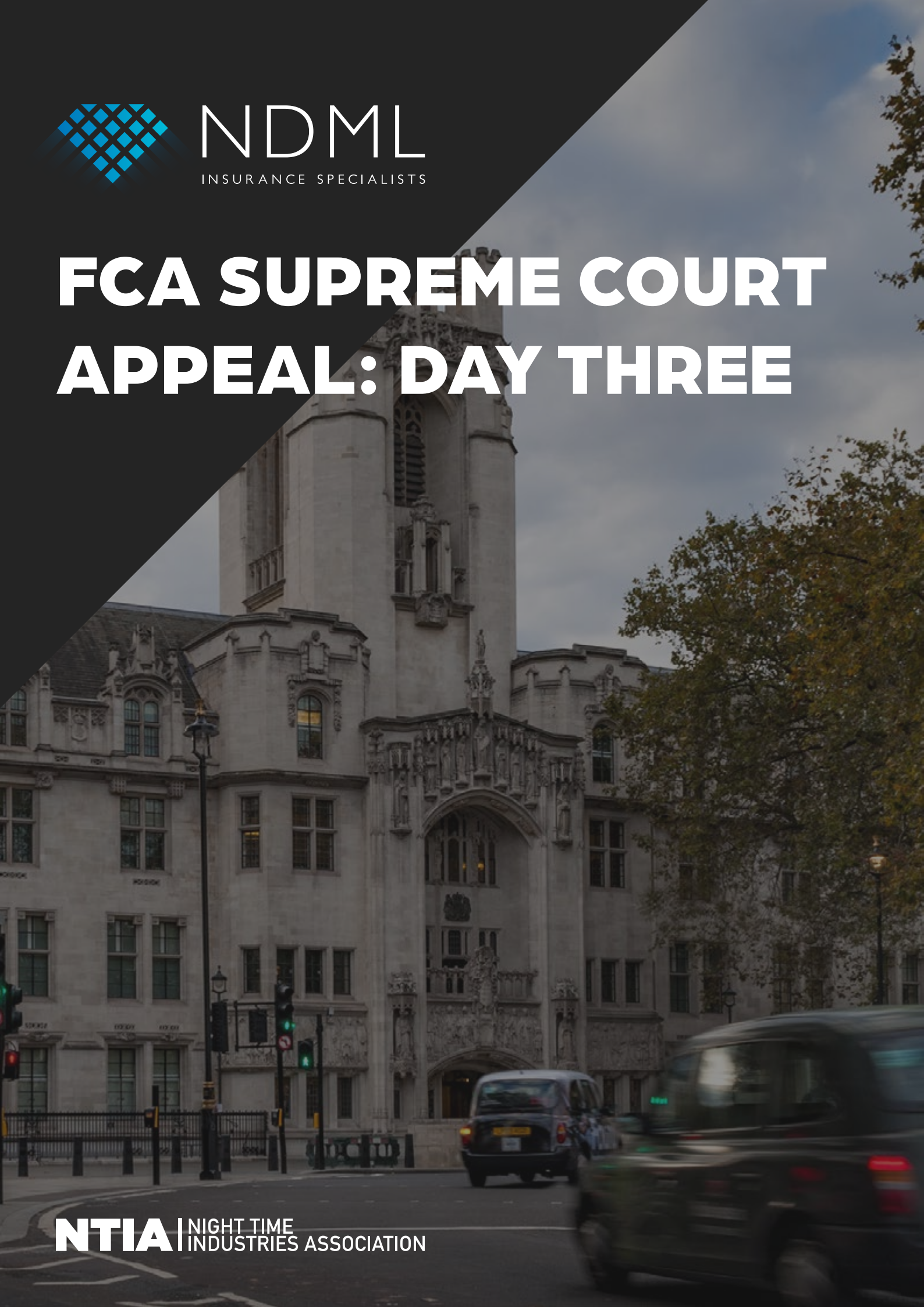
FCA SUPREME COURT APPEAL: DAY THREE



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Mr Edelman began by continuing his previous day's submissions on behalf of the FCA, turning to the issue of 'notifiable disease' and the character of the risk associated with the same.

