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The COVID-19 business interruption insurance test case: the "lay of the land" post the Supreme Court judgment

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In this article, Pollyanna Deane, Partner, and Georgina Candy, Associate, of Fox Williams LLP's Financial Services Regulatory Team and its Insurance Group, consider the Supreme Court judgment in *Arch Insurance (UK) Ltd v FCA and others ([2021] UKSC 1)*, known as the FCA's BI test case. In particular, they provide guidance on the most novel or unorthodox elements of the judgment and their wider implications.

Introduction

On 15 January 2021, the Supreme Court handed down the judgment in the COVID-19 business interruption insurance case *Arch Insurance (UK) Ltd v FCA and others ([2021 UKSC 1)*, referred to below as the "BI test case".

The underlying purpose of the BI test case was to determine the cover provided under various sample insurance wordings. The FCA therefore tested a "selection of policy wordings that would be representative of the key issues in dispute between policyholders and insurers" (see FCA press release: Update on FCA test case of the validity of business interruption claims). The regulator's selection process started with an information gathering exercise: 56 relevant insurance companies were asked to provide the regulator with information on their business interruption (BI) policies, and how they intended to handle claims on these policies. Holders of BI insurance policies in dispute with their insurers were also asked to send the regulator their arguments and relevant policies. After analysing this information, the FCA (supported by external legal counsel) invited eight insurers to participate in the High Court test case. Interestingly, major insurers like Allianz Insurance plc, Axa Insurance UK plc and Aviva Insurance Ltd were not asked to participate. The FCA does, however, include these companies in a wider list of insurers with policy wordings that may be affected by the outcome: a reflection of the market tendency to copy peers or use the same brokers to develop policy wording. A prominent example is the *JELF* wording, which is used widely in the market thanks to the engagement of certain brokers.

The High Court proceedings brought by the FCA considered 21 sample policy wordings. However, the FCA estimated that some 700 types of policies held by 370,000 policyholders across 60 different insurers could potentially be affected by the BI test case. The High Court judgment consisted of detailed and nuanced analysis of the different policy-wordings. However, the headline points can be summarised as follows:

- In relation to disease clauses, the High Court agreed with the FCA's analysis that the proximate cause of the BI was the notifiable disease, based on the analysis that the individual outbreaks in the relevant policy area were an indivisible part of the disease.
- The High Court found that two of the QBE policies did not always respond as the wording in these policies limited cover to matters occurring at a particular time, in a particular place and in a particular way, which could not mean the incidence of COVID-19. Such policies were only relevant where policyholders could show that the case(s) of COVID-19 within the relevant policy area (rather than elsewhere) were the cause of the BI.
- The cover available under a prevention of access clause will depend on the precise terms of the policy and how the government advice applied to the particular business in question. In general, the High Court construed the prevention of access/public authority wordings more restrictively than most of the disease clauses. For example, the High Court held that "emergency in the vicinity" and "danger or disturbance in the vicinity" required something specific which happens at a particular time and in the local area. Such wordings only provided for localised cover and, therefore, action by an authority would have to be in direct response to the localised occurrence of COVID-19.
- In relation to hybrid clauses, the High Court followed its analysis of the "disease" element of the wording

but, as with the prevention of access wordings, construed the meanings of "inability to use" and "restrictions imposed" narrowly.

- The High Court held that it would be contrary to the purpose of a trends clause to include any part of the insured peril in the calculation of what the position would have been if the insured peril had not occurred.

(For more detailed comment on the High Court judgment, see Article, Pollyanna Deane's insurance column: September 2020.)

It cannot be said that the High Court judgment was a landslide victory for either side of proceedings, and it follows that Ecclesiastical and Zurich (whose policies did not respond) did not issue an appeal. On appeal, however, the Supreme Court unanimously ruled in favour of policyholders by allowing all the FCA's appeals (albeit on a qualified basis) and by dismissing the insurers' appeals. In practice, the Supreme Court ruled that all tested policies responded. The majority opinion was reached in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed), however, all Justices agreed on the conclusions reached therein. For sake of clarity, this article only refers to the reasoning found in the majority opinion.

Unsurprisingly, commentary surrounding the Supreme Court's decision views it as a policy-led decision: one that features arguably unorthodox reasoning to deliver a policyholder-friendly outcome. As such, this article does not seek to provide a comprehensive guide to the BI test case, but rather to provide guidance on the most novel or unorthodox elements of the Supreme Court judgment and the wider legal implications they entail.

