

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
AND
IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2010

Before :

MR JUSTICE HAMBLÉN

Between :

ORIENT-EXPRESS HOTELS LIMITED	<u>Claimant</u>
- and -	
ASSICURAZIONI GENERAL S.p.A. (UK Branch)	<u>Defendant</u>
Trading as Generali Global Risk	

Mr Alistair Schaff QC & Ms Rebecca Sabben-Clare (instructed by Rosling King LLP) for
the Claimant

Mr Simon Picken QC & Miss Sushma Ananda (instructed by Steptoe & Johnson LLP) for
the Defendant

Hearing dates: 17th May 2010

Judgment

Mr Justice Hamblen :

Introduction

1. The Claimant (“OEH”) appeals under section 69 of the Arbitration Act 1996 against an arbitration award (“the Award”) published on 26 November 2009 by a tribunal consisting of Sir Gordon Langley (Chairman), Mr. George Leggatt QC and Mr. John O’Neill FCII (“the Tribunal”) pursuant to permission to appeal given by Mr. Justice Burton.
2. OEH seeks to appeal the Award on two questions of law arising under a combined property damage and business interruption policy of insurance (“the Policy”) purchased by OEH from the Defendant (“Generali”), as follows:
 - (1) Whether on its true construction, the Policy provides cover in respect of loss which was concurrently caused by: (i) physical damage to the property; and (ii) damage to or consequent loss of attraction of the surrounding area;
 - (2) Whether on the true construction of the Policy, the same event(s) which cause the damage to the insured property which gives rise to the business interruption loss are also capable of being or giving rise to ‘special circumstances’ for the purposes of allowing an adjustment of the same business interruption loss within the scope of the “Trends Clause.”

The background to the appeal

3. OEH is a well-known luxury hotelier and holiday operator and was the owner of the Windsor Court Hotel, 300 Gravier Street, New Orleans, a premier 23 storey hotel situated in the Central Business District, close to the historic French Quarter of New Orleans (“the Hotel”).
4. The arbitration concerned the effects of Hurricane Katrina and Hurricane Rita in New Orleans in the autumn of 2005. The Hotel suffered significant physical damage from wind and water. The Hotel was closed throughout September and October 2005. The Hotel re-opened on 1 November 2005, albeit not fully repaired and with its services and amenities not fully operational. OEH sustained significant business interruption losses.
5. The surrounding area of New Orleans was also devastated by Hurricanes Katrina and Rita. A state of emergency had been declared and a curfew imposed on 27 August 2005; a mandatory evacuation of the City was ordered (with limited exceptions) on 28 August and repeated (without most of the exceptions) on 6 September 2005. The City was only re-opened and the curfew lifted at the end of September and beginning of October 2005.
6. OEH accepts that it has to establish, and can only recover in respect of business interruption loss caused by physical damage to the Hotel.

7. The essential issue raised by OEH on its appeal is how the policy responds in circumstances where both the Hotel and the wider area (“the vicinity”) were damaged and where OEH contends that significant aspects of its business interruption loss were caused both by the damage to the Hotel and by damage to the vicinity (and the consequences of such damage to the vicinity, such as broader loss of attraction), both of which had themselves been caused by the same hurricanes.
8. OEH submits that the point is illustrated by considering the month of September 2005. The Hotel was closed for the entirety of this month on account of the damage to the Hotel, save for use by a team of NBC reporters. OEH claims that it suffered business interruption losses of about US\$2.15m for this month. However, the City of New Orleans was effectively ‘closed’ for the whole of September 2005. Thus, no one could visit the Hotel because it was damaged; but no one could visit the Hotel because New Orleans was effectively closed off. If the Hotel had been left undamaged but all other consequences of Katrina / Rita are assumed to have occurred (“an undamaged Hotel in an otherwise damaged City”), the business interruption loss for September 2005 would have been the same; on the other hand, if the Hotel had been damaged but the vicinity had not been damaged and closed off, paying customers would not have been able to stay in the damaged hotel either and the business interruption loss for September 2005 would also have been effectively the same.
9. OEH contends that it is entitled to an indemnity under the primary indemnity provisions of the Policy for all business interruption loss resulting from an interruption of or interference with its business caused by (insured) damage to the Hotel, even if that business interruption loss was also (concurrently) caused by damage to the vicinity (or the consequences of such broader damage to the vicinity) resulting from the same hurricanes.
10. Generali contend, and the Tribunal held, that OEH can only recover in respect of loss which it can be shown would not have arisen had the damage to the Hotel not occurred – i.e. which satisfies the “but for” test of causation. The Tribunal held that this means putting OEH in the position of an owner of an ‘undamaged hotel in an otherwise damaged City.’ This means that, in relation to the September 2005 example, since an undamaged hotel would have suffered the same loss due to the vicinity damage and its consequences there is no indemnity under the primary insuring provisions of the Policy in respect of such loss.
11. OEH contends that in so holding the Tribunal erred in law. The “but for” causation test is not the appropriate causal test to be applied in the present case. The Tribunal should have treated this as a case of a loss caused by two concurrent independent causes, one of which was insured (physical damage to the Hotel). It contends that if the damage to the Hotel is a cause of the business interruption loss, it matters not that the same loss was also concurrently caused by vicinity damage (or the consequences of vicinity damage). In particular, there is no exclusion for loss caused or concurrently caused by vicinity damage and a reduced indemnity which seeks to put the claimant in the position of an undamaged Hotel in an otherwise damaged City does not properly compensate it for the business interruption losses caused by the damage to the Hotel.