In the view of Mr Edelman, insurers that did not specify the diseases against which they intended to insure were 'taking the plunge' by opening their coverage to potentially unknown diseases that could become manifest and which, given the nature of notifiable diseases, would have a significant chance of spreading in such a way as to give rise to an epidemic/pandemic. In turn, any development of an epidemic that arises from the spread of a notifiable disease is likely to be unpredictable and irregular – the crisis would not, therefore, confine itself to *"a particular neat circle".*

Indeed, taking the example of SARS, Mr Edelman showed that this previous epidemic had given rise to extreme counter-reactions from authorities, such as the closure of all 3500 sites of public entertainment in Beijing. As such, whilst the actions in dealing with COVID-19 were unprecedented in the UK, in the view of Mr Edelman the insurers who had chosen to insure notifiable diseases such as SARS should have been aware that any outbreak could lead to widespread and stringent governmental action. Indeed, the capacity for this type of action was already on the UK statute books prior to the pandemic occurring.

In the view of Mr Edelman:

> *"This demonstrates, as the court held, that these policies , even the one-mile radius ones, are contemplating the disease affecting a wide area, either because of the spread of the disease or because the threat to health that the scattering of cases, if it's in the early stages, might represent."*

Mr Edelman suggested that the construction of those wordings that refer to a 1- or 25-mile radius was such that they made no reference to a requirement for the actual diagnosis of the disease within the specific area. Indeed, according to Mr Edelman, the policies did not even require a person with the disease to be symptomatic. As such, the implication is that, had someone lost their sense of taste or smell within the particular geographic area, this would be sufficient for triggering the coverage under the policy. Furthermore, none of these policies provide guidance on which tier of public authority is responsible for any outbreak. Consequently the inference is that the insurers were content to include cases where the manifestation of disease had to be dealt with by the local authority *as well* as HM Government. The policies could have been more specific on all these points, but they were not.

Mr Edelman sought to turn the insurers' arguments against them in considering the correct operation of the 25-mile radius proviso. The insurers had previously tried to argue that, if there were no cases of COVID-19 within a 25-mile radius of a policyholder, their business would still have been forced to close. Mr Edelman advised that this was precisely the case and therefore, if there had indeed been no cases of COVID-19 within the 25-mile radius of a business *that policyholder would have had no coverage at all.* However, if a business did have cases within the 25-mile radius as part of a broader pandemic it was only correct that cover responded.

In the view of Mr Edelman, the purpose of the 25-mile radius condition is to ensure that coverage is not simply contingent on governmental or public authority action, but also that the area surrounding the client's premises has been one of those that has been affected by the disease.

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Mr Edelman turned to general issues relating to the construction of the policies in question and what they are insuring. In his view, the policies are covering 'loss', which is caused by interruption or interference with the business, which is in turn caused by the insured contingency (in this case, COVID-19). How the insured contingency causes the interruption is not specified within the relevant wordings, meaning that the actual trigger for interruption should be, in the view of Mr Edelman, *"any consequence of the disease which then has an effect on the business at the premises".*

Mr Edelman raised the point with respect to the trends clauses that the cause of the loss is a composite peril and therefore it is unreasonable to revisit one of the constituents of this peril when calculating the appropriate trends. Furthermore, the insurers' case, according to Mr Edelman, was shown to be contrary to the intention of the policies by the mere virtue of the fact that the insurers had changed their arguments on several occasions, sometimes in the period between the written and oral submissions. Mr Edelman emphasised a point made on a previous day that one has to contemplate *"what would have happened in the normal real world, not what would have happened in some world that could never exist"*.

Turning to the wordings of specific insurers, Mr Edelman addressed certain elements of the QBE policy, noting that this policy had actually sought to limit its coverage by stipulating an exclusion for AIDS. Clearly QBE had considered what diseases they wished to include and had concluded that it was only AIDS that they did not want to cover.

Furthermore, Mr Edelman pointed out that the manifestation of disease within a 25-mile radius would not in itself cause an interruption or interference with a business.

> *"Something more has to happen. And this is obviously contemplating, because of the nature of the disease and the reference to something which has to be notified if there is an outbreak, that the public authorities will be acting, and they will be acting to the whole of the outbreak...They're reacting to an outbreak of a disease and this clause is saying, well, we'll insure you for interruption or interference arising from the disease, an outbreak of which has to be notified , as long as someone in the policy area has manifested the disease, has symptoms of it."*

Mr Edelman averred that, had they wished to make the manifestation of the disease directly causative of the loss, they could have stated this principle within the wording. In his view, the 'natural' reading of the wording is to see the manifestation of the disease as a precondition for coverage, not a *direct* causative requirement for the loss. By suggesting that the applicable radius is a limiting factor for the purposes of coverage, wherein *only* the cases within the radius are to be assessed in terms of whether they are causative of the loss, this creates an unwritten exclusion within the policy. If the local outbreak is an indivisible part of the national outbreak, it can not be logical to view the manifestation of the disease outside of the 25-mile radius as a competing cause of the business interruption.

