1. As counsel for one of the insurers in the case, I think I have been asked here to give a contrary view about causation to the one that has been held to be correct by Lord Hamblen and Lord Leggatt, Lord Reed, Lord Briggs and Lord Hodge, Lord Justice Flaux as he then was and Mr Justice Butcher, not to mention Adam Kramer and Professor Jane Stapleton. Commercial barristers are renowned for their humility and I propose to follow in that noble tradition.

2. You might think me today not so much the meat in the sandwich between Adam and Jane, as the sour grapes in the fruit bowl. I will try not to live down to that billing, but perhaps to be enough of the mustard or piccalilli to raise an interesting debate.

3. I propose to spend 20 minutes making some remarks under four headings:

   (1) Describe what I see as the key features of the Supreme Court's reasoning on causation.

   (2) Provide a short critique of it.

   (3) Comment briefly on the causation analysis of a few clauses that were not appealed to the Supreme Court.

   (4) Provide a few conclusions

4. In describing the Supreme Court's reasoning, I will take it at a swift pace, taking grateful advantage of the fact that you have heard it already in helpful detail from Adam.

The Supreme Court Judgment on causation

5. Take a basic disease clause like "*We shall indemnify you for business interruption caused by any occurrence of a notifiable disease within a radius of 25 miles of the Premises*." There was also a clause tested where the radius was only 1 mile and it was treated just the same. The insured peril is an occurrence of a notifiable disease within 1 mile or 25 miles of the Premises. The damage is interruption to the insured business. The loss is measured through various contractual definitions including the trends clause.

6. Applying the traditional insurance law approach, which was codified in the Marine Insurance Act 1906, the insured has to show that the insured peril was a proximate cause of the loss. On the correct analysis of the wording, this meant that the insured had to show that occurrences of disease, within 1 mile or 25 miles of the premises, were a proximate cause of the interruption to their business.

7. Most of the losses had been caused by national government responses to the pandemic, rather than by cases local to the premises. The same losses would have been suffered even if the local cases – the insured peril - had not occurred. If the insured peril was not even a 'but for' cause of the loss, then on a standard traditional view, it was not a candidate to be a proximate cause.

8. At paragraph 168 of the judgment, their Lordships held that the question whether the peril is a proximate cause involves a judgment as to whether it made the loss inevitable in the ordinary course of events. This is put forward as being an

analytical improvement upon the traditional formulation that selecting legal causes is a matter of 'common sense'.

9. The judgment then sets out the well-known principle that there may be two proximate causes of the same loss and, if there are, that suffices to trigger cover, as long as one is an insured peril and the other is not excluded. But, their Lordships note at paragraph 175, in the cases illustrating that principle, neither one of the causes on its own rendered the loss inevitable in the ordinary course of events. It was the combination of the two causes that did that. For example, in the *Miss Jay Jay*, insured adverse sea conditions combined with uninsured design defects of the yacht to cause the casualty.[1]

10. In paragraph 176, their Lordships state that there is no reason in principle why such an analysis cannot be applied to multiple causes – more than two - which act in combination to bring about a loss. On the facts of the present case, every case of Covid combined with every other case of Covid to cause national governmental measures.

11. Normally, their Lordships explained, 'but for' causation is essential for one thing to be considered a cause of another, but there are exceptions. These arise where two factors combine to cause a result, where neither is necessary because of the other. In other words, the effect is over-determined by two or more causes. I think the clearest example – very similar to the two hunters that Adam mentioned - is

[1] *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32

that two fires may combine to burn down a property, but either would have done the damage if the other had not. Neither fire is a 'but for' cause of the damage, but it feels intuitively acceptable to say that both were causes of it.

12. Lords Hamblen and Leggatt then notice that where you have very many events, rather than just two, which combine to cause a loss, it is far harder to say intuitively whether each of them is a cause.

13. At paragraphs 190 - 191, we reach the legally decisive part of the judgment: where multiple causes combine to cause loss, it is a question of contractual interpretation whether it has been agreed that each individual one should be treated as a proximate cause of loss.

14. In this case, the parties should be taken as having known when they contracted that a notifiable disease might spread within and outside the 25 mile radius and might lead to national government reaction that would cause business interruption. The parties cannot have intended that cases outside the radius could be set up as causes of loss in competition with those inside it. So the conclusion is that on these wordings, the parties meant that if the insured peril – cases within the radius – was one of many underlying causes of government action and thus business interruption, it was covered.

Unpacking and critique

15. The definition at paragraph 168 of proximate cause as being something which made the loss inevitable in the ordinary course of events is very similar to the first

limb of *Hadley v Baxendale*, which states that a loss properly attributable to a breach of contract is one from which the effect arises naturally in the usual course of things.

16. As Adam points out in his book on contract damages,[2] contract damages cases rarely turn on legal causation, save in the sense of a break in the chain, and that may be, at least in part, because the well-established *Hadley v Baxendale* rules of remoteness in contract do so much of the work that in tort sometimes has to done by legal causation.[3] This new formulation – at paragraph 168 - of what counts as a proximate cause confirms the close kinship between remoteness and causation in contract cases.

17. It follows from paragraphs 168 and 175 together that the well-known principle about two concurrent causes in cases like *The Miss Jay Jay* has been misstated in every authority including the FCA judgment itself. That is because the test for a proximate cause in paragraph 168 means that the correct analysis was that the two candidate causal events <u>together</u> amounted to one single proximate cause. Recall that each was necessary, but neither was sufficient, and the two were causally unrelated to each other, in the sense that they did not derive from some common cause. Once it is appreciated that the proper analysis of those cases is that you have two unrelated events which combine to form one proximate cause, it is easy to see why the authorities have put matters in terms of only two such

[2] *The Law of Contract Damages* (2014) at p.339.
[3] There are exceptions, including *Galoo v Bright Graeme Murray* [1994] 1 WLR 1360.

events and required them to have approximately equal efficacy for the principle to apply that if one such partial cause is covered then the loss is said to be proximately caused by an insured peril.

18. In that situation, if you expand the set of candidate events indefinitely, you end up with the full set of all the 'but for' conditions which have combined to cause the loss. But if you do that, you have abandoned the search for proximate cause altogether.

19. It is perhaps conceivable that the principle might apply to three factors, though even that has never been decided. But this principle is not apt to be extended indefinitely as suggested in paragraph 176.

20. The example of the two fires is different, because there the two causes are each sufficient, but neither is necessary because of the sufficiency of the other. The intuition that it is acceptable to describe each fire as a cause of the loss is largely because of the feature that each one by itself is a sufficient cause.

21. We can see that by contrasting the two fires with another example cited in the judgment: a million people each contribute a teaspoon of a water to a flood. Superficially, that is like the two fires, but because each teaspoon is not sufficient to cause any damage at all, it is clearly better to say that each person contributes to the damage rather than causing it.

22. That point I have just made is expressly rejected in paragraph 190 of the judgment. The Supreme Court prefers the view that the question whether a single

event that combines with many others to cause loss is itself a proximate cause of the loss is a question of contractual interpretation. This is a novel idea, because previously one might have been forgiven for thinking that the exercise in interpretation was to identify the peril and the loss and that after that, the question of proximate causation was determined by well understood legal principles. Under those principles, a million cases of covid, like a million teaspoons of water, may combine to have an effect, but if the insured peril is just one or a few of those cases or teaspoons, then it will not have caused the loss in question, because that one or a few was neither necessary nor sufficient to cause that loss.

23. What about the reasoning from the factual matrix? If you buy or sell insurance against infectious disease within a 25 mile, or even a 1 mile radius, you know that one situation which might cause loss is where the same disease is also present outside the radius.

24. The structure of that argument is that if the insured peril is an event which might cause loss on its own, but which might also cause loss in combination with other similar events having a common cause, then such a common cause becomes a peril insured against.

25. Another approach, which I would venture to suggest is more orthodox, is that the formulation of the peril in the wording is the parties' agreement about how far back on the causal chain the insurance reaches. Any event will have numerous causes, and those causes will each have numerous causes, and so on. Every time you trace further back, you widen the net of consequences which derive from that

cause. Where does the inquiry stop? It should stop at the insured peril as defined by the policy wording.

The AOCA clauses[4]

26. There were several wordings that were held at first instance not to respond, in respect of which the FCA did not appeal. These were similar to the hybrid clauses to which Adam introduced you earlier, but not quite identical. Simplifying and amalgamating some wordings, they provided for insurance for business interruption caused by prevention of access to the premises, caused by actions of the authorities, caused by a danger or an emergency likely to endanger life, in the vicinity of the premises.

27. Flaux LJ and Butcher J held that phrases like "*danger or disturbance in the vicinity of the premises*" and "*an emergency likely to endanger life or property in the vicinity of the premises*" indicated a cover that was narrow and localised. It did not engage the wider approach to causation in which each case of covid was a concurrent cause of all the relevant government actions.

28. Although these clauses were not appealed, the reasoning process of Flaux LJ and Butcher J is consistent with the Supreme Court's approach, because they treated it as a question of interpretation whether to apply the traditional approach to causation to the peril as defined, or to find that the parties' intention was that even a peril that was not a 'but for' cause of the loss could nevertheless qualify as a

[4] Actions of Competent Authorities.

proximate cause if it was part of a wider event that was itself the necessary and sufficient cause of the loss.

29. The obvious objection to this approach is that it is incredibly uncertain. What exactly makes it clear that cover for emergencies in the vicinity is narrow localised cover, but cover for cases of infectious diseases within 1 or 25 miles is NOT to be characterised in that way?

Conclusions

30. If the parties' definition of the insured peril gives way to a broad idea that they must have intended to insure events further back on the causal chain which were capable of causing the peril, that could have other applications in numerous insurance contexts. Indeed, it would be possible to apply the reasoning to other contractual definitions even beyond insurance.

31. Although I would expect members of Combar to demonstrate their usual ingenuity in devising new applications of this approach, what contractual interpretation can give, contractual interpretation can equally withhold. I question whether there many circumstances where this approach will be applied again, to arrive at a result which could not be reached by more orthodox means.

32. If my analysis is right, then does that imply that the result is bad law made by a hard case? If I said that it did, then I would fulfil my role as the sour grapes in the fruit bowl. Let me instead suggest that any legal system will occasionally come upon a case which is so hard that the lesser evil is to make a bit of bad law; and

that it is the mark of great Judges since Solomon to recognise such cases when they see them and to minimise the wider impact of the bad law that results from them.

33. It was, naturally, put best by one of those great judges, Oliver Wendell Holmes, who said in a dissenting speech in *Northern Securities Co v United States*:[5]

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

[5] (1904) 193 US 197, 401-402.