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Insurance contract law: causation

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An overview of the law of causation in general insurance contract law. The note explains the principle of proximate cause, the findings of the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd and others [2021] UKSC 1* relating to causation where there are multiple concurrent causes of loss and the relevance of causation when calculating the insurance indemnity.

Scope of this note

The concept of causation is central to many insurance claims, most especially as it regulates the necessary link between an insured peril (also known as insured risk) and the insured harm (for example, damage, personal injury or business interruption), and also between the harm and consequential loss (in policies such as business interruption policies where such loss is recoverable). The issue of causation was explored in a number of important cases arising out of non-damage business interruption coverage in the context of COVID-19, centering on the Supreme Court test case, *Financial Conduct Authority v Arch Insurance (UK) Ltd and others [2021] UKSC 1* (FCA v Arch (SC)), decided in early 2021 (after an expedited trial in the High Court (*FCA v Arch Insurance (UK) Ltd and others [2020] EWHC 2448 (Comm)* (FCA v Arch (HC)) and leapfrog appeal). The findings of the Supreme Court in FCA v Arch (SC) relating to causation, although made in the context of COVID-19 business interruption insurance claims, have wider consequences as they are relevant to all types of insurance claims where there are concurrent causes of loss.

This note explains:

- The principle of proximate cause in general insurance contract law.
- The relevance of the "but for" test of causation when determining proximate cause.
- The approach of the Supreme Court in FCA v Arch (SC) when determining causation where there are multiple concurrent causes of loss.
- The relevance of causation when quantifying the insurance indemnity.

For a summary of the decisions in FCA v Arch (SC) and FCA v Arch (HC), see Articles, COVID-19: implications of Supreme Court judgment in FCA BI test case and COVID-19: implications of judgment in business interruption test case. For an explanation of the background to the litigation see Practice note, COVID-19: FCA business interruption insurance test case.

How causation issues can arise

The risk undertaken by an insurer is typically defined by certain consequences having been caused by certain insured perils. In perhaps the simplest case, of a property damage policy, it will be necessary to show that property damage was caused by an insured peril, which may be identified in an exhaustive list of perils (such as fire and flood) or may be identified negatively (an "all risks" policy that covers all risks save for those that are excluded). The necessary causation enquiry focusses on the link between the peril and the damage: was the property damage sufficiently caused by an insured peril, for example, fire?

In some policies the causation enquiry can arise at different stages and often more than once, as follows:

- Within the insured peril.
- Between the insured peril and the harm.
- Between the harm and the (consequential) loss.

Within the insured peril

Some insured perils are "composite" perils which require different things to have happened in a causal sequence (see FCA v Arch (SC) at paragraph 216). Non-damage business interruption cover (that is cover that expressly provides an indemnity for interruption in the absence of damage to the insured property) might be triggered by "inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following ... an occurrence of any human infectious or human contagious disease". (For more

information, see below, Multiple causal connections within a single cover).

Between the insured peril and the harm

The connection between the insured peril (for example, fire or disease) and the harm (damage to property or business interruption) is the classic and most common causational connection required in insurance, and is similar to the classic causational requirement in tort (between the acts or omissions of the tortfeasor and the personal injury or property damage).

In relation to property policies, it is necessary to show that an insured peril caused the physical destruction or damage, which is the harm to the policyholder's interest in the property that is being insured.

Similarly, for business interruption policies, it is necessary to show that, for example, the damage or disease caused the interruption. It is clear that interruption is not part of the description of the insured peril but rather "a description of the type of loss or damage covered by the policy, in the same way as the type of loss or damage covered by, for example, a buildings insurance policy is physical destruction or damage". The word interruption "describes the nature of the harm to the policyholder's interest in the subject matter of the insurance for which an indemnity is given if it is proximately caused by an insured peril" (FCA v Arch (SC), paragraph 215).

Therefore, in the example of a composite peril given above, Within the insured peril, it would be necessary to show that the peril occurred, namely that the inability to use the premises arose under the specified causal sequence (involving disease followed by public authority restrictions), but also that the business interruption was itself caused by the inability to use the premises resulting from those underlying causes.

This causal link between the peril and the harm is considered in detail below, Proximate cause and the link between the insured (or excluded) peril and the harm.

Between the harm and the (consequential) loss

For some types of policy, the concept of "loss" (at least as a concept of measuring losses at large) is not relevant. A property policy typically specifies that, once the necessary harm (physical damage) has been established, the indemnity is to be calculated by reference to the cost of reinstatement (repair or replacement) of the property. Similarly, a liability policy provides an indemnity against the insured's liability to a third party and costs that fall within the cover, so that quantification of the insured's loss (and the insurance indemnity) does not engage causation issues in the same way as other types of cover, such as those which provide an indemnity for consequential loss.

Consequential loss, such as lost profits, rent and other financial losses, is typically not recoverable unless described in the policy and insured as such (Re Wright and Pole (1834) 1 AD & EL 621).

However, some types of policy expressly cover consequential loss and require that such loss be caused by a trigger event. Although quantifying that loss is merely the "pecuniary measure" of the harm (such as interruption in a business interruption cover), this quantification includes a causation requirement: the loss must result from (or similar express wording) the interruption due to an insured peril (FCA v Arch (SC), paragraph 216). The quantification machinery, which in business interruption cover includes "trends or circumstances" clauses in the policies (see below, Trends clauses), further emphasises that the aim is to identify losses caused by the interruption, as distinct (in business interruption policies, for example) from losses caused by a downturn in revenue which would have occurred because of business trends or other circumstances independent of the interruption and the insured peril which gave rise to it.

Other kinds of policy than business interruption may also involve claims for consequential loss, such as insurance in respect of rent, hire-purchase transactions and insurance for the cancellation of events such as concerts or films (see *MacGillivray on Insurance Law (Sweet & Maxwell, 15th edition), Chapter 31, paragraphs*, 33-015 and 33-016).

Multiple causal connections within a single cover

The causation requirement for the purpose of quantifying loss is illustrated by the "hybrid" clause (a clause that provides cover for a combination of disease and prevention of access/public authority action) included in one of the policies issued by insurer Hiscox and considered in FCA v Arch (SC) (paragraph 216):

> "Setting out the elements of the insured peril in their correct causal sequence, they are: (A) an occurrence of a notifiable disease, which causes (B) restrictions imposed by a public authority, which cause (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of financial loss. Counsel for Hiscox in their submissions on this issue usefully represented the structure of the clause in a symbolic form as A→B→C→D, where each arrow represents a causal connection."

In that analysis, the insured peril is the "causal sequence" A→B→C (all of which must occur with those necessary

causal connections), the harm that must be caused by the peril is D (interruption), and further it is necessary for loss to be (solely and directly in this case) caused by that interruption.

Proximate cause and the link between the insured (or excluded) peril and the harm

Section 55 of the Marine Insurance Act 1906 and the role of contractual intention and construction

The core link between the insured peril (or, indeed, although the point arises less frequently, any excluded peril) and the relevant harm is the proximate cause test. This is set out in section 55 of the Marine Insurance Act 1906 (MIA 1906) (although is accepted as applicable to non-marine insurance) in the following terms:

> "... unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

As the opening words of section 55 make clear, the requirement is subject to contrary provision in the relevant policy. That is, the insurance policy may provide for a different connection between the insured (or excepted) peril and the loss. For example, the words "caused by" have historically and uniformly been interpreted as importing the concept of proximate cause. By contrast, the words "caused directly or indirectly by" have been interpreted to refer to causes which are more immediate or more remote than the proximate cause (*Brian Leighton (Garages) Limited v Allianz Insurance Plc [2023] EWCA Civ 8, at paragraph 29*. See Legal update, Consideration of "damage caused by pollution or contamination" exclusion in insurance policy (Court of Appeal)).

