THE HIGH COURT

COMMERCIAL

[No. 2020/3656 P.]

BETWEEN

HYPER TRUST LIMITED TRADING AS THE LEOPARDSTOWN INN

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3558 P.]

BETWEEN

ABERKEN LIMITED TRADING AS SINNOTTS

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3402 P.]

BETWEEN

INN ON HIBERNIAN WAY LIMITED TRADING AS LEMON AND DUKE

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3453 P.]

BETWEEN

LEINSTER OVERVIEW CONCEPTS LIMITED TRADING AS SEÁN'S BAR

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 5th February, 2021

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Introduction

1. The principal question which arises in each of these four cases is whether the defendant insurer (*'FBD'*) is obliged to cover any of the losses suffered by the plaintiffs following the imposed closure of public houses at the behest of the Government on 15th March, 2020 as the Covid-19 pandemic began to take hold in Ireland. Each of the plaintiffs hold policies of insurance issued by FBD in advance of 15th March, 2020. If it is concluded that FBD has a liability to the plaintiffs under the respective policies of insurance, a further issue arises as to the extent of the cover available under the policies.

2. Because these issues arise in each of the four cases, they were heard together over a period of eleven days in October 2020. It is hoped that the ultimate outcome of these cases will assist in the resolution of a large number of similar claims which have been brought against FBD on foot of similarly worded policies of insurance issued by FBD. Each of the policies in question contain the same standard wording found in the FBD Public House Insurance policy which was designed specifically for the insurance needs of the public house trade.

3. According to the evidence of the Chief Underwriting Officer of FBD, the policy in question has been sold to approximately 1,300 publicans throughout Ireland ranging from the owners of small rural pubs to larger urban pubs. She gave evidence that roughly 84% of policies were sold directly to publicans through FBD direct sales channels with the remaining 16% being sold through brokers. This should be seen against the backdrop that, as explained further below, FBD had a long standing relationship with the Vintners Federation of Ireland (*'VFI'*). The VFI is one of two organisations representing publicans in Ireland and is traditionally associated with pubs outside the greater Dublin area. Within the greater Dublin area, the predominant

organisation representing publicans is the Licensed Vintners Association (*'LVA'*). FBD has, for some time, also been the sponsor of the LVA annual general meeting and the dinner which traditionally takes place after that meeting.

4. The FBD policy (which will be examined in more detail below) provides cover in respect of a range of different risks as described in ss. 1-8 of the policy terms not all of which are relevant for present purposes. At this point, it is sufficient to note that s.1 provides cover in respect of accidental loss or damage to buildings, s.2 provides cover in respect of trade contents and s.3 provides a form of business interruption cover. In particular, s.3 covers consequential loss to the public house business arising from loss or damage to the buildings (covered under s. 1) or to the trade contents (covered under s. 2). Section 3 also provides cover in respect of losses arising from the imposed closure of the premises by order of a government or local authority following the occurrence of a number of specified circumstances including *"outbreaks of contagious or infectious diseases on the premises or within 25 miles of same".* At its most basic level, the dispute between the parties relates to the proper interpretation of s.3 of the policy. In each of these cases, FBD has declined cover in respect of the plaintiffs' losses on the grounds that the imposed closure did not arise in consequence of an outbreak of Covid-19 on any of the plaintiffs' premises or within a 25-mile radius of the premises. FBD maintains that the imposed closure arose not as a consequence of a local outbreak of the disease but as a consequence of the countrywide presence of the disease. In short, FBD accepts that there was an imposed Government closure but it contends that the closure cannot be said to have been causatively linked to an outbreak of Covid-19 which occurred within the 25-mile radius surrounding the plaintiffs' respective premises. It was also argued initially by FBD that pandemic coverage was plainly not contemplated or intended by the FBD

policy. Later, following the very helpful evidence given by the Chief Underwriting Officer of FBD, it was clarified, in the closing submissions of counsel for FBD, that FBD did not go so far as to contend that the policy could never respond in a pandemic situation although, as will be seen from the more detailed discussion below, counsel for FBD continued to argue that the fact that the closure of public houses arose against the backdrop of a pandemic was, nonetheless, relevant to the question as to whether the conditions of the FBD policy had been satisfied.