For sake of comprehension, it should be noted that the appeal concerned both so-called "disease clauses" and "prevention of access/hybrid clauses". In general, these clauses can be described in the following terms:

- "Disease clauses" provide cover for BI loss caused by the occurrence of a notifiable disease at or within a specified distance of the policyholder's business premises.
- "Prevention of access" clauses typically provide cover for BI losses resulting from public authority intervention preventing access to, or use of, the insured premises.
- "Hybrid" clauses are a combination of the elements of disease and prevention of access clauses.

Causation

Having established that the disease clauses covered the effects of cases of COVID-19 occurring within the specified radius of the insured premises, the Supreme Court dealt with the question of what connection must be shown between any such cases of the disease and the BI loss for the policy to respond. Arguably, the parts of the judgment focusing on causation are most interesting from a legal point of view.

Proximate causation: a new test?

The Supreme Court confirmed that the causal connection required depends on the legal effect of the insurance contract as applied to the facts. However, as the Supreme Court noted, the general approach to the question of causation in insurance is the test of "proximate cause", as set out in section 55(1) of the Marine Insurance Act 1906. The test of proximate causation can be displaced if, on its proper interpretation, the policy provides for some other connection between the loss and the occurrence of an insured peril.

The Supreme Court examined the meaning of "proximate cause" and explained that it has to date meant the "real or efficient cause" of the loss which, as set out by various authorities, is to be determined by applying common sense. However, in further analysis of the common-sense principle found at paragraph 168, the Supreme Court seems to apply a gloss to this principle, which may, as Simon Salzedo QC has argued (in a webinar, *FCA v Arch and Others*, delivered by Brick Court Chambers on 22 January 2021) augment the traditional common-sense approach.

The Supreme Court explained that the question as to whether the occurrence of such a peril was the proximate (or "efficient") cause of the loss involves making a judgment as to "whether it made the loss inevitable: if not, which could seldom ever be said, in all conceivable circumstances, then in the ordinary course of events" [168]. The novel wording of "inevitability … in the ordinary course of events", entails an analysis as to whether any events that occurred after the potentially proximate peril in question (Cause A) could be regarded as sufficiently "abnormal" (or rather, out of the ordinary course of events) so as to "negative" the causal connection between Cause A and the loss.

In applying this test, the Supreme Court provided guidance that human actions are generally not to be regarded as "negativing" the causal connection unless they are wholly unreasonably or erratic.

Concurrent causes

The Supreme Court then set out the established law relating to concurrent causes, which can be summarised as follows:

- It can be held that a loss was caused by two proximate causes provided they are of "equal, or at least nearly, equal" efficiency.

- Where there are two proximate causes of loss, if one is an insured peril and one is not, then the policy will respond (following the case of *J.J Lloyd Instruments Ltd v Northern Star Insurance Co. Ltd (the "Miss Jay Jay") [1987] 1 Lloyd's Rep 32*).
- Where there are two proximate causes of loss, if one is an insured peril but the other is expressly excluded from cover under the policy, generally, the exclusion will prevail (following the case of *Wayne Tank and Pump Co Ltd v The Employers' Liability Assurance Corporation Ltd [1973] 3 All ER 825*).

However, in dicta found at 175 of the judgment concerning the exclusion principle, it is noted that "in each case [where the express exclusion has prevailed] it was the combination of the two causes which together made the loss inevitable. Neither would have caused the loss without the other". So, in *Wayne Tank* if the employee had not been negligent, the defective equipment would not have created a fire; similarly, if the equipment had not been defective then the employee's negligence would not have created a fire. It is therefore to be seen if, on the basis of this observation, further decisions hold that express exclusions will only prevail where the loss is caused by interdependent concurrent causes (one of which is excluded).

The Supreme Court also noted that the facts of the *Miss Jay Jay* case similarly concerned interdependent causes. The Supreme Court reasoned that although such interdependent causes are not sufficient on their own to cause loss, they are "necessary" causes of the loss in the sense that "but for" one of the causes the loss would not have occurred. Such interdependent concurrent causes do, therefore, meet the "but for" threshold.