The Policy

12. The principal clauses of relevance are the following:

(1) The Policy's Insuring Clause:

"In consideration of the Insured... paying the premium.... the Insurers... agree... to indemnify the Insured

- a) under the Material Damage and Machinery Breakdown Sections against direct physical loss destruction or damage except as excluded here in to Property as defined herein such loss destruction or damage being hereafter termed Damage
- b) under the Business Interruption Section against loss due to interruption or interference with the Business directly arising from Damage and as otherwise more specifically detailed herein."

(2) The insuring clause at the head of the Business Interruption section of the Policy:

"If any property owned used or otherwise the responsibility of the Insured for the purpose of or in the course of the Business suffers Damage as defined or there occurs an event or circumstances as described elsewhere in this Section of the Policy and the Business be in consequence thereof interrupted or interfered with the Insurers will pay to the Insured the amount of the loss resulting from such Interruption in accordance with the provisions contained therein".

(3)The Trends Clause:

"In respect of definitions under 3, 4, 5 and 6 above for Gross Revenue and Standard Revenue adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage."

13. The Policy also provided cover for Prevention of Access ("POA") and Loss of Attraction ("LOA").

14. The POA Clause provides as follows:

"This policy is extended to include reduction in Revenue incurred by the Insured:

- a) arising out of Property in the vicinity of any location owned occupied or operated by the Insured suffering Damage or being closed (in whole or part) or deemed unusable by a competent authority and which shall consequently prevent or hinder the use of the location concerned or access thereto whether Property Insured shall be damaged or not;..."

15. The LOA Clause provides as follows:

“This Policy extends to indemnify the Insured in respect of a reduction in Revenue resulting directly from loss destruction or damage to property or land in the vicinity of any premises owned and/or managed by the Insured and insured under this Policy.”

16. OEH has recovered an indemnity under the POA and the LOA clauses but this is subject to significantly lower limits than would be the case under the Insuring Clause.

The Award

17. The most material parts of the Award are as follows:

“THE CONSTRUCTION ISSUE

15. The issue arising on the construction of the policy is of fundamental importance to the approach to the Business Interruption claim and has had a major effect on the nature and quality of the evidence adduced, particularly by OEH. Expressed in summary terms the issue is this: does the Insuring Clause of the Policy provide cover (as OEH submits) for any and all losses suffered by the Hotel as a result of the Hurricanes and their effect both on the City of New Orleans and in causing damage to the Hotel or does it provide cover (as Generali submits) only for losses caused by damage to the Hotel itself but not (save for the Prevention of Access and Loss of Attraction extensions) losses caused by the damage to and devastation of the City? If, for example, the consequence of the damage to the City but not to the Hotel was a severe shortage of staff or a lack of demand for Hotel accommodation, are those matters which Generali can deploy to limit the claim or not?

16. The relevant provisions of the Policy are set out in Schedule A. They are the Insuring Clause and the definition of “*Damage*” contained in it, the first provision of the Business Interruption Section set out, the Loss of Revenue and Trends Clauses and the Prevention of Access and Loss of Attraction extensions to the Policy.

17. The Insuring Clause defines “*Damage*” as (in effect) “*direct physical loss destruction or damage*” to the Hotel. Cover for Business Interruption is for “*loss due to interruption or interference with the business directly arising from Damage*”. The Business Interruption Section of the Policy uses substantially the same language. The condition for cover is that there has been Damage and that “*the Business be in consequence thereof interrupted or interfered with*”. So, too, the provision that the insurance is limited to the amount by which the Revenue of the Hotel “*shall in consequence of the Interruption*” fall short of the “*Standard Revenue*”. The Trends Clause is perhaps even clearer. The target is to establish Revenue figures for the previous 12 months and the period following the Damage which “*represent as nearly as may be reasonably practicable the results which*

but for the Damage would have been obtained during the relative period after the *Damage*". The emphases are ours.