The term proximate causation is not defined in the MIA 1906, but the case law establishes that the requirement is based on the presumed intentions of the parties, and therefore is a question of construction (FCA v Arch (SC) paragraphs 163 and 190, summarising some of the authorities). As Lord Briggs (in the minority in FCA v Arch (SC) but in agreement on this point) noted at paragraph 320: "The question whether particular consequential harm to a policyholder is subject to indemnity is as much a part of the process of interpreting their bargain as is the identification of the insured peril." In other words, the question is whether, on the proper construction of the policy, the parties intended that the insurance would respond to harm causally related to the insured peril in the manner that it was in fact (see below, The proximate cause test).

The proximate cause test

Unless the policy provides otherwise, the insurer is liable for any loss proximately caused by an insured peril (section 55, MIA 1906 and FCA v Arch (SC) at paragraph 162). This is sometimes said to be a "fundamental rule of insurance law" (see for example *MacGillivray on Insurance Law, Chapter 19,* paragraph 19-001). Ultimately, however, the proximate cause test rests on the presumed intention of the parties (see *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd [1918] AC 350*, per Lord Atkinson at 365 and Lord Shaw at 369, quoted in FCA v Arch (SC) at paragraph 166).

The speeches in *Leyland Shipping* used a number of descriptions of proximate cause but Lord Shaw provided the following guidance (pages 369 and 370):

- The true and overriding principle is to look at a contract as a whole and to ascertain what the parties to it really meant.
- The proximate cause is not the cause proximate in time to the loss, but rather "that which is proximate in efficiency."
- Causation is not a chain but a net and "where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency."
- At any given point in a net, influences, forces and events converge from all directions, not just in a straight line and an earlier cause may be more potent that a later one (*Allianz v University of Exeter [2023] EWHC 630 (TCC)*).

Although the authorities often refer to "the" proximate cause or "the" real efficient cause of loss, in reality, a loss may result from a combination of causes, either operating independently of one another, or, often, in a chain where each would not have arisen but for that preceding it in the chain. Of these causes, the search is for the, or a, proximate cause and it is generally irrelevant if a cause is either more remote in the chain than the proximate cause, or more immediate (*Reischer v Borwick 1894 2 QB 548*, *Brian Leighton (Garages) Limited v Allianz Insurance Plc [2023] EWCA Civ 8* and *Allianz v University of Exeter [2023] EWHC 630 (TCC)*, where the court held that the insurer was entitled to reject a claim on the basis that the proximate cause of the damage was the dropping of a bomb during the Second World War (a peril that was excluded under a war exclusion in the policy) and not the controlled detonation of the bomb decades later in 2021. See

also, below The effect of the passage of time on proximate causation).

Determining the real or dominant cause of loss has been said to require the application of business or relevant industry common sense (see *Leyland Shipping* per Lord Dunedin at page 362, *The TM Noten BV v Harding [1990] 2 Lloyd's Rep 283* per Bingham LJ at pages 286 and 287 and *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* per Lord Savile at paragraph 19). However, in FCA v Arch (SC) the Supreme Court sounded a note of caution, explaining that the common sense principles or standards to be applied in selecting an efficient cause of the loss "are capable of some analysis," and that it is "not a matter of choosing a cause as proximate on the basis of an unguided gut feeling" (paragraph 168).

Policy language

The meaning of proximate causation is not fixed and ultimately depends on the specific construction of the particular contract. Typically, there will be a term used in the policy to describe the requisite link between the peril and the harm. That term may be "caused by", but it may be something else. The policy may require that loss or damage be "suffered by", for example, fire or hurricane. The interruption may need to "result from" or be "in consequence of" public authority action. Other commonly used terms are "following" or "arising out of", and sometimes with qualifications such as "directly" or "directly or indirectly", or "solely".

As explained above, The proximate cause test, the default position is that the applicable test is proximate causation unless the contract provides with sufficient clarity that something else is to apply. Although, there are bodies of law on the meaning of specific words, the Supreme Court in FCA v Arch (SC) noted that while words such as "indirectly" or possibly "following" may indicate a looser causal requirement than proximate cause, "it is rare for the test of causation to turn on such nuances". The Supreme Court's conclusions in that case (that on the proper interpretation of the disease clauses, in order to show that business interruption loss was proximately caused by one or more occurrences of illness resulting from COVID-19, it was sufficient to prove that the interruption was a result of government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause) applied across a range of policy wordings, including "following", "arising from" and "as a result of" (paragraphs 162 and 212 of the judgment).

As to the word "indirectly" broadening the proximate cause test (indicating that the causative link may be more remote than a proximate cause), in *Crowden v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm)* Peter McDonald Eggars QC stated that even an indirect cause "must be significant; it must stand out as a contributing factor, at least, to the claim, liability or loss" (see paragraphs 71 and 72, where the judge cited Scrutton J's words in *Coxe v Employers' Liability Assurance Corporation [1916] 2 KB 629* that he was "unable to understand what is an indirect proximate cause" and in his judgment the only possible effect which could be given to those words was that "a more remote link in the chain of causation is contemplated than the proximate and immediate cause"). The phrase "in connection with" can denote a looser ("relatively weak") causal connection (*Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others [2022] EWHC 2548 (Comm)* per Butcher J at paragraph 116, considered in Legal update, Causation, aggregation and furlough payments considered in insurance claim for business interruption losses (High Court)).

As to the word "following", this has been held to import more than merely a temporal relationship but not necessarily one of proximate causation (see FCA v Arch (HC) at paragraph 95). The word "resulting" has been held to be more consistent with a proximate cause requirement than the use of the "less forceful" word "following" (see the Irish decision of *Hyper Trust v FBD Insurance plc [2021] IEHC 178* at paragraphs 174 and 175). The words "occasioned by" have been treated by agreement of the parties as imposing the proximate cause standard (*Allianz v University of Exeter [2023] EWHC 630 (TCC)*, paragraph 18).

The burden of proof

The insured has the burden of proving to the ordinary civil standard that a loss occurred which was proximately caused by an insured peril (*Rhesa Shipping v Edmunds (The Popi M) [1985] 1 WLR 948*).

However, where the insured has proved a loss resulting from an insured peril, the insurer then has the burden of proving the applicability of any exception, condition or warranty (*Colinvaux and Merkin's Insurance Contract Law (Sweet & Maxwell, Chapter B12,* paragraph B-1080 and *Munro, Brice & Co v War Risks Assoc Ltd [1918] 2 KB 78*, pages 88 and 89 (although the decision was reversed on appeal, the findings in relation to the burden of proof were not considered by the Court of Appeal).

Under an all risks policy, the insured satisfies the applicable burden by proving a loss caused by a fortuitous event, and the insurer then has the burden of proving that the loss was caused by an excluded or uninsured peril (*British Marine v Gaunt [1921] 2 AC 41*, per Lord Sumner at 57 and 58).

Generally, the burden of proving that a loss was not accidental (for example, that it was caused by fraud, or

arson) lies on the insurer (*Slattery v Mance [1962] 1 QB 676*, per Salmon J at 681). However, where an insured seeks to recover for a peril of the sea (the definition of which includes an element of fortuity) it has the burden of proving that the loss was not caused by its own deliberate and wrongful actions (*The Alexion Hope [1988] 1 Lloyd's Rep 311*; *Brownsvill Holdings v Adamjee Insurance, The Milasan [2000] 2 Lloyd's Rep 458* and *Suez Fortune Investments Ltd v Talbot Underwriting Ltd (Brillante Virtuoso) [2019] EWHC 2599*, per Teare J at paragraph 60).