Against this background of established law, the Supreme Court extended the doctrine of concurrent causes, stating that there is "no reason in principle why such an analysis cannot be applied to multiple causes which act in combination to bring about a loss" [176]. The effect of this extension means that where multiple concurrent but interdependent perils cause a loss, provided one is insured, the loss will be covered. However, the Supreme Court extended the doctrine even further and, as discussed below, held that in certain circumstances (where agreed by the parties) the multiple concurrent causes do not have to meet the "but for" test. (That is, X cannot be a cause of Y if Y would have in any event occurred irrespective of, but for, X.)

The impact of this fundamental shift in the application of the "but for" test is not to be underestimated. To date, insurers have based the construction of policy wordings and the operation of claims processes on this test on the basis that it was entrenched within insurance law. Testament to this legal entrenchment is the Supreme Court's reliance on predominantly academic publications, as opposed to legal precedents, when creating this seminal inroad into the "but for" test. This legal development will have the practical implication of, in certain circumstances, changing the basis on which insurers will pay and, therefore, begs the question as to whether academic sources are a suitable basis to develop what is, fundamentally, a commercial test.

Is the "but for" test necessary?

Counsel for the insurers tried to argue, as many of us thought, that the fundamental threshold test for a factual causation inquiry is the "but for" test.

The Supreme Court agreed that in most cases (of any field of law) the "but for" test is an essential determinant as to whether any cause can be deemed a legal cause of a consequence. However, it went on to note that there were cases where the threshold would not apply:

- Cases where two causes, started independently of each other, combine to cause a loss. For example, where two fires combine to burn down a property. Neither fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred (so called "over-determined" cases).
- Cases where no individual events were sufficient to bring about the result by itself, but together they have brought about a loss. For example, 20 people combining to push a bus over a cliff, as only 13 were needed. (Here, treating the "but for" test as a minimum threshold would be nonsensical as no one person's actions would be held to have caused the loss).

The judgment therefore establishes a seminal inroad into the need for the "but for" test when establishing causation. It is this inroad that allowed the Supreme Court to hold (as discussed further below), that the parties can agree whether insurance is intended to cover a peril when said peril can only cause loss in combination with a wider set of uninsured events, irrespective of the fact that the insured peril would not pass the "but for" threshold.

It is anticipated that the inroad the Supreme Court has made into the "but for" test will form the basis of further challenges to the test, perhaps across various fields of law (although we do think these challenges are likely to be met with a reticence to widen the exceptions to the "but for" test any further). The Supreme Court's departure from the "but for" test in this case was fortified by the decision to overturn, rather than distinguish, the case of *Orient Express* where the reasoning used was an extension of the "but for" principle (see The Orient-Express Case overruled). Again, this was a case that much of the insurance industry had relied on when handling claims.

Multiple concurrent causes

The Supreme Court noted that the question of causation becomes more difficult when the number of separate events that combine to bring about loss is multiplied: "instead of 2 or 20 events, there are 200,000".

The question at issue was whether a cause which, in combination with many other similar causes, subsequently results in a loss, can be deemed a proximate cause (noting that this cause could not alone result in the loss). A further nuance to this question is that the cause under consideration is insured, while the others are not. The answer, the Supreme Court held, was a matter of contractual interpretation:

> "all that matters is what risks the insurers have agreed to cover ... this is a question of contractual interpretation which must accordingly be answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation" [190]

The BI test case, therefore, affirms orthodox law that "what the causal test is (whether it is proximate causation or something looser)" is a matter of contractual interpretation, but also establishes the novel notion that the nuances of how that causal test is applied can also be discerned through contractual interpretation. In other words, it was held that it can be determined from the policy whether insurance of one peril is intended to cover that peril even though it can only cause loss in combination with a wider set of uninsured events.

The implications of this novel question of causation should be considered wherever there is a peril that may be part of a wider event and that wider event may also cause loss to the policyholder. Prominent examples include epidemics, floods, and hurricanes. If the insurer wishes to exclude the wider event the policy should explicitly provide for this. We anticipate (hope springs eternal) that a more careful approach to wordings will follow.

What should be considered when carrying out the novel "Case in a Crisis" test?

We refer to the novel test of causation set out above as the "Case in a Crisis" test. In answering this novel question of causation, the following guidance can be drawn from paragraphs 194 and 195 of the judgment as to what considerations are pertinent when construing the policy:

- Background knowledge is important [194].
- Background knowledge can include the "presumed knowledge" of parties, based on what a reasonable person would suppose [194].
- Background knowledge can take into account the commercial intent of the policy [195].

Commentators (Pollyanna Deane, Fox Williams LLP webinar: *The FCA business interruption insurance test case - the judgment*, 20 January 2021) have warned that this "question of contractual interpretation which must accordingly be answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation" [190] in effect allows the benefit of hindsight to encroach on the interpretation of the policy. In doing so, this interpretative exercise arguably undermines the certainty of the legal framework that the insurance industry operates within, especially since it is perfectly arguable that the policies under consideration were never intended to respond to a pandemic as they were drafted with a focus on premises and the immediate location.

Interpretation

General contractual interpretation: contextualism vs textualism

At paragraph 47, their Lordships state that "there is no doubt or dispute about the principles of English law that apply in interpreting the policies. They were most recently authoritatively discussed by the court in *Wood v Capita Insurance Services Ltd [2017] UKSC*." Thereby re-affirming that the law to be applied in interpreting insurance policies is the law pertaining to general contractual interpretation.

What the Judges do not explicitly acknowledge, however, is the pendulum that has been swinging throughout the development of this body of law concerning how much weight commercial sense, and other contextual considerations, can be afforded in the interpretation of a contract and in what circumstances this weight can be afforded. In understanding the implications of the BI test case decision, it is helpful to provide a brief summary of the evolution of the law of contractual interpretation; especially those cases referenced by the Supreme Court.

Lord Hoffmann infamously set out the basic principles of contractual interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998]* (ICS), where it was held that interpretation is the ascertainment of the meaning the document would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It noted that, where words are ambiguous, background can be used to deduce the correct meaning or even to conclude that the parties have used the wrong words or syntax.

The Supreme Court cites *ICS* at paragraph 61 of the BI test case, noting that it does not consider the drafting of the so-called disease clauses as one where the language has gone wrong and therefore warranting "verbal rearrangement or correction of the words". This principle was further explored in the case of *Rainy Sky SA and others v Kookmin Bank [2011] UKSC 50*, again referred to in the BI test case, which allows for considerations of the commercial purpose of the contract where there is "no obvious meaning of the words used and they were reasonably capable of bearing more than one possible meaning". Interestingly, despite the criticism the High Court meted out to Ecclesiastical regarding their policy wording, which the Court considered to be poorly drafted, the lower court also did not engage with any rearrangement but held that the policy was clear in not responding. Had the Ecclesiastical policies been subject to appeal, we wonder if the outcome may have been different considering the seemingly policy-led judgment of the Supreme Court.

However, subsequent to the above cases, the senior courts cautioned against the disregard of the primacy of language (see Lord Neuberger in *Arnold v Britton [2015] UKSC* (paragraph 17)) A proponent for re-asserting the primacy of language was Lord Jonathan Sumption who argued (speaking extra-judicially at Keble College, Oxford, 8 May 2017) that "judges were not necessarily very well placed to determine what common sense would require or what the parties would have intended. A Judge's notion of common sense tends to be moulded by their personal ideas and fairness. Fairness has nothing to do with commercial contracts." As such, many legal commentators considered the law in a state of flux: an issue which was considered in the case of *Wood v Capita Insurance Services Ltd* wherein Lord Hodge sought to settle the law by declaring that "textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation".

We should, therefore, view the BI test case judgment against this fluctuating backdrop of law, understanding that it may inadvertently recalibrate the general law of contractual interpretation.

Notably, at paragraph 162 of the judgment, the Supreme Court distinguishes contractual interpretation relating to the meaning of the disease, hybrid and prevention of access clauses from their discussion of interpretation relating to matters of causation; stating that the latter "is not a question which depends to any great extent on ... how the words used would be understood by an ordinary member of the public. What is at issue is the legal effect of the insurance contract as applied to a particular factual situation". The Supreme Court does not, however, explain to any great degree why it is that interpreting questions of causation should attract a greater consideration of contextual factors. In setting out how to discern whether the parties intended for the novel issue of whether insurance of one event is intended to cover that event when it can only cause loss in combination with a wider set of uninsured events (the new "Case in a Crisis" approach), the Supreme Court stressed the importance of background knowledge and contextual considerations. It did not mention the primacy of language. Furthermore, in ascertaining the presumed commercial intent of the policy [195], the court will no doubt take into account considerations of commercial sense.