18. Mr Fletcher QC submitted on behalf of OEH that the Policy provisions require the Tribunal to ask first whether there was "*Damage*" to the Hotel within the meaning of the Policy. To that question he submitted (rightly) that there was only one answer: Yes. There is no dispute, for example, that the top four floors of the Hotel in particular suffered considerable physical damage from Hurricane Katrina and that Hurricane Rita caused (in particular) rain damage to the already damaged Hotel. The second question, Mr Fletcher submitted, was whether that damage caused interruption or interference with the business of the Hotel. Again there is no dispute that the answer to that question is in the affirmative, albeit there are major disputes as to the extent to which it did so. The third question, in Mr Fletcher's formulation in opening submissions, was what is the loss resulting from such interruption?
19. It is the third question on which the parties part company. On behalf of Generali, Mr Picken QC submitted that the words are clear: the cause of the loss has to be and be shown by OEH to be interruption or interference resulting from the physical damage to the Hotel and not from the damage to the City of New Orleans or, say, want of demand because of the damage to the City which the Hotel would have suffered even if it had not been damaged at all.
20. Mr Fletcher did not, in the view of the Tribunal, ever supply a convincing answer to this submission. He criticised the submission as one creating a false hypothesis because the cause of the damage to the City and to the Hotel was the same event or events and submitted that the policy was intended to cover losses resulting from all damage caused by the events which damaged the Hotel and only to exclude losses resulting from damage which was completely unconnected in the sense that it had an independent cause. He submitted that the law relating to concurrent causes would in any event enable the Hotel to recover in circumstances where a given loss was caused both by Damage to the Hotel and the damage to the City. And he submitted that the effect of excluding losses resulting from damage to the City was to require an artificial and hypothetical enquiry to be made. But none of these submissions in the view of the Tribunal address the language used in the provisions to which we have referred and which we have emphasised. That language requires OEH to establish that the cause of the loss claimed is the Damage to the Hotel. It is not necessary or relevant for this purpose to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property in the City: the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover. As for the argument that there were concurrent causes, it is difficult to think of examples of a loss that would reasonably be attributable both to the Damage to the Hotel and to the Damage to the City. But in any event the language of the Trends clause is, the Tribunal thinks, conclusive. This clause specifically requires the business interruption loss to be assessed by reference to the results which "*but for the Damage*" (i.e. the damage to the Hotel) would have obtained during the relevant period. It is accordingly irrelevant whether there was a concurrent cause of any such losses. As for the point that this is an artificial enquiry, all claims for Business Interruption raise hypothetical

issues and whilst the Tribunal would acknowledge that the evaluation required on the facts of the present dispute is more difficult than most, this cannot affect what is the correct approach in principle.

21. Mr Fletcher sought to draw support for his arguments from various passages in a textbook, *Riley on Business Interruption Insurance*, and from the case of *Prudential Lmi v Colleton Enterprises*, 976 F2d 727 (1992), a decision of the United States Fourth Circuit Court of Appeals. The passages from *Riley* were not specifically directed to the question whether losses resulting from events which caused the damage to the insured's property are recoverable under a standard business interruption wording even if the losses are not due to that damage itself but to damage to other property which is not the responsibility of the insured: and in the Tribunal's view the passages cited do not begin to bear the weight which Mr Fletcher sought to place on them. Nor did the Tribunal derive assistance from the United States case, which involved different policy wording. The critical question in that case was whether particular profits would have been earned "*had the loss not occurred*". The majority of the Court of Appeals interpreted these words as requiring the court to ask whether the profits would have been earned had the hurricane not occurred, to which the answer on the facts was "no". The third member of the Court of Appeals dissented on the ground that "*had the loss not occurred*" did not refer to the hurricane or to the overall loss in the surrounding area, but only to the loss incurred by the insured. It seems to the Tribunal, with respect, that the reasoning of the dissenting judge is persuasive; but whether it was right or not on the wording of the policy in that case, the Tribunal has no doubt that the Policy in the present case permits recovery only for loss caused by the Damage to the Hotel itself.

BUSINESS INTERRUPTION LOSS

22. The consequence of our decision on the Construction Issue is that it is necessary to assess the Business Interruption loss on the hypothesis that the Hotel was undamaged but the City of New Orleans was devastated as in fact it was."
18. The Tribunal therefore held that a "but for" causation approach was appropriate and that "it is necessary to assess the BI loss on the hypothesis that the Hotel was undamaged but the City of New Orleans was devastated as in fact it was" [22]. Its subsequent detailed assessment of recoverable BI loss proceeds on this scenario of "an undamaged Hotel in the otherwise damaged City."

Question 1: Whether on its true construction, the Policy provides cover in respect of loss which was concurrently caused by: (i) physical damage to the property; and (ii) damage to or consequent loss of attraction of the surrounding area;

19. The Policy responds to loss resulting from interruption / interference consequent on 'Damage' (which is defined as "direct physical loss destruction or damage except as excluded herein").