The burden of proof may be displaced by express terms of the policy (*Levy v Assicurazione Generali [1940] AC 791*, where the policy expressly provided that where the insurer sought to rely on a policy term such as an exclusion to reject the claim, the burden of proving that the loss was covered was on the insured. However, Mustill J adopted a more cautious approach to terms reversing the burden of proof in *Spinney's (1948) Ltd v Royal Insurance Co [1980] 1 Lloyd's Rep 406*, where it was held that insurers still had to produce evidence from which it could reasonably be argued that the relevant exclusion applied).

The effect of the passage of time on proximate causation

The proximate cause test described above, The proximate cause test, is more sophisticated than an investigation merely into what was the most recent cause. In some cases, the proximate cause may be the most recent cause, but in others it will not be. The fact that timing does not determine what cause is proximate is well illustrated by *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd [1987] 1 Lloyd's Rep 32* ("The Miss Jay Jay") in which the Court of Appeal held there were two proximate causes of the loss of a vessel, first, its inherent unseaworthiness (due to design defects), and second the (obviously subsequent) adverse sea conditions experienced on a voyage. Further, in *Allianz v University of Exeter [2023] EWHC 630 (TCC)*, the proximate cause (act of war) arose many decades prior to the most recent cause (controlled detonation, some 80 years later).

A particularly stark issue in relation to the passage of time arose in the COVID-19 business interruption cases. The FCA v Arch test case concerned only cases of COVID-19 from the start of 2020 until the first lockdown and related public authority orders in late March 2020. There was no explicit consideration in the test case as to whether any COVID-19 cases were too early in 2020 to qualify as proximate causes of the March 2020 government actions. The Supreme Court simply held, in agreement with the analysis of the Divisional Court, that the proximate cause test was satisfied if there had been at least one occurrence of COVID-19 within the geographical area covered by the relevant clause which predated the government action, explaining that "each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it)" (FCA v Arch (SC), paragraph 212). There was also no consideration whether any government action after the first lockdown was lifted in July 2020 was proximately caused by occurrences of COVID-19 prior to the first lockdown, or only proximately caused by later cases more recent to the government actions in the second half of 2020 (and beyond). Both questions arose in subsequent cases.

The first question was due to be considered in the London International Exhibition Centre and other test cases in spring 2023 but it was not pressed as a preliminary issue and so, although pleaded, remains to be determined in a later trial.

The second question was considered in a collection of test cases on aggregation and causation heard consecutively in 2022 before judgments were given in any, namely *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others [2022] EWHC 2548 (Comm)*, *Various Eateries Trading Ltd v Allianz Insurance plc [2022] EWHC 2549 (Comm)* and *Greggs plc v Zurich Insurance plc [2022] EWHC 2545 (Comm)*.

In *Stonegate* and *Various Eateries*, the policyholders argued that there was cover for business interruption loss occurring after the period of insurance had ended but within the maximum indemnity period (MIP) specified in the policy. In *Stonegate*, for example, they argued that their losses in the period 30 April 2020 (when the period of insurance ended) to 30 April 2023 (the end of the MIP) were proximately caused by covered events (namely cases of COVID-19 occurring within the Vicinity (as defined) and within the period of insurance). They contended that, based on the findings relating to causation in FCA v Arch (SC), the occurrences of COVID-19 within the period of insurance were concurrent proximate causes of the cases of COVID-19 that occurred after the insurance had expired. The court held that FCA v Arch (SC) had not decided that each case of COVID-19 was equally causative of government or consumer response over a prolonged period of time. It was not plausible that early cases of COVID-19 (that is those occurring before April 2020) were equal or approximately equal causes of the various government measures adopted at different stages during the MIP and of consumer behaviours at the different times during that period. The incidence of cases varied over time and with that variation there were changes in governmental and consumer responses (paragraphs 201 to 204 of the judgment).

The reasoning in *Stonegate* was also applied in *Various Eateries*, where the judge further stated that the fact that the cases of COVID-19 occurring in the period of insurance may have caused later cases of the disease (because cases make cases) was not sufficient to say that the cases of the disease in the period of insurance were the proximate cause of the governmental measures and public response after the period of insurance. However, insurers accepted that cases of COVID-19 before the period of insurance ended could have caused interruption after the period of insurance ended. Examples could be cases where people had died as a result of contracting COVID-19 before the end of the period of insurance, or cases of long COVID in people who were infected before the end of the period of insurance, but it was for the policyholders to prove that there had been interruption as a result of COVID-19 cases before the period of insurance ended (paragraphs 61 and 62 of judgment). These causational findings in *Stonegate* and the related cases will not form part of the appeal to the Court of Appeal that is due to take place.

Multiple proximate causes

Where there are two (or more) proximate causes of a harm, one covered, but the (or an) other excluded, the exclusion prevents recovery (*Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd [1974] QB 57* (per Cairns LJ); *The Demetra K [2002] 2 Lloyd's Rep 581* (per Lord Phillips at paragraph 18); *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* (per Lord Savile at paragraph 22 and Lord Mance at paragraph 88); *Navigators Insurance Co Ltd v Atlasnavios-Navegacao Lda, [2018] UKSC 26* (per Lord Mance at paragraph 49, considered in Legal update, Supreme Court upholds decision that war risks insurers not liable to shipowners); and FCA v Arch (SC) at paragraphs 172 and173). In FCA v Arch (SC), it was said that, although it is "always a question of interpretation", where there are two proximate causes, one of which is an insured peril but the other is excluded "the exclusion will generally prevail" (paragraph 174).

Conversely, if one proximate cause is covered, and the other is neither covered nor excluded, the policy will respond (*The Miss Jay Jay*, especially per Slade LJ at page 40).

In FCA v Arch (SC), the key hurdle for the policyholders was the "but for" test, that is showing, for example, that "but for" the cases of COVID-19 in the vicinity they would not have suffered any interruption (see below, Satisfying the "but for" test is not enough to satisfy proximate causation), but the reasoning of the Supreme Court depended upon the finding that the insured peril was one of multiple broadly equal effective/dominant causes. This applied to the case of disease within the radius as regards the disease clauses (paragraphs 189 to 191, 212, 295, 319, 321). This was possible because, although there were very many (perhaps a million, said Lord Briggs at paragraphs 319 and 321) concurrent causes, none was more dominant than another (paragraph 212).

It similarly applied, with hybrid (which combine disease and prevention of access) and prevention of access clauses as regards the insured public authority ordered closure, and the concurrent other causes of interruption such as the advice that customers stay at home, fear or illness (paragraphs 229 and 230 and 237 to 239).

Where the insured peril was not even an equally dominant cause (for example, where the prevention of access really had little to do with the interruption) then there would be no cover, even despite the Supreme Court conclusions relating to the "but for" test (paragraph 244, see also below, Satisfying the "but for" test is not enough to satisfy proximate causation).

In particular, what is unlikely to be required or permissible, on the proper construction of a particular policy, in cases of multiple concurrent proximate causes is to weigh the totality of insured perils against the totality of the uninsured perils, providing all the perils are individually sufficiently effective to be proximate causes (FCA v Arch (SC) paragraphs 198 and following). This is not the same, of course, as dividing up causes where the harm or loss can itself be apportioned with some exclusively caused by one or more causes and other harm or loss caused by other causes (FCA v Arch (SC) paragraph 198). If such apportionment is possible in a particular case, the losses due to insured causes would be covered, whereas those due to uninsured causes would not (*Stanley v Western Insurance Company (1868) LR 3 Ex 71, 74-75*).