One analysis would see the rejection of linguistic meanings as drawing an explicit delineation between the bodies of law denoting general principles of contractual interpretation discussed under the "interpretation" sub-heading of the judgment, from those principles set out in the common law authorities specifically relating to interpreting questions of causation. On this analysis, the Justices have examined judgments like *Leyland Shipping Ltd v Norwich Union Fire Insurance Society Ltd,* where "the overruling principle is to look at the contract as a whole and ascertain what the parties to it really meant", and have added a further contextual gloss to the ascertainment of what the parties meant.

However, on another analysis, the weight afforded by the Supreme Court to contextualism when interpreting causal questions could be an application of the general principles of contractual interpretation, but an occasion where elements of wider context are deemed pertinent by the nature of the contract. As stated by Lord Hodge in *Wood v Capita Insurance Services Ltd* "the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

On either of the above analyses, the judgment sets a precedent for greater contextualism when interpreting insurance policies. Such contextualism is in stark contrast to the primacy of language afforded in other insurance cases, for example *Equitable Life Assurance v Hyman* where, notwithstanding the fact that construing the policy wordings to demand payment of the GAR provisions led to the decline of Equitable Life, the language used prevailed. It may be the case that such see-sawing back and forth over the primacy of language is never settled as it reflects the courts ability to respond to various scenarios and background issues, not least the political expediency of some decisions.

The form of the policy

The Supreme Court considered a general exclusion found in RSA 3, which as a stand-alone clause sought to exclude cover for a disease that amounts to an epidemic. ("RSA 3" and other such monikers in this article are those adopted by the courts to distinguish the different policies under consideration.)

While the law of contractual interpretation necessitates that a policy be considered as a whole, the Supreme Court took an unorthodox approach in interpreting this exclusion clause by predominantly considering the form of the policy. The Supreme Court held that a policyholder reaching page 93 of the RSA 3 policy wording would not understand the general exclusion on that page to be removing a substantial part of the cover for BI conferred on page 38. It was held that if the policy had intended to exclude such risks it would have been done so "transparently as part of the wording of the extension and not buried away in the middle of the general exclusion ... at the back of the policy" [78].

Given such reasoning, it is advisable when drafting insurance policies to ensure that any exclusions are featured near to, or indeed within, the insuring clause that they purport to qualify. Cross references are likely as is repetition, so one wonders the extent to which the Principle 7 of the FCA's Principles for Businesses (clear fair and not misleading) will be exercised.

The meaning of the words used

The Supreme Court did, however, take a more orthodox approach to its interpretation exercise of the insuring clauses. It examined how the words used would be understood by a reasonable person, in this case the reasonable policyholder (following the principles set out in the *ICS* case). These meanings should be considered by all those drafting future policies as the Supreme Court arguably took a wide approach when construing the wordings considered. Our key observations are below.

Occurrence

The Supreme Court held that the word "occurrence" has a widely recognised meaning in insurance law, which accords with its ordinary meaning as "something which happens at a particular time, at a particular -place, in a particular way" [67].

However, their Justices had to consider how the word "occurrence" should be interpreted in the context of a disease, which by its nature is something that spreads rather than occurs at a particular time and place and in a particular way. In doing so, they held that the best interpretation was to regard each case of illness sustained by an individual as a separate occurrence.

Restrictions imposed

One of the elements found in the hybrid wording (meaning clauses that contained elements of both "disease" clauses and "prevention of access" clauses) in Hiscox 1-3 and in Hiscox 4 is that the BI must be "due to restrictions imposed by a public authority". (Wording presented by other insurers included "closure or restrictions placed"; "enforced closure"; "action" preventing access; and a denial or hindrance in access imposed in the "non damage and denial of access").

In interpreting these meanings, the Supreme Court held that "an instruction given by a public authority may amount to a 'restriction imposed' if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers" [121].

In holding that "restrictions imposed" do not have to have the force of law, this judgment sets a precedent for, in certain circumstances, holding government guidance to be mandatory. In doing so, the judgment validates the government ruling through a notion of legitimate authority, rather than through any valid legal basis. Constitutional questions aside, this may have uncertain commercial implications as to when a business should or should not follow government guidance. Given the large amount of "guidance" (such as the FCA's Perimeter Guidance manual (PERG)) in financial services regulation, the idea that the status of government guidance can be retrospectively crystallised into a decree of a mandatory nature is troubling.

However, the judgment caveats its interpretation noting that "this is likely to arise only in situations of emergency". If the meaning of "emergency" is construed tightly enough in later cases, the repercussions of this finding should not be widespread.

The Supreme Court also considered the nature of the restriction, noting that the restrictions do not always have to be directed at the insured premises. For example, a police cordoning of the surrounding area would amount to a duly imposed restriction.

Inability to use

The Court held that an "inability to use" cannot simply be an impairment or hindrance in use. However, the Supreme Court held that this requirement does not require the totality of the premises to be rendered unusable. As such this requirement will be satisfied "either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities".

Prevention of access

Similarly, the Arch wording of "prevention of access" was found to be distinct from a mere hindrance to use the premises. However, consistent with the Supreme Court's analysis of "inability to use", the wording may also (depending on the facts), cover prevention of access to a discrete part of the premises or access to the premises for discrete purposes will have been completely stopped from happening.

So, for example, a restaurant that offers take-away services can still be covered when they cannot use the dining area: there is a prevention of access to the premises for the discrete business of providing an eat-in service.

Trends clauses

The Supreme Court analysed the function of trends clauses, finding that they are only "part of the machinery contained in the policies for quantifying loss" [240] and as such determine how the indemnity payable is to be calculated. Accordingly, the Supreme Court made it clear that trends clauses are not to be used to interpret the policy wording or have any impact on the risks or insured perils covered by the policy. The Supreme Court, therefore, found that trends clauses should "be construed consistently with the insuring clauses in the policy" [261] and "if possible … construed so as not to take away the cover provided by the insuring clauses" [264].

In the context of BI, trends clauses often call for an inquiry into what the financial results of the business would have been if the insured peril had not occurred. Indeed, the policies considered in the BI test case included trends clauses that expressly incorporated such a "but for" test.

However, so as to give effect to the previously stated principles concerning the proper function of a trends clause, the Supreme Court stated that "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" [287]. In effect this means that any indemnity payable under an insurance policy cannot be adjusted under a "but for" trends clause for any reason connected to the insured peril. This finding, therefore, impacts the insurance claims process and will need to be taken into account by any insurer or insurance intermediary when adjusting and settling claims.

The Orient-Express Case overruled

Of particular note is the Supreme Court's treatment of the decision in *Orient-Express Hotels Ltd v Assicurazioni General SpA [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531*, which counsel for the insurers sought to rely on in relation to issues of causation and the trends clauses.

By way of brief recap, the *Orient-Express* case concerned a claim for BI loss arising from damage to a hotel resulting from Hurricanes Katrina and Rita. The hotel's insurance policy only covered physical damage to the hotel. It did not provide cover for damage to the wider city. The policy also included a trends clause which incorporated a "but for" causation test. As such, it was held that but for the physical damage to the hotel, there would still have been a reduction in business due to the wider devastation of the city. The court, therefore, found that the indemnity payable could be adjusted by means of the trends clause.

However, in line with its analysis as to the function of trends clauses, the Supreme Court made a clear decision that the *Orient-Express* case had been wrongly decided and overruled the case, noting that as both sets of damage arose from the same underlying cause, the wider damage should not have been taken into account within the trends clause adjustment.

Conclusion

On the whole, it seems fitting to deem the Supreme Court judgment as maverick. Previously entrenched principles of insurance law, such as "but for causation", are jettisoned in favour of heavy reliance on academic publications; an arguably inappropriate basis for the development of tests that have practical implications for insurance businesses (for example, the operation of claims processes). The judgment does present interesting developments regarding causation, particularly through the creation of the novel "Case in a Crisis" test, which considers whether the parties intended to cover a peril when said peril can only cause loss in combination with a wider set of uninsured events. It remains to be seen, however, whether the courts will follow such developments or whether they will apply these unorthodox developments selectively by distinguishing cases on the facts.

Such disregard for commercial practicalities and the continuity of insurance law will not, however, help anyone in the long term. While policyholders may be grateful currently, the judgment could be a pyrrhic victory as insurers may be reluctant to engage with anything other than straightforward, vanilla policies and cover. From the market point of view, wordings should now be carefully adopted and revised in the light of the Supreme Court's decision.