Alternatively, Mr Edelman suggested that one could assess each claim on the basis of concurrent causes, wherein a competing cause may not be insured but also may not be specifically excluded. If each individual instance of COVID-19 is as equally effective a cause of the government restrictions as every other instance of COVID-19, then one has 'insured' causes within the 25-mile radius and 'uninsured *but not excluded*' causes outside this area. Based on general legal principle (specifically the case of *Wayne Tank*), Mr Edelman suggested, the claim against QBE should therefore succeed.

Turning to the policy subset of 'QBE2', Mr Edelman noted that this wording was more specific in its construction regarding how the disease should present itself for cover to be in place. The QBE2 policy states that the notifiable disease in question must be *"sustained by any person",* which, in the view of Mr Edelman, allows for the presence of an infected person within the 25-mile radius who is asymptomatic. This provision in turn undermines the insurer's case that the disease has to be directly causative of the loss – if the policy allows for coverage in the event that someone is asymptomatic within the confines of the 25-mile radius, then it can not be stringent on the principle of direct causation. Indeed, one assumes that each business would have had a great many asymptomatic people within their locality, a fact which gave rise to the imposition of the national lockdown.

Mr Edelman then turned his attention to the implications of the word 'event' within the QBE2 policy, stating that the High Court's interpretation of how the term modified coverage was erroneous:

> *"Multiple cases of a disease within the relevant policy area and outside would be regarded as an outbreak and one can fairly describe an outbreak as an event, and there's no reason why if the outbreak is also outside the relevant policy area that should stop it being an event or create a separate event. It's all one outbreak."*

At this point the court took some time to digress into the application of the 'but for' test and its correct application to the current claims. Lord Leggatt and Lord Reed made interesting observations that if one took the 'but for' test to its logical extreme, all the cases of a disease within the 25-mile radius would cancel each other out causally. This clearly can not be correct, and therefore the same principle must apply to cases *outside* the radius – just because they exist does not mean that they causally defeat the cases within the 'insured' area.

Given the above, Mr Edelman asserted that a person within the 25-mile radius who has sustained COVID-19, whether symptomatic or not, is a 'proviso' for coverage and this is the natural interpretation of how the policy has been written:

> *"All they're talking about is a qualifying condition, and this is the way they've expressed it...that is actually what they mean. Because if they had meant something different, the clause would have looked very different and it would have been requiring something very different to have happened in the policy area."*

On the issues surrounding the interpretation of the word 'event', Mr Edelman posited two possibilities:

1. The word 'event' is simply a catch-all term for everything that follows within the wording, in this case the concept of 'notifiable disease'.
2. If point 1 is not correct, and the word 'event' is in fact referring to a particular case of the disease, it still does not imply that that case must be the sole proximate cause. Instead, it is merely describing a state of play wherein events are conceivable both inside and outside the specified radius, all of equal individual rating. If this is the case, then the mere presence of uninsured (but not excluded) events outside the radius is no obstacle to the policy providing coverage for those equally-weighted events within the 25-mile radius area.

Mr Edelman also pointed out that the operation of the sub-limits within each policy inherently implied the connection between coverage and a broad outbreak of disease. In QBE2, there is a sub-limit of £100,000 'in respect of any one incident'. If the insurers were intent on suggesting that 'incident' (and by, implication, 'event') meant the sustaining of COVID-19 by one individual, then this would mean that their policy had the potential to pay out £100,000 *for every person who had*

suffered COVID-19 within the specified area. This is clearly not what the insurers had in mind when the policy was drafted and therefore the words 'incident' and 'event', being synonymous, must apply to a wide outbreak of the disease containing multiple individual cases.

Mr Edelman then turned his attention to the issue of how losses might be calculated in light of downturns in turnover that preceded the policy trigger. In effect, the concern is that (for example) a business may have closed on the advice of the government, with the legislation following a few days later. However when one comes to assess the claim, an insurer could (in theory) state that the 'trend' of the business was at zero before the policy trigger of legislation came into force and therefore no claim should be paid.