Summary

Where there are more than one proximate causes, if one is an excepted peril then there will be no cover, but otherwise there will be cover providing at least one proximate cause is an insured peril (subject to discussion of the but for test immediately below) even though other proximate causes are not insured perils.

Satisfying the "but for" test is not enough to satisfy proximate causation

The basic justification for the proximate cause test is that it is not sufficient to show that a harm would not have occurred "but for" the insured peril (*Marsden v City and County Assurance Co (1865) LR ICP 232*). For

insurance cover purposes, the "but for" test alone returns a lot of "false positives" (FCA v Arch (SC) paragraph 181). Insurance policies (like legal causation in contract and tort) typically require more, and that is what proximate cause does, by asking whether of all the causes in the world that together contribute to bringing about the harm, the insured peril is a sufficiently effective cause for the policy to respond.

Is it necessary to satisfy the "but for" test in order to satisfy proximate causation in multiple concurrent cause cases?

There is a separate question as to whether it is necessary (even though not sufficient) to satisfy the "but for" test. Usually, it is.

When considering the link between a wrongdoing and loss in tort or contract law, it is fundamental that the loss would not have occurred "but for" the wrongdoing. This is part of the very measure of loss in tort and contract law, which requires the claimant to be put in the position it would have been put in had the tort or contract breach not occurred. And, as set out below, Trends clauses, trends clauses in business interruption policies (being clauses that allow for adjustments to profit figures to be made to take account of any trends and other circumstances which would have affected the business even in the absence of the insured event) similarly make explicit the "but for" requirement of causation of loss. This is therefore core to the basic concept of what it is to cause something in most situations.

When considering the link between the insured peril and the harm in an insurance policy, there is no such explicit requirement in section 55 of the MIA 1906 (which requires that loss is "proximately caused"). Insurance, unlike contract and tort, is not about blaming the insurer for what happened, but merely about working out whether the risks taken by the insurer (the insured perils) are sufficiently linked to the harm for cover to respond. But in that context, the "but for" test will usually need to be satisfied. As the Supreme Court pithily explained in FCA v Arch (SC) at paragraph 181:

> "We agree with counsel for the insurers that in the vast majority of insurance cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y."

Usually, if a harm (such as physical damage to property or interruption to a business) would have occurred even "but for" the insured peril, the harm will not fall within the insured risk. The insurer can usually say that in covering the insured against damage resulting from floods, it was not intended to cover damage that would have occurred even without a flood.

However, as was observed in FCA v Arch (SC), referring to some of the tort case law and academic commentary and examples, in some cases it is contrary to common sense to apply a "but for" test, especially where there is a set of concurrent causes none of which individually were "but for" causes of the relevant consequence (that is, without any one cause the consequence would have occurred unchanged) but where the set together was necessary (that is, without the set of causes the consequence would not have occurred). In those circumstances, the contribution that any of these causes makes - a lesser causal connection than "but for" - is enough causal connection (paragraphs 182 to 185). Examples of where the "but for" test is inadequate to determine causation, include where two hunters both fatally shoot a victim (a case where both were sufficient - that is, each alone would have led to the result, yet because of the presence of the other neither was necessary as the harm would have happened even "but for" each when considered alone (an example derived from *Cook v Lewis [1952] 1 DLR 1*(a tort case)); or 20 people combine to push a bus over a cliff (a case where no individual was a necessary or sufficient cause).

It is important here to distinguish the problem considered in the *Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22* line of cases relating to injury caused by the negligent exposure to asbestos. There, on the evidence, only one of the multiple contender causes was a "but for" cause of the loss (a single asbestos fibre) but the state of science meant that there could never be enough evidence to prove which one, that is, it is a problem of evidence and proof and not a problem with the "but for" test.

One of the main contributions of the decision in FCA v Arch (SC) is to make clear that the question of whether the proximate cause requirement, or, more accurately, the particular causal connection required by the express words of a particular policy, is satisfied in a particular case of concurrent causes where none are "but for" causes, is a question of construction of the policy (paragraphs 190 and 191).

An example relied on in FCA v Arch (SC) relates to insurance decisions concerning defence costs, such as *International Energy Group Ltd v Zurich Insurance plc UK Branch (Association of British Insurers and another intervening) [2015] UKSC 33* and the Privy Council decision in *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd [1997] 1 WLR 1237*, where it was held or accepted that insureds are entitled to an indemnity even though the "but for test" is not satisfied (see the majority at paragraph 186 to188 although Lord Briggs, speaking for the minority, warned they may be

sui generis (paragraph 326)). In those cases, the policy covered defence costs attributable to covered litigation against the insured even if those costs would have been incurred without that litigation because they were jointly incurred for the purposes of other litigation that was not insured (that is, they were necessary for the purpose of dealing with, for example, uninsured claims against the insured arising out of fraud allegations, or uninsured claims against uninsured co-defendants). This is simply because the case law confirms that such policies are intended to cover those costs (and that such costs do "arise from", "on account of", or similar, the covered litigation) even though the insured peril is not a "but for" cause of the costs.

The Supreme Court's approach to the "but for" issue on the facts of FCA v Arch

Disease clauses

The primary concurrent causation issue relating to the disease clauses in the FCA v Arch test case was that the insured peril for such clauses was confined to the occurrence of disease within 25 miles or 1 mile of the insured premises, but the interruption resulted from national government measures which were a response to the disease nationwide and would have happened even without the cases in any particular 1 mile or 25 mile radius (see for example paragraph 179). Accordingly, even if any specific occurrence, or even if all cases within a circle around the premises with a 1 mile or 25 mile radius, had not taken place, the national measures and so interruption would still have occurred. The insured peril was therefore not a "but for" cause of the interruption, and the question of construction arose as to whether it therefore was or was not a cause of the interruption within the meaning of the causal requirements specified in the policy (see paragraph 192).

Insurers maintained that the cover in practice only or mostly responded to local outbreaks that were entirely or mostly within the relevant radius, such that any public authority action was "but for" (and dominantly) caused by the occurrences within the radius. Accordingly, the "but for" test prevented cover in the circumstances of a national government response to a nationwide pandemic, as that was in partly responding to the local cases.

The Supreme Court construed the relevant policies emphasising that many of the diseases to which the insured peril related (notifiable diseases, including SARS) were of their nature infectious diseases that can spread widely, and so the parties must have contemplated that the disease could occur inside and outside the radius, and that the entire outbreak could trigger the relevant public authority action (paragraphs 194 to 197 and the minority at paragraphs 315 and 316). Further, the entire outbreak did in fact do so, and each case of COVID-19 was an "equal and effective cause" of the government action and public response to it (paragraph 212. See also the Irish decision of *Hyper Trust Ltd v FBD Insurance plc [2021] IEHC 78* at paragraphs 190 and 198 to 199). In those circumstances, "the parties could not reasonably be supposed to have intended that cases of the disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius" at least where the insurers do not expressly confine the insured peril to interruption solely or only caused by (/ resulting from/following, etc.) the disease within the radius, and had not specified an exclusion to that effect (FCA v Arch (SC), paragraph 195). The causal requirements therefore do not require that the "but for" test be satisfied in these circumstances in which the cases within the radius contributed to the national action (paragraph 212). (See further the similar analysis of the Irish High Court in *Hyper Trust* at paragraphs 143 to 147.)

Therefore, it was held that the logic of the examples of the two hunters or (more closely) 20 bus-pushers be applied to concurrent effective but not "but for" causes, even if (as in this case) there were thousands or even over a million such concurrent causes (namely, the individual occurrences of COVID-19 to which the government's nationwide instructions and legislation were a reaction) (paragraphs 189 to191 and 319).