20. Generali point out that the answer to the question of law raised is moot. The Tribunal has not excluded recovery of losses concurrently caused by Damage to the Hotel and damage to the vicinity or consequent loss of attraction. It has only excluded losses which would have been suffered in any event but for the Damage to the Hotel. Such losses are not to be regarded as caused in fact by the Damage. At the hearing it became apparent that the crucial issue of law dividing the parties was the appropriateness of applying the “but for” causation test in this case.
21. OEH accepts that the normal rule for determining causation in fact is the “but for” test. This is generally a necessary but not sufficient condition.
22. As stated in *Clerk and Lindsell on Torts* (19th ed):

“FACTUAL CAUSATION

(a) The “but for” test

2-07 The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the “but for” test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant?... the “but for” test functions as an exclusionary test, *i.e.* its purpose is to exclude from consideration irrelevant causes. The fact that the defendant’s conduct is found to be *a* cause, applying the “but for” test, is not conclusive as to whether he should be held responsible in law since the function of the causal enquiry in law is to determine which causes have significance for the purpose of attributing legal responsibility. It is sometimes said that the law seeks the *causa causans* (effective factor) rather than the *causa sine qua non* (factor(s) without which damage could not have occurred.”

23. As stated in *McGregor on Damages* (17th ed):

“(1) *Cause in fact*

6-006 For the determination of whether a defendant’s wrongful conduct is a cause in fact of the damage to a claimant the test, which has almost universal acceptance, is the so-called “but for” test. The defendant’s wrongful conduct is a cause of the claimant’s harm if such harm would not have occurred without it; “but for” it. This is the threshold which claimants must cross if their claim for damages is going to get anywhere. Satisfying the cause in fact test is in the vast multitude of cases a necessary condition of the imposition of liability: it is by no means a sufficient condition because the all important cause in law tests, as we shall see, must be satisfied as well.

6-007 The importance of the cause in fact test lies not in its everyday observance but in its very occasional breach. For, as we shall see, there

are situations where the test proves inadequate to the task, situations where fairness and reasonableness require that there be a relaxation in the standard of factual causation required.

....

(1) *The exceptions*

6-016 The exceptions that have appeared to the rule that the “but for” test must be satisfied concentrate upon the tort of negligence. Only the tort of conversion has also fallen for consideration. However, in principle the exceptions are applicable, whatever the tort or breach of contract...

6-017 (a) Negligence. The typical situation where an extension of liability may prove necessary in the interests of fairness and reasonableness, with a consequent departure from the “but for” test, is where two or more acts or events or agencies are involved and the wronged claimant is unable to prove which act, event or agency has caused the harm.”

24. OEH submits that this is one of those “very occasional” cases where “fairness and reasonableness” require a relaxation in the standard. In this connection OEH referred to *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 and Lord Nicholls judgment at [73] and [74]:

“73 This threshold “but for” test is based on the presence or absence of one particular type of causal connection: whether the wrongful conduct was a necessary condition of the occurrence of the harm or loss.... In very many cases this test operates satisfactorily, but it is not always a reliable guide. Academic writers have drawn attention to its limitations: see, for example, the late Professor Fleming's *The Law of Torts*, 9th ed (1998) , pp 222-230 , and Markesinis & Deacon, *Tort Law*, 4th ed (1999) , pp 178-191 . Torts cover a wide field and may be committed in an infinite variety of situations. Even the sophisticated variants of the “but for” test cannot be expected to set out a formula whose mechanical application will provide infallible threshold guidance on causal connection for every tort in every circumstance. In particular, the “but for” test can be over-exclusionary.

74 This may occur where more than one wrongdoer is involved. The classic example is where two persons independently search for the source of a gas leak with the aid of lighted candles. According to the simple “but for” test, neither would be liable for damage caused by the resultant explosion. In this type of case, involving multiple wrongdoers, the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple “but for” test is not satisfied. In so deciding the court is primarily making a value judgment on responsibility. In making this judgment the court will have regard to the purpose sought to be achieved by the relevant tort, as applied to the particular circumstances.”

25. OEH acknowledges that the cases in which it has been held to be inappropriate to apply the “but for” test have been cases in tort, and in particular negligence and conversion. However, it submits that the same approach should be applied in an appropriate case in contract. It contends that this was such a case, being a case of two concurrent independent causes in relation to which the application of the “but for” test would lead to the untenable conclusion that neither of the causes caused the business interruption loss.
26. In this connection, aside from the passages from *McGregor* and *Kuwait Airways* referred to above, OEH relies upon *Clerk and Lindsell* para. 2-72:

“(a) *Successive Sufficient causes*

Where there are two simultaneous, independent events, each of which would have been sufficient to cause the damage, the “but for” test produces the patently absurd conclusion that neither was the cause. The only sensible solution here is to say that both caused the damage..”

27. It also relies upon *Hart and Honore on Causation in the Law* (2nd ed):

“We have already touched on one variety of these causal anomalies. This is the case where two causes, each of them sufficient to bring about the same harm, are present on the same occasion. A defendant starts a fire which, before it destroys property, joins a fire started by another. Each would have been sufficient to have burnt the property. Two men may simultaneously fire and lodge a bullet in their victim’s brain, or may simultaneously approach an escaping gas with a lighted candle. In these cases the normal assumption that on any given occasion only one set of sufficient conditions of a given contingency is present has broken down. With it goes the possibility of treating either of the two ‘causes’ as a necessary condition in the third of the three senses analysed above: we cannot say that either was necessary on this occasion and so a condition *sine qua non*, because the other cause would have sufficed to produce it (p123).

....

...Two sufficient causes of an event of a given kind are present and, however fine-grained or precise we make our description of the event, we can find nothing which shows that it was the outcome of the causal process initiated by the one rather than the other. It is perfectly intelligible that in these circumstances a legal system should treat each as the cause rather than neither, as the *sine qua non* test would require (p124).

....

In this section we deal with additional causes, i.e. with cases in which there are present on a given occasion two or more factors each sufficient with normal conditions to bring about certain harm. The two factors must be independent in the sense that neither is a necessary condition of the occurrence of the other.

In our view, as explained in Chapter V, when each factor is sufficient, with other normal conditions, to bring about the harm as and when it occurs, each is properly described as a cause of the harm. Thus, when two persons, *A* and *B* simultaneously shoot at *C*, each shot being sufficient to kill him, both *A* and *B* are criminally and civilly liable for *C*'s death. This is because each shot is sufficient, in conjunction with other normal conditions, to bring about *C*'s death as it occurred (viz. by shooting) at the moment when it occurred.” (p235)

28. OEH submits that the logical consequence of the application of the “but for” test in the present case would be that it would recover neither under the main Insuring Clause (because “but for” the Damage the loss would still have occurred due to the vicinity damage or its consequences) nor under the POA or LOA (because “but for” the prevention of access and/or loss of attraction the loss would still have occurred due to the Damage to the Hotel).
29. Although OEH cannot point to any insurance or indeed contract case in which it has been held to be inappropriate to apply the “but for” test, it relies on the generally accepted principle that where there are two proximate causes of a loss an insured can recover on the basis that it is sufficient that one of the causes was a peril insured, provided that the other cause is not excluded – see *Miss Jay Jay* [1987] 1 Lloyd’s Rep. 3. Whilst to date this has been a principle applied in respect of concurrent interdependent causes, OEH submits that it should equally be applied to concurrent independent clauses.
30. OEH submits that some support for this approach is to be found in the case of *IF P & C Insurance Ltd v Silversea Cruises Ltd* [2004] Ll. R.I.R. 217. That case concerned a claim under a business interruption policy for loss of income suffered by a cruise line following the 9/11 New York attacks. The policy covered loss of income “resulting from a State Department Advisory or similar warning regarding ... terrorist activities, whether actual or threatened...”. One of the insurers’ arguments was that any loss of income was attributable to the attacks themselves rather than any SDA warning. Tomlinson J rejected this argument on the facts and held that “it is impossible to divorce the effect of the warnings from the effect of the events which they so swiftly followed”. However, he also observed as follows at para. 69:

“I also note in passing that since, as I find, and as was common ground between the two experts, the events of 11 September and the warnings were concurrent causes of the downturn in bookings, including cancellations thereof, and since the consequences of the events of September 11 are not for the purposes of section Aii excluded from the ambit of the cover, as opposed to being simply not covered, a claim under the policy must lie — see *Wayne Tank and Pump Company Ltd v Employers Liability Assurance Corporation Ltd* [1974] 1 QB 57. I am not sure that, on this hypothesis, insurers contend to the contrary.”

31. On appeal the insurers did argue to the contrary on the basis of an exclusion of market loss “unless as a direct result of an insured event”. This argument was rejected on the basis that the underlying causes of the warnings were not excluded perils; they were

simply not covered as perils in themselves - *IF P & C Insurance Ltd v Silversea Cruises Ltd* [2004] Ll. R.I.R. 697.

32. I agree with Generali that no great assistance can be derived from this case, which largely turned on the court's factual conclusions. In particular it does not address the specific issue of two concurrent independent causes, nor the applicability of the "but for" causation test in such a case. Further, there is an important difference between a case involving two concurrent interdependent causes and one involving two concurrent independent causes. In the former case the "but for" test will be satisfied; in the latter it will not.
33. Nevertheless, in my judgment as a matter of principle there is considerable force in much of OEH's argument. As a general rule the "but for" test is a necessary condition for establishing causation in fact. However, there may be cases in which fairness and reasonableness require that it should not be a necessary condition. This is most likely to be in the context of negligence or conversion claims, but I would accept that in principle it is not limited to tort or to particular torts. I would also accept that a case in which there are two concurrent independent causes of a loss, with the consequence that the application of the "but for" test would mean that there is no cause of the loss, is potentially an example of a case in which fairness and reasonableness would require that the "but for" test should not be a necessary condition of causation, particularly where two wrongdoers are involved. However, whether or not that is so will depend on all the circumstances of the particular case and ultimately the issue is whether the Tribunal erred in law in applying a "but for" causation approach under this Policy on the facts as found by them. There are a number of difficulties in so establishing.
34. First, as the Tribunal held (and as is addressed under Question 2 below), this is a Policy under which it has been agreed that a "but for" approach to causation should be adopted to the assessment of loss of revenue. This is made clear in the Trends Clause which is predicated on calculating the recoverable losses on the basis of what would have happened "had the Damage not occurred" or "but for the Damage". As such, it is difficult to see how it could ever be appropriate to disregard that causal test, or how the Policy would work if one did.
35. OEH submits that this is to treat the Trends Clause as an exclusion clause, which it is not. However, in my judgment it merely involves adopting an approach to causation which is consistent with and indeed required under the Policy. The Tribunal regarded this as an important and indeed conclusive consideration. Whether or not it is conclusive, it is very difficult to see how the Tribunal could be said to have erred in law in adopting the causal approach laid down in the Policy itself. On any view it is highly relevant to what "fairness and reasonableness" requires.
36. Secondly, whether "fairness and reasonableness" require that the "but for" test should not be applied is very much a matter for the tribunal of fact, rather than for this court on an appeal limited to questions of law.
37. Further, OEH faces the difficulty that the issue has not been addressed by the Tribunal and there are no findings made in relation to it. This is because, as OEH accepts, this was not the way the case was put before the Tribunal. Although OEH submitted at the arbitration that this was a case of concurrent causes and that that should be

sufficient to establish a right to an indemnity, it did not submit that this is one of those exceptional cases in which “fairness and reasonableness” require that the “but for” test should not be applied. Whilst this does not necessarily mean that OEH is precluded from raising its present argument, the burden of establishing an error of law is all the greater where it is based on an argument that was not put to the Tribunal, and in respect of which no findings have been made, particularly in relation to an issue of this nature.

38. Thirdly, in any event I am not satisfied that it has been shown that “fairness and reasonableness” does require that the “but for” test should not be applied. The Tribunal, in accordance with the Trends Clause, has adopted a “but for” the Damage to the Hotel causation test as the basis of assessing the recoverable losses. If such a test is not adopted what is the alternative? One possibility would be “but for the damage to the Hotel and the City” – i.e. an “undamaged Hotel in an undamaged City” scenario. However, that would measure the gross operating profit which would have been made by OEH if the hurricanes had not struck at all and would therefore compensate OEH for all business interruption losses howsoever caused, even where those losses were not in any way caused by Damage (and as such are not recoverable under the main Insuring Clause of the Policy). Another possibility would be a “damaged Hotel in an undamaged City” scenario. However, that would measure the gross operating profit which would have been made by OEH if the hurricanes had only struck the Hotel, leaving New Orleans intact. A comparison between such a gross operating profit and the actual profits obtained would result in a recovery by OEH of all losses caused by damage to the City rather than Damage to the Hotel – the opposite of what the Policy permits OEH to recover. The only other possibility is a “damaged Hotel in a damaged City” scenario. However, that would mean comparing the Hotel’s actual performance with what actually happened and would, therefore, lead to a nil recovery by OEH. None of these alternatives would appear to be more fair and reasonable than the “but for” test adopted by the Tribunal, still less so clearly so as to require the discarding of that test.
39. Further, it is not the case that the application of the “but for” test means that there can be no recovery under either the main Insuring Clause or the POA or LOA. If, for the purpose of resisting the claim under the main Insuring Clause, Generali asserts that the loss has not been caused by the Damage to the Hotel because it would in any event have resulted from the damage to the vicinity or its consequences, it has to accept the causal effect of that damage for the POA or LOA, as indeed it has done. It cannot have it both ways. The “but for” test does not therefore have the consequence that there is no cause and no recoverable loss, but rather a different (albeit, on the facts, more limited) recoverable loss.
40. For all these reasons in my judgment it has not been established that the Tribunal erred in law in adopting the “but for” approach to causation which they did.
41. The answer to the first question of law is therefore “Yes” unless the application of the “but for” test means that the loss claimed was not caused in fact by physical damage to the insured property.

Question 2: Whether on the true construction of the Policy, the same event(s) which cause the damage to the insured property which gives rise to the business interruption

loss are also capable of being or giving rise to ‘special circumstances’ for the purposes of allowing an adjustment of the same business interruption loss within the scope of the “Trends Clause.”

42. OEH submits that having regard to the purpose of the Trends Clause, its language and commercial common sense, the clause should be construed as not permitting an adjustment for the consequences of the very same insured peril which caused the insured damage which gave rise to the business interruption and relevant business interruption loss.
43. As to the purpose of the clause, OEH points out that the primary Insuring Clause requires the claimant to prove that it has suffered business interruption loss resulting from business interruption caused by insured damage.
44. The Policy then goes on to provide for a standard formula for calculating the recoverable business interruption loss. Focussing on loss of revenue, one has to compare actual revenue in the Indemnity period with the revenue in the 12 months prior to the damage (the Standard Revenue).
45. However, without an adjustment mechanism, as provided by the Trends Clause, the application of that standard formula to the facts of a given case may not give proper effect to the indemnity intended to be provided under the Business Interruption section of the Policy, namely in respect of the loss resulting from the business interruption suffered in consequence of property damage which is itself the result of an insured event. The purpose of the Trends Clause is to allow for an appropriate adjustment to be made to the components of the standard formula so as to give effect to the requirement that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less.
46. As to the wording of the clause, OEH submits that, even on a literal approach to the words, “had the Damage not occurred” or “but for the Damage”, on the Trends Clause’s hypothesis, Hurricanes Katrina and Rita (which caused that Damage) could not have occurred either. One cannot ignore the Damage and yet pretend, for the purposes of the Trends Clause, that the event which caused the Damage still happened. However, this does not follow. The only assumption required by the clause is that the Damage has not occurred. It does not require any assumption to be made as to the causes of that Damage.
47. Secondly, OEH submits that the Trends Clause is dealing with the effect of real ‘trends, variations or special circumstances’ which either did affect the business or which would have affected the business, had the Damage not occurred. It is dealing with the implications of actual events, not imaginary or hypothetical ones. The only permitted counterfactual is to assume that there was no insured damage and to ask what consequences these actual trends, variations or circumstances would have had. A hypothetical Rita or Katrina (i.e. one which is assumed not to have caused damage to the Hotel but which otherwise operated to its full extent), is not a ‘special circumstance’ which would have affected the business had there been no damage but an entirely fictional event. However, the clause requires a single assumption to be

made (that there was no Damage), and for the actual facts to be considered on the basis of that assumption. That is what the Tribunal have done.

48. Thirdly, OEH submits that the opening part of the Trends Clause requires adjustments to be made for ‘the trend of the Business and for variations in or special circumstances affecting the Business either before or after the Damage’ and that these words are looking at trends, variations or circumstances independent of the (insured) Damage. However, the trends, variations and circumstances considered by the Tribunal were independent of the insured Damage, albeit not independent of the cause of that Damage.
49. Fourthly, OEH submits that there has to be mutuality about the proper approach to the consequences of the insured event (i.e. the hurricanes) which caused the (insured) Damage for the purposes of the Trends Clause; and introducing into the adjustment process the effect of the consequences of the same insured event which caused the Damage which gave rise to the business interruption loss gives rise to very odd results. It would mean that an insured whose property is damaged by a natural peril which had struck a wider area could argue thus: ‘had the damage not occurred, but the peril giving rise to the damage is nonetheless assumed in all other respects, I would have been better off because all my rival hoteliers would have been disabled and I would have been able to monopolise what was left of the trade?’ OEH submits that this is counter-intuitive; the insured would be relying on the peril insured and the consequences on his own property and business to set up his business interruption claim in the first place and simultaneously pretending that the same insured event had not caused his property any damage in order to enhance his claim.
50. OEH relies upon the fact that this “windfall” argument has been rejected by some courts in the US as contrary to the indemnity principle and in particular the case of *Prudential v Colleton Enterprises* 976 F.2d 727. However, the US cases turn on the wording of the particular policies in issue, as the Tribunal pointed out [20]. Further, I agree with the Tribunal that the reasoning of the dissenting judge in the *Colleton* case relied upon by OEH, is the more persuasive. That reasoning focused on the fact that the clause required consideration of the position “had no loss occurred”; not “had no hurricane occurred”. As the dissenting judge stated:

“The majority persists in framing the issue as what the motel’s situation would have been had the hurricane not occurred at all. However, the contract states that “due consideration” be given to pre-damage earnings and the “probable earnings thereafter, *had loss not occurred*” (emphasis added). “Had no loss occurred” does not refer to the overall loss in the surrounding area; rather, it clearly refers only to the loss incurred by the insured...

The majority acknowledges that proof of an imminent general economic upturn, or of a lost profit opportunity thwarted by the loss causing event, can justify recovery under a lost-earnings provision. I assume, then, that had the motel been destroyed by an isolated fire the day before Hugo hit it, the majority would rule that lost profits would have been recoverable because the cause of the property loss (the fire) was not the same as the cause of the profit opportunity (the storm). Similarly, if gold were discovered the day after Hugo and the entire region filled with gold seekers (as well as relief workers), I

assume that lost profits would be covered. Colleton had a lost profit opportunity (the dimensions of which the parties stipulated). Although Hugo caused both the property loss and created the profit opportunity, it does not strike me as an “intuitively-sensed logical flaw” to permit recovery under these circumstances.”

51. Fifthly, OEH submits that Generali’s argument has the remarkable result that the more widespread the impact of a natural peril, the less cover is afforded by the business interruption policy for the consequences of damage to the insured property. So, if the tsunami or hurricane or fire only affects the insured property, this will give rise to a full, unadjusted recovery for all business interruption loss caused by the damage to the insured property; yet, should the tsunami, hurricane or fire cause additional devastation to a whole swathe of properties in the same area, the claimant is somehow to be worse off because it is to be treated as if its insured property had (hypothetically) escaped damage but as if its business would still have suffered a loss of income due to the damage (or resulting loss of attraction) in the wider area. However, under this Policy the amount recoverable under the main Insuring Clause will always depend on the extent to which the business interruption losses claimed are caused by Damage. That is what the main Insuring Clause requires as a matter of causation. It has nothing to do with whatever other devastation the hurricanes may have caused elsewhere than at the insured property.
52. Sixthly, OEH submits that Generali’s approach subverts first principles in that it involves seeking to strip out from the claim for business interruption loss caused by insured damage, not merely the concurrent consequences of extraneous circumstances but the concurrent consequences of the very peril that caused the damage which was a proximate cause of the business interruption loss in the first place. However, the relevant insured peril is the Damage; not the cause of that Damage.
53. Seventhly, OEH submits that the Defendant’s approach raises serious practical difficulties which are unlikely to have been intended as a consequence of including the Trends Clause. In the event of a business interruption caused by insured damage, and simultaneous vicinity damage and loss of attraction, the precise reasons for cancellations and reduced revenue are likely to be a ‘mixed bag’ which cannot sensibly be separated from each other for the purpose of adjustment of a business interruption loss. However, the Tribunal’s approach does not require an inquiry into actual motives. It takes the actual revenue as a given and then asks what, if any, loss has been caused on the basis of the stated assumption. That may not always be a straightforward exercise, but it can be done, as the evidence before the Tribunal and the Award itself demonstrate.
54. Eighthly, OEH submits that if insurers wish to negotiate for a provision which strips the wider consequences of the catastrophe out of the cover, even in a case where the catastrophe has caused actual damage to the insured property and resulting business interruption loss, it is incumbent on them to do so specifically, and with express reference to such situations, in a very clear exclusion clause. The Policy contains no express exclusion for business interruption loss caused by insured damage which is also caused by the vicinity implications of the same insured event operating more generally. However, this argument depends on establishing an ambiguity. The

Tribunal did not consider there to be any ambiguity as to what was agreed by the Trends Clause, and I agree with them.

55. Finally, OEH relies upon text books on Business Interruption insurance, which, it submits, provide no support for the Tribunal's approach. However, none of them clearly or specifically addresses the present issue or clause and I find that they provide no real support for either side's argument.
56. In rejecting OEH's argument on this issue the Tribunal said that it was not necessary "to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property in the City". It made the point that "the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover".
57. I agree with the Tribunal that the clause is concerned only with the Damage, not with the causes of the Damage. What is covered are business interruption losses caused by Damage, not business interruption losses caused by Damage or "other damage which resulted from the same cause". Nowhere in the Trends Clause does it state that "variations or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred" has to be something completely unconnected with the Damage in the sense that it had an independent cause to the cause of the Damage. The assumption required to be made under the Trends Clause is "had the Damage not occurred"; not "had the Damage and whatever event caused the Damage not occurred".
58. I agree with Generali that OEH's construction effectively requires words to be read into the clause or for it to be re-drafted. Further, such a re-drafting of the Trends Clause, which would allow OEH to recover for the loss in gross operating profit suffered as a result of the occurrence of the insured event (i.e. the hurricanes) as opposed to the loss suffered as a result of the Damage to the Hotel, is inconsistent with the causation requirement of the main Insuring Clause which OEH accepts requires proof that the losses claimed were caused by Damage to the Hotel.
59. I therefore consider that the Tribunal's construction and application of the Trends Clause was correct. As already stated, I also consider that they were entitled to treat the Trends Clause as providing clear support for adopting the "but for" approach to causation which they did.
60. The scheme of the Policy is that business interruption losses caused by Damage to insured property are recoverable under the main Insuring Clause (as is consistent with the Trends Clause). Other losses not caused by Damage (i.e. physical damage to the Hotel) but caused by damage to the City/lack of demand are recoverable under the Loss of Attraction and Prevention of Access extensions. That is what OEH paid premium for under the Policy and that is what the Tribunal held that OEH is entitled to recover.
61. The answer to Question 2 is therefore "Yes".

Conclusion

62. For the reasons outlined above no error of law has been established and the appeal must be dismissed.