The graph below demonstrates what might happen in terms of a business' turnover vs what should happen in terms of calculation of a loss:

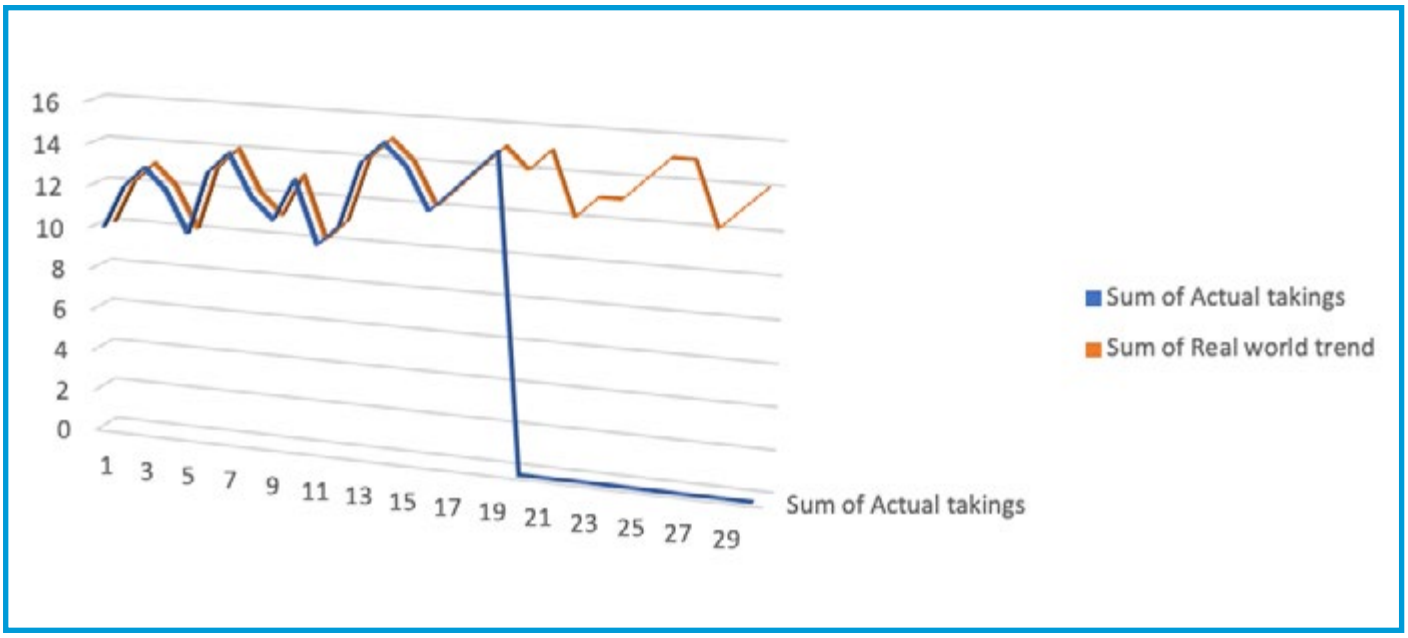

Fig.1 – The difference between actual takings and a forecast excluding COVID-19.

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If the business voluntarily closed following government advice on the 20th, but legislation did not come in until the 29th, one could look at the 'trend' of the week prior to the legislation (the blue line) and say that the business was not taking anything in advance of the policy trigger and therefore, by virtue of the trends clause, the business was not entitled to any reimbursement. However the orange line shows what the client would have generally expected to take if their 'real world' trend continued. It is this trend that Mr Edelman was seeking to use as the basis for calculation.

Mr Edelman stressed that it was not the intention of his submission to argue for the settlement of losses prior to the policy trigger. However if COVID-19 has caused a dip in turnover, and it *eventually* becomes part of the policy trigger, you should discount its influence on the downturn pre-trigger for the purposes of calculating the loss. Mr Edelman added that, out of all the insurers involved, Hiscox seem to have accepted his argument.

Lord Reed eloquently posited the logical conclusion of the insurers' arguments:

> *"If the trends clauses are to be interpreted as meaning that businesses can only recover if they ignore government advice, issued in the interests of public safety to cover the period before legislation can be brought into force, then the effect of giving the reading to the contract is to encourage companies to behave in a socially irresponsible manner which would damage their commercial reputations and be contrary to their public interest."*

In effect, the insurance policy would reward those companies who conducted themselves in such a way as to put public health at risk.