It is important to understand that the requirement for proximate causation is not being disapplied here. There is still a causal requirement, however that requirement is satisfied without the "but for" test to the extent of other concurrent COVID-19-related causes that also do not satisfy the "but for" test. Concurrent causes unrelated to COVID-19,

however, such as a chef who was due to leave anyway, will prevent or reduce cover (paragraphs 231 and 232 (or if a licence would not have been renewed in any case (*Hyper Trust* at paragraphs 205 and 221).

Prevention of access and hybrid clauses

Similar issues arise for prevention of access and hybrid clauses (as those terms were used in the FCA v Arch test case). These involved composite perils such as those referred to above, Within the insured peril. They raise further "but for" problems. Where the insured peril includes a requirement of prevention of access/hindrance of use/inability to use/closure of the premises (or similar), there is a question whether the, or at least some, interruption (and, later, the loss) was caused by the prevention of access to the premises, in circumstances in which, even without that prevention of access, there would have been interruption or loss because of the broader effects of COVID-19 beyond that prevention of access to the premises. Those wider effects of COVID-19 include the stay at home and distancing instructions (on customers and employees), self-imposed fear and illness, the closure of surrounding businesses (which itself is sometimes covered by "loss of attraction" business interruption extensions), and the general business downturn during the pandemic. Indeed, such concurrent causation is shown by the fact that the businesses suffered a substantial drop in income as a result of COVID-19 even before they were ordered to close (that is, before the insured peril of prevention of access was triggered).

The Supreme Court was clear that, for example, where the government orders a shop to close, all COVID-19 losses (from the walk-in business) are recoverable, not only those losses which would not have occurred had the shops remained open but COVID-19 still existed. The closure (an insured peril) and stay at home orders (not an insured peril) are concurrent "but for" causes and so either satisfies the necessary causal requirements. The consequences of COVID-19, which would have caused business interruption loss even in the absence of the insured peril (prevention of access), must be removed from the counterfactual when considering whether the interruption was caused by the prevention of access and what loss is recoverable (paragraphs 229 to 230 and 247).

This would also be true for other prevention of access-type clauses, such as vermin clauses: if a policyholder takes out cover for interruption due to an authority action following discovery of vermin, it would not be reasonably understood (without express words to the contrary) that the indemnity would be limited to loss that would not have been suffered but for the forced closure of the premises (that is it would not be open to argue that a vermin infestation would have led to business interruption loss even in the absence of public authority action) (paragraphs 238 to 239). The Supreme Court also drew an analogy with the facts in *IF P&C Insurance Ltd v Silversea Cruises [2004] EWCA Civ 769*, where the cover was for business interruption loss resulting from US State Department warnings following the 9/11 attacks, and the indemnity was not reduced to the extent that interruption and loss would still have resulted from the attacks even without the State Department Warnings (FCA v Arch (SC) paragraphs 241 and 242).

This solution to the "but for" problem, namely that on their proper interpretation, the prevention of access clauses covered loss caused by the orders to close regardless of whether there were other concurrent uninsured (but not excluded) causes of the loss, is not the end of the enquiry. There will still be cases in which the prevention of access was not a sufficiently dominant cause, as compared with the other consequences of COVID-19, for it to be a proximate cause at all. This was explained in FCA v Arch (SC) (paragraph 244):

> "For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the COVID-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of

its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered."

The same will apply once the prevention ceases over time to be an effective cause of loss because the prevention has ceased, the premises are open, and the consequences of the closure have abated. One would not continue to strip out the consequences of COVID-19 then, when prevention of access has ceased to have any effect (*Hyper Trust* at paras 215, 262 to 266).

With "hybrid" clauses, which are a hybrid of disease and prevention of access clauses, the composite insured peril requires prevention of access or similar to have been caused by occurrences of a notifiable disease within 25 miles or similar. The issue in relation to disease clauses, as to whether the disease within 25 miles caused the national action which caused the order preventing access to the premises, arises, although here it does so not as to the link between the insured peril and the harm of interruption, but as to a link within the composite peril between elements of it (prevention of access and occurrences of disease). The issue in relation to prevention of access clauses also arises, as to whether the prevention caused interruption or loss that would have happened even without the order preventing access due to other COVID-19 effects. Unsurprisingly, these issues were resolved by the Supreme Court in the same way as for disease and prevention clauses.

The "underlying fortuity"/" originating cause" basis

The Supreme Court explained its conclusions on to the application of the "but for" test and the principle of concurrent cause, on the basis that other effects of COVID-19, "although not themselves covered by the insurance, ... are matters arising from the same original fortuity which the parties to the insurance would naturally expect to occur concurrently with the insured peril. They are not in that sense a separate and distinct risk" (paragraph 237). The "originating cause" of the insured peril - the cause that comprises or sits behind the first element of the insured peril - was the global COVID-19 pandemic, and the parties did not intend any consequences of that originating cause to restrict the scope of the indemnity (paragraphs 240, 247, 284, 294, 295, 309 and 310). (See also *Hyper Trust* at paragraph 212, where the Irish High Court referred to COVID-19 as the "common thread" between the insured peril and society's reaction to the virus.)

This language of "originating cause" is common in aggregation clauses, where it is generally used by insurers (or, as applicable, reinsurers) to gather together multiple incidents or claims under a single cover limit (see *Axa Reinsurance (UK) Ltd v Field [1996] 1 WLR 1026*, and Practice note, Reinsurance: an overview). The adoption of the term "originating cause" by the Supreme Court in considering causation in insurance law, cannot be accidental. By doing so, the Supreme Court makes use of the fact that insurers think of risks in terms of "originating cause" packages (shown by their sometimes providing aggregation clauses for them), and in future they can now also sometimes expect to cover all the consequences of such causes where:

- Those consequences are concurrent causes of harm;
- None are "but for" causes of the harm;
- At least one of them is an insured peril; and
- None are excluded.

It is also worth noting some ambiguity as to the geographic extent of the underlying fortuity (COVID-19) identified in FCA v Arch (SC). The UK national action was only a response (or only primarily a response) to COVID-19 within the UK, but that is primarily an issue relevant to the question of whether the interruption or prevention was caused by the disease within 25 miles of the insured premises. As to the broader question of what COVID-19, UK COVID-19 or global COVID-19, and its consequences should be stripped out of the counterfactual (that is what concurrent effects of COVID-19 on the insured business should be ignored when determining business interruption loss) the Supreme Court judgment and declarations suggest that it is the concurrent effects of the global COVID-19 pandemic that should be stripped out (paragraph 240 of the judgment and declaration 11.1). (See also Hyper Trust at paragraph 224 as to this uncertainty).

Concurrent causes and business interruption caused by property damage: the Orient-Express

Prior to FCA v Arch (SC), the leading insurance case on the "but for" test was the property damage business interruption case of *Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186*. The policy included a business interruption extension giving cover for interruption directly arising from damage to property on an all risks basis. A New Orleans hotel was damaged by hurricanes Katrina and Rita and, in addition to the property damage claim, a claim was made on the business interruption extension. The arbitral tribunal and then the High Court rejected the claim on the basis that the insured peril was property damage to the hotel and even "but for" that property damage there would have been the same business interruption because the wider New Orleans area was devastated and evacuated. In other words, the correct approach was to imagine a New Orleans devastated by the hurricanes, but with an unscathed insured hotel in the middle of it, and to ask what interruption would have been suffered. (There were also some US cases where the insureds, rather than the insurers, had argued for this approach, because in the different circumstances of those cases, that counterfactual would lead to windfall profits as the unscathed insured property would have enjoyed monopoly profits as the only operating business in the region. In those cases, the approach was generally rejected. (See FCA v Arch (SC) paragraphs 279 and 280.))

The Divisional Court in FCA v Arch identified part of the fallacy in the reasoning of the arbitrators and the judge as being that:

> "they proceeded on the basis that only the Damage in the abstract should be stripped out in assessing the counterfactual under the trends clause [whereas] on a proper analysis, the insured peril in that all risks policy was not Damage in the abstract, but Damage caused by a fortuity, there the hurricane, so that what should have been stripped out in the counterfactual was not just the Damage but the Damage and the hurricane" (see FCA v Arch (DC), at paragraph 345).

The Supreme Court agreed that Orient-Express had been wrongly decided (despite one of the Supreme Court panel, Lord Hamblen, having decided that case in the High Court, and another, Lord Leggatt, having been on the arbitration panel that decided the same way), on the basis that both the insured cause (damage to the hotel) and uninsured causes (damage to the surrounding area) arose from the same underlying fortuity (the hurricanes), and although neither satisfied the "but for" test (because of the other), loss resulting from both causes operating concurrently was covered, provided (as was the case) that loss from the uninsured peril was not excluded by the policy (FCA v Arch (SC), paragraphs 308 to 310).

The Supreme Court did not conduct any more detailed analysis of the extent to which the parties would have contemplated that property risks may well affect a wider area (as it did for notifiable diseases), but presumably such reasoning remains necessary and implicit. Certainly, it is foreseeable (at least) in the case of storm damage (an event typically covered by an all risks policy) that a storm capable of causing damage to one property will or may cause widespread damage to other properties. If wider consequences of the relevant underlying cause were not reasonably foreseeable it is possible this would lead to a different result. In other words, there is probably no rule of law or practice that this result will always apply for concurrent consequences of an underlying fortuity only one of which is insured and none of which are "but for" causes: rather it may always, ultimately, turn on a matter of contractual interpretation and foreseeability.

Construction of the insured peril after the FCA v Arch test case

The Divisional Court in FCA v Arch found that the insured peril was simply the underlying fortuity of COVID-19, but with a condition requiring that there had been an occurrence of COVID-19 within the radius specified in the policy (for example 25 miles) (paragraph 102 of the judgment and paragraph 64 of the judgment in FCA v Arch (SC), commenting on this aspect of the Divisional Court's decision). The majority of the Supreme Court rejected this approach, confining the insured peril to an occurrence of disease (COVID-19) within the relevant radius; any case of COVID-19 outside that area was not an insured peril (paragraph 74). However, the Supreme Court then held that, as a matter of construction, the parties intended the causal requirements to allow recovery for the consequences of the broader underlying fortuity of COVID-19 (that is, cover was not confined to business interruption which resulted only from cases of COVID-19 within the relevant radius, as opposed to other cases elsewhere). The minority (Lord Briggs and Lord Hodge), as well as agreeing with the majority's approach, would also have accepted the Divisional Court's approach on the basis that it amounted to the same thing in substance. As Lord Briggs observed, the result of the majority's reasoning is that the parties would answer the question "do clauses with the radius limitations provide cover for the adverse business consequences of a national reaction to a national pandemic disease?" in the affirmative. In their view, this in effect meant that the

national pandemic was the insured peril, provided it reached, spread, encroached or extended within the radius (paragraphs 322 and 324).

Other radiuses

The FCA v Arch test case only considered 25 mile and one mile radius disease and prevention of access clauses. The reasoning focused on the former, and was then applied to the latter (paragraph 94). (A one mile prevention of access clause was also considered in *Corbin & King Limited and others v Axa Insurance UK Plc [2022] EWHC 409 (Comm)*, considered in Legal update, High Court holds that COVID-19 related BI losses are covered by denial of access clause in insurance policy (see below, Prevention of access clauses for more information)).

Market policies include other distances, including 250 metres and "vicinity of the premises". The latter was found to give rise to the same causation test in a prevention of access wording in *Policyholders v China Taiping Insurance (UK) Co Ltd (10 September 2021)* arbitration, considered in Legal update, COVID-19: arbitrator dismisses business interruption insurance claims (and see below, Prevention of access clauses for more information).

"At the premises" disease and similar business interruption clauses

The FCA v Arch test case did not consider, for example, clauses requiring the disease or emergency to be "at the premises" rather than within 25 miles or one mile of the premises. It was decided in a further set of test cases (of preliminary issues) under the lead case, *London International Exhibition Centre plc v RSA and others [2023] EWHC 1481 (Comm)* that "at the premises" clauses simply defined the geographical area in which the occurrence of the disease had to occur more narrowly than radius clauses (although some premises are very large), and the Supreme Court's causation approach applies equally. In other words, providing the insured can prove there was a case of COVID-19 at the premises prior to the Government action, the policyholder can recover as the Government action was proximately caused by the insured peril.

Prevention of access clauses

The Divisional Court in FCA v Arch (DC) found that certain prevention of access wordings did not provide cover. For example, clauses requiring:

- "an incident... within a one mile radius... which results in a denial or hindrance of access..."; or
- "action by competent authority following a danger or disturbance in the vicinity of the premises"; or
- "action by competent authority following a danger or disturbance in the vicinity of the premises".

The Divisional Court held that the insured peril in those clauses was only the local peril of the occurrences of disease within the radius. By contrast, it found that some prevention of access and other wordings provided broader coverage and responded to any wider or national action in response to the COVID-19 pandemic. The Supreme Court's different approach (finding that all radius clauses required a local peril, but that proximate causation was satisfied even though the "but for" test was not) opens the door to undermining the Divisional Court's findings on those clauses, even though they were not appealed to the Supreme Court. (The Supreme Court appears to have indicated this at paragraph 250.)

The reasoning of the Supreme Court in FCA v Arch (SC) opened the way for Lord Mance to express a preliminary view in *Policyholders v China Taiping Insurance (UK) Co Ltd* (10 September 2021) that the Supreme Court causational approach applied to a prevention of access clause providing cover for interruption or interference in consequence of the actions of a competent local authority due to "emergency threatening life or property in the vicinity of the premises", so that providing the pandemic came within the vicinity there would be cover in the same way as there was for the radius clauses in the test case. (It was not necessary to express a definite view on the issue because the policyholders' claims failed in any event as the relevant authority defined in the clause did not include the actions of a central or countrywide authority such as the UK government. For more information, see Legal update, COVID-19: arbitrator dismisses business interruption insurance claims.) This was followed by a finding by Cockerill J in *Corbin & King Limited and others v Axa Insurance UK Plc [2022] EWHC 409 (Comm)* that, based on the approach to causation of the Supreme Court in FCA v Arch (SC), a prevention of access clause providing cover for loss resulting from interruption arising directly from the actions of a statutory body in response to a "danger or disturbance within 1 mile" also led to broad recovery (that is for losses suffered as a result of restrictions imposed by the government) provided there was a case of COVID-19 within a one mile radius of the premises. This decision has not been appealed. Some insurers in *London International Exhibition Centre plc v RSA* and others also accepted that a clause very similar to that considered in the China Taiping arbitration but with the words "immediate vicinity" would respond under the FCA v Arch (SC) causation test save that there was a disease exclusion in that clause.

A series of test cases behind the lead case, *Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE*, on the applicable causation test for prevention of access wording are being heard in autumn 2023.

Causal links within the insured peril

As set out above, Within the insured peril, the composite perils clauses (prevention of access and hybrid clauses) considered in the FCA v Arch test case, and later *China Taiping*, *Corbin v King*, *London International Exhibition Centre* and *Gatwick Investments*, include causal links within the perils themselves, for example, between the occurrence of COVID-19 within 25 miles of the insured premises and the public authority action. Indeed, that was the link considered in the FCA v Arch test case, and the same approach applies. The link between the disease within the radius and authority action in a prevention of access and hybrid clause had the same causal requirement as that between disease and interruption in disease clauses (paragraph 213, FCA v Arch (SC)).

The link between the harm and loss and the measure of indemnity

In business interruption cover, the indemnity is for an unliquidated amount of loss that was, for example, caused by or resulted from, the relevant harm (interruption) triggered by the peril (for example, fire, government action or disease). Accordingly, if there is an insured peril within the meaning of the policy (for example, fire or disease), it must then be considered whether the insured peril was the proximate cause of the loss or damage. In the context of business interruption policies, this is often explicitly recorded in trends clauses, which are typically found in such cover and which allow for adjustments to profit figures to be made to take account of any trends or circumstances which would have affected the business even in the absence of the insured peril (see below, Trends clauses).

There is a historical fiction that, at common law, an insurer's obligation under an indemnity insurance contract gives rise to an action for unliquidated damages, arising from the failure of the insurer to prevent the insured from suffering damage, for example, interruption or liability to a third party. Accordingly, if there is an insured loss, the insurer is considered to be in breach of contract and liable to pay damages in the form of the insurance monies due under the insurance contract (see *Firma C-Trade SA v Newcastle Protection and Indemnity Association Socony Mobil Oil Inc and others v West of England Shipowners Mutual Insurance Association (London) Ltd (No. 2) [1991] 2 AC 1*, per Lord Goff at page 35, who stated that "a promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense"). The quantification of the indemnity always depends on the policy wording, but in general "the insured is entitled to be put by the insurer into the same position in which he would have been had the event not occurred, but not a better position" (see *Callaghan v Dominion Insurance [1997] 2 Lloyd's Rep 541* per Sir Peter Webster at page 544 *col. 2* and *Endurance Corporate Capital Ltd v Sartex Quilts and Textiles Ltd [2020] EWCA 308*, per Leggatt LJ (as he then was) at paragraphs 35-36). Leggatt LJ's analysis there was expressly based on the "general object of an award of damages for breach of contract". (For more information on the decision in *Endurance*, see Legal update, Property insurance: Court of Appeal holds insured entitled to indemnity on reinstatement basis even though insured had not reinstated property.)

In FCA v Arch (SC) the Supreme Court resolved the indemnity causation question (that is the causal link between the harm or damage and the loss) in a similar way to the question of the causal link between the insured peril and the harm (interruption). Even where the policy required that loss was "solely and directly" caused by the interruption, it was held that the intention of the policy was that other aspects of COVID-19 should not prevent cover (for example, because people would have stayed at home anyway). Accordingly, for the period during which, and to the extent to which, the insured peril (for example, disease and government action) is a proximate cause of loss, determining the indemnity involves removing the entire underlying fortuity (for example, COVID-19) and all its effects, even though "but for" the insured peril some of it would still have been suffered (for example, even without closure of premises some people would have stayed at home), and even if prior to the triggering of the insured peril the revenue had dropped substantially (for example, due to people staying at home and a general downturn due to COVID-19). In essence, it was held that it would be wrong to reduce the indemnity for loss proximately by the insured peril, even if it was also proximately caused by uninsured (but non-excluded) perils with the same originating cause (paragraphs 228 and 294 to 296 of judgment).

For prevention of access and hybrid clauses this means that for the purpose of determining the loss in the context of COVID-19:

- For the period of prevention (or equivalent), all COVID-19 losses are removed (paragraphs 228 to 230).
- But this only applies to the part of the business for which there is interruption, for example the in-person part of a shop but not its web business, even if other parts of the business are depressed by the effects of COVID-19 (paragraphs 141, 283 to 286).
- Once that prevention has ceased, it is likely that only losses proximately caused by the (former) prevention will be recoverable. That is, losses solely caused by the ongoing effects of COVID-19 on the community will not be recoverable (paragraph 244 of FCA v Arch (SC) and *Hyper Trust Limited v FBD Insurance*

plc at paragraphs 215, 262-6). (See above, The effect of the passage of time on proximate causation, for consideration of the timing of causation.)

Trends clauses

Business interruption insurances typically incorporate policy sections stipulating the methodology of quantifying lost revenue, rather than leaving this to be determined by the evidential and legal techniques of the general law when quantifying claims for consequential loss in (for example) contractual or tortious damages claims.

As explained in FCA v Arch (SC) (paragraph 253), such provisions typically take the form of a formula under which the loss is taken to be the amount by which the revenue and gross profit of the insured during the indemnity period (usually 12 months) falls short of revenue ("standard revenue") and gross profit earned in the equivalent period a year or immediately before the date of the insured event, as adjusted by a so-called "trends clause".

The aim of a trends clause (usually expressly stated) is to make such adjustments as necessary to the calculation of gross profit to provide for the trend of the insured business, the intention being that the adjusted figures will represent the results which would have been obtained had the insured event not occurred.

A number of trends clauses of this type were considered in the FCA v Arch test case, all of which referred to the aim of the clause as being "to represent" "as near as possible" or "as nearly as may be reasonably practicable" "the results which would have been achieved" "but for the damage" or "if the damage had not occurred" (see FCA v Arch (SC), paragraph 256 (though the reference to "damage" is inappropriate in business interruption cover which does not depend on physical damage to the insured property, and should better be understood in such cases as a reference to the "insured peril", see paragraph 257 of the judgment).

The proper approach to construction of such trends clauses was explained in FCA v Arch (SC) at paragraphs 259 to 264, where three important points were made:

- First, trends clauses are part of the machinery for quantifying loss, but do not define the scope of the indemnity, that being the function of the insuring clauses.
- Second, the trends clauses should if possible be construed consistently with insuring clauses.
- Third, accordingly, trends clauses should if possible be construed so as not to detract from the cover provided by the insuring clauses, otherwise the quantification machinery is transformed into a form of exclusion.

Accordingly, the Supreme Court concluded that unless the policy wording requires otherwise:

> "the trends clauses should not be construed so as to take away cover for losses prima facie covered by the insuring clauses on the basis of concurrent causes of those losses which do not prevent them from being covered by the insuring clauses."

(paragraph 264)

The Supreme Court held that the "simplest and most straightforward way" to construe trends clauses consistently with the insuring clauses was to recognise that the aim of trends clauses "is to arrive at the results that would have been achieved "but for" the insured peril and circumstances arising out of the same underlying or originating cause. Accordingly, the trends or circumstances referred to in the clause for which adjustments are to be made should generally be construed as meaning trends or circumstances unconnected with the insured peril" (paragraph 268).

Consistent with this, the court ultimately concluded that trends clauses in the form considered by it should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause. This was the reasoning that was advanced but rejected in *Orient Express* Hotels Ltd v Assicurazioni Generali SPA t/a Generali Global Risk [2010] EWHC 1186 (Comm), a decision which has now been overruled by the decision in FCA v Arch (SC) (see also *Riley on Business Interruption (Sweet & Maxwell, 11th Edition, 2021) Chapter 4*, paragraph 4.5).

Mitigation

In common law, damages for breach of contract and tort are reduced to the extent that they were proximately caused by the failure of the claimant to minimise the loss. This is known as the duty to mitigate and is part of the test for legal causation in contract and tort (see *BPE Solicitors v Hughes-Holland [2018] AC 599 (SC)* at paragraph 20, Lord Sumption. See also Practice notes, Damages for breach of contract: an overview and Damages in tort: an overview).

In marine insurance, insureds and their agents are under a statutory duty to take reasonable measures for the purpose of averting or minimising loss (section 78(4) of the Marine Insurance Act 1906). Marine policies frequently contain a "sue and labour" clause, requiring the insured to take reasonable measures to avert or

minimise loss, and a corresponding obligation on insurers to pay for the reasonable cost of such measures.

In other insurance, the insured is probably under a common law duty to mitigate its loss following the occurrence of an insured event (see *MacGillivray on insurance law,* paragraph 31-008, *City Tailors Ltd v Evans (1921) 126 LT 439*, page 443).

The question is not free from doubt, however, and it appears arguable, at least under English law (in contrast to that of Australia and New Zealand), that the insured has no duty to mitigate its loss unless such a duty is laid down in the policy (see *Colinvaux's Law of Insurance (Sweet & Maxwell, 13th ed, 2022, Chapter 11,* paragraphs 11-299 and 11-300).

Perhaps as a result, many policies contain an express mitigation condition. However, there are limits to what the insured is expected to do at common law (that is absent an express clause): so, for example, it has been held, in the context of business interruption cover, that the insured is not expected to take on fresh premises from which to conduct its business; and, on the same footing, profits made at fresh premises should probably not be taken into account in adjusting the claim (see *City Tailors* per Lord Atkin at page 445. See also *All Leisure Holidays LT v Europaische Reiseversicherung AG [2011] EWHC 2629*, where in the context of travel insurance, the court held that the insured was not under a duty to mitigate its loss by taking another cruise offered by a different provider in circumstances where its cruise had been cancelled). As many policies contain wording addressing mitigation, it is always necessary to consider the policy wording before reaching a conclusion as to the extent of the insured's duty to mitigate in any particular case.

If the insured in good faith takes steps to prevent a loss, and thereby creates another loss covered under the policy this should be recoverable (as it would be under common law contract and tort principles of legal causation) (see, for example, *Quinta Communications SA v Warrington [2000] Lloyd's Rep IR 81*).

However, it may be different where the loss incurred in preventing an insured loss is not itself loss of a kind covered under the policy. For example, it was held that sums paid by the insured water authority to carry out work to avert or lessen its liability to a third party were not sums it was legally liable to pay as damages or compensation, and so were not recoverable under the terms of the relevant insuring clauses in its liability policy. The court doubted the proposition advanced by the insured that the law requires an insured (in the absence of express terms) to make reasonable efforts to prevent or minimise loss which may fall to the insurers and rejected the argument that there was an implied term that the insurer would pay for such precautions (see *Yorkshire Water v Sun Alliance & London Insurance Ltd [1997] 2 Lloyd's Rep 21*, per Stuart-Smith LJ at paragraph 224).

The position appears to be different under property insurance, where loss or damage caused by efforts to avert or extinguish a fire have been held to have been proximately caused by the fire so long as there was reasonable justification for the measures taken (*Stanley v Western Insurance Co (1886) LR 3 Ex 71* and *Symington v Union Insurance Society of Canton Ltd [1928] 12 WLUK 55*). So long as the measures taken were reasonable, it will probably be no defence for insurers to show that no damage would have been suffered if those measures had not been taken (*MacGillivray on Insurance Law*, paragraph 26-012).

It has also been suggested that the doctrine of proximate causation means it is unnecessary for the court to imply a term in an insurance contract that an insured should take reasonable precautions to avert or minimise loss. The need to prove that the loss was proximately caused by the insured peril leads to the result that if the insured decides not to take a step which it would be reasonable to take (or perhaps unreasonable not to take) its loss will to that extent have been proximately caused by that decision rather than the insured peril (*MacGillivray on Insurance Law*, paragraph 26-014).

In summary a number of points should be borne in mind when an issue arises as to the duty of the insured to take steps to avert or minimise loss (or as to its entitlement to recover the cost of doing so from the insurer):

- First, the terms of the policy must be checked, as an express term may well provide the answer.
- Second, the answer will or may be different in different classes of insurance such as liability and property.
- Third, the question whether an insured acts reasonably or unreasonably will always be relevant, if not necessarily determinative and causation may provide an answer.
- Fourth, the duty of good faith may be engaged if a decision (for example not to take action to avert a loss) is taken in bad faith or, of course, fraudulently.
- Fifth, the authorities on this topic are at best difficult to reconcile and at worst conflicting, and ripe for coherent review.

Aggregation

Insurance policies often include aggregation clauses which provide for two or more events, losses or claims, depending on the type of insurance cover, that are covered by the policy to be treated as one event, loss or claim where they are linked by a defined connection.

Aggregation can benefit the insured and the insurer: it may, for example, enable an insurer to limit its liability; or an insured to pool together its losses so that the overall loss exceeds the policy excess or retention and triggers the liability of the insurer.

The necessary connection between the events or claims will often involve causational aspects. These may be very general, for example, losses "arising out of one event"; or they may be much more specific, for example losses "directly attributable to one outbreak of disease". In the context of COVID-19 and business interruption, the latter wording was said to be likely to give rise to "obvious problems of what constitutes an outbreak and by what criterion it is possible to judge whether a large number of cases of a disease are all part of one outbreak or are part of or constitute a number of different outbreaks" (FCA v Arch (SC), paragraph 66)

The approach to interpreting aggregation clauses was summarised by the Court of Appeal in *Spire Healthcare Ltd v Royal & Sun Alliance Insurance Ltd [2022] EWCA Civ 17*, considered in Legal update, Court of Appeal considers "one source or original cause" aggregation wording in liability insurance policy. In its judgment, the Court of Appeal summarised a number of key points:

- The usual principles of contractual construction apply; and such clauses are to be construed in a balanced way without predisposition to narrow or broad interpretation (per Andrew Baker LJ, with whom Bean and Underhill LJJ agreed, at paragraph 20. See also *AIG Europe v Woodman [2017] UKSC 18*). However, some formulations have been held to achieve a broad effect, for example "consequent on or attributable to one source or original cause" (paragraph 21).
- There is in principle no distinction between an "original" and an "originating" cause, both of which connote a considerably looser causal connection than "proximate cause" (paragraph 21 and *Beazley Underwriting Ltd v The Travelers Companies Incorporated [2011] EWHC 1520*). However, although the original cause does not need to be the sole cause of the insured's liability (or loss), it is necessary to find a single unifying factor, and not every "but for" cause is sufficient to amount to an "original cause" (paragraph 24).

It cannot be assumed that a particular word bears a consistent meaning across all policies, because the particular context of the same wording in different policies (and even, occasionally, in different parts of a single policy) may produce a different interpretation of that wording (*Colinvaux & Merkin's Insurance Contract Law,* paragraph C-0161 and *Midland Mainline Ltd v Commercial Union Assurance Co Ltd [2004] Lloyd's Rep IR 22*).

For information on aggregation in insurance and reinsurance, see *Article, COVID-19: Aggregation in insurance and reinsurance*.

Key takeaway

Causation is a concept of fundamental importance in many contexts in insurance and can give rise to difficult issues of fact and law. Correct resolution of these issues depends not only on the general law and the many decided cases, but also, but often crucially, on the proper interpretation of the relevant policy wording and the application of business common sense. The decision of the Supreme Court in *FCA v Arch* has provided welcome certainty in some areas, for example as to the analysis of concurrent causes and the proper interpretation of trends clauses, but further elucidation is to be expected from the raft of business interruption cases now making their way through the courts.