5. Similar issues arise in all four cases. However, in the proceedings instituted by Inn on Hibernian Way Limited (*'the Lemon and Duke proceedings'*) an additional issue arises in respect of a representation made to that plaintiff by FBD prior to the policy being put in place. Subject to the issue in relation to that representation, the cases largely turn on the proper interpretation of a number of provisions of the policies.

6. Because the cases are principally concerned with the interpretation of the policy, oral evidence has played a lesser role in the hearing of these proceedings than in many other commercial disputes. This arises in circumstances where the principles developed by the courts governing the interpretation of contracts do not permit parties to give evidence of their subjective intention in entering into the contract or as to their subjective understanding of the meaning of its terms. The courts approach the question of interpretation on an objective basis and it is now well established that the court's task is essentially to work out the meaning of a contractual term by reference to the contractual language used construed in the context of the terms of the contract as a whole and also in the context of the relevant factual and legal background. This process of interpretation has now become known as the *"text in context"* approach. The court seeks to put itself in the position of the parties at the time the contract was

made and to interpret the contract by reference to the meaning it would convey to reasonable persons having all the background knowledge that would have been reasonably available to the parties at that time.

7. This is not to suggest that the interpretation of the policy is the only issue that arises or that the interpretation of the policy is a relatively straightforward exercise. The sheer extent of the arguments advanced on both sides as to the interpretation of the relevant terms of the policy demonstrates that the issue as to the true meaning of the policy is far from easy. The extensive argument on both sides as to the meaning of the relevant provisions of the policy occupied the greater part of the eleven-day hearing and few, if any, of the arguments advanced on either side can be dismissed as wholly implausible. On the contrary, the arguments on both sides (both written and oral) were made with great skill. The quality of the advocacy was of an exceptionally high standard.

8. All of that said, there were times, during the hearing, when it struck me, quite forcefully, that many parties who take out insurance policies are likely never to have considered, at the time that the policy was taken out, that so much time and effort would be spent in debating the meaning of words found in the policy such as *"by"* or *"following"* or *"as a result of"* or *"event"* or *"occurrence"* or on arguments in relation to the concept of *"proximate cause"* or the nature of an insurance policy as a contract of indemnity. Equally, it is unlikely that they would have in mind the somewhat abstract principles underlining the need to construct an appropriate *"counterfactual"* in order to determine what would have been the position of the insured's business but for the occurrence of the insured peril. But, a policy of insurance, like any written contract which has been accepted by the parties, is, subject to some exceptions which are not here relevant, binding on the parties to it

notwithstanding that one or more of them may not have fully understood all of its terms or the legal consequences that flow from the use of particular terms in the policy. The parties to a written contract of this kind are bound by what they have agreed in writing and, if there is a dispute as to the meaning of the terms which bind the parties, it is the task of the court to try to ascertain the true meaning of the words used in the contract in accordance with well-established principles which are binding on me. As outlined in para. 6 above, the approach of the court is to consider the meaning of the relevant contractual provisions not by reference to the subjective understanding of the parties but by reference to how they would be understood by reasonable persons with all the background knowledge reasonably available to the parties at the time the contract was made. Approached in that way, the fact that the parties (or one of them) may not have given thought to the meaning of a particular clause is not relevant. The reasonable person test overcomes any such difficulty. The reasonable person is presumed to have read and understood the contract and to have given some thought to its implications.

9. In due course, it will be necessary to address, in more detail, the applicable principles. Before doing so, it is necessary to explain the structure of the judgment as follows:

(a) Paragraphs 12 to 41 address the dispute which arose at the outset of the hearing in relation to the admissibility of certain of the evidence which was proposed to be called and record the rulings made by me in relation to that dispute;

(b) Paragraph 42 identifies the witnesses who gave evidence at the hearing;

(c) In paras. 43 to 51 I seek to summarise the evidence, insofar as relevant and make findings of fact with regard to the circumstances relating to three of the plaintiffs and the placing of insurance by them with FBD;

(d) In paras. 52 to 72, I address the individual circumstances relating to the Lemon & Duke claim. In contrast to the other plaintiffs, the Lemon & Duke policy was put in place after the threat posed by Covid-19 first emerged and on the basis of a specific representation made by FBD as to the extent of the cover available;

(e) In 73 to 74, I summarise the requirement to consider both the text of the policy and the relevant context in seeking to ascertain its true meaning;

(f) In paras. 75 to 83, I address the factual background and assess some of the evidence relevant to that background;

(g) In paras. 84 to 101, I consider the manner in which the Covid-19 pandemic unfolded in Ireland and how it was initially addressed by FBD;

(h) In paras. 102 to 109, I consider the relevant regulatory context in which the policies were issued;

(i) In paras. 110 to 112, I consider the contents of a number of documents which FBD was required by law to issue to the plaintiffs as part of the process of putting the policies in place;

(j) In paras. 113 to 126, I seek to summarise the principles applicable to the interpretation of the terms of the policies and identify and discuss specific terms of the policy;

(k) In paras. 127 to 139, I address the ambit of the relevant insured peril;

(l) In paras. 140 to 147, I consider the issue as to whether cover is limited to closures arising from localised outbreaks of Covid-19 and as to whether cover is available where there is a nationwide outbreak;

(m) In paras. 148 to 175, I consider the meaning of the word *"following"* as used in the relevant provision of the policy in issue in these proceedings. The length of this section reflects the extent of the argument on the issue in the course of the parties' submissions;

(n) In paras. 176 to 177, I consider the meaning of the word *"by";*

(o) In paras. 178 to 179, I consider the meaning of the word *"outbreak";*

(p) In paras. 180 to 184 I seek to arrive at the overall meaning of the relevant clause in the policy;

(q) In paras. 185 to 213 I address a number of issues that arise in relation to causation;

(r) Paragraphs 232 to 250 address the *"trends and circumstances"* provisions of the policy;

(s) Paragraphs 251 to 254 deal with the evidence of two experts called on behalf of FBD.

(t) Paragraphs 255 to 267 are concerned with the ambit and meaning of the *"indemnity period"* as defined in the policy*;*

(u) The claim made by the Lemon & Duke plaintiff for aggravated damages is addressed in paras. 268 to 273; and

(v) A very brief summary of my conclusions is contained in paras. 275 to 284

10. It should be noted that it has been agreed between the parties that, if the plaintiffs succeed in establishing that FBD is liable to provide some level of cover to them, the issue as to the quantum of the losses covered by the policy will be addressed

at a later stage. It should also be noted that this judgment was originally scheduled to be delivered on Friday 15th January, 2021. However, on 14th January, 2021, an application was made to me on behalf of FBD to postpone delivery of the judgment in order to give the parties an opportunity to consider the judgment of the UK Supreme Court in a case brought by the UK Financial Conduct Authority in relation to the interpretation and potential application of a number of policies of business interruption insurance (all governed by English law) in the context of the impact of Covid-19 on pubs and restaurants. Coincidentally, that judgment was also scheduled to be delivered on 15th January. I acceded to the application by FBD in circumstances where, in the course of the hearing before me, the plaintiffs had placed considerable reliance on the first instance decision which was the subject of the appeal to the UK Supreme Court. I directed that each of the parties should furnish short written observations to the court addressing the implications of the Supreme Court judgment by 29th January, 2021. Such submissions were subsequently received by me. I confirm that I have considered both the Supreme Court judgment and the additional submissions. However, I have not substantially altered my judgment as a result. I have retained those sections of the judgment which addressed the first instance decision and have made some additional observations by reference to the UK Supreme Court judgment where appropriate. I have taken that course in circumstances where the arguments made to me by the parties in relation to the first instance decision were far more detailed and complete than the subsequent written observations delivered on 29th January. It is important to emphasise that I have arrived at my decision by reference to the facts and circumstances of the cases before me (including the specific terms of the FBD policy) and on the basis of the relevant law as understood by me. Although aspects of my judgment have been influenced by the approach taken in the U.K.

proceedings, it is important to record that my decision, either in its original undelivered form as of 14th January, 2021 or as of today, has not been reached solely on the basis of the approach taken in the proceedings in the United Kingdom (whether at first instance or on appeal).

The evidence before the court.

11. In terms of the evidence, there was a considerable debate during the early part of the hearing as to the extent and nature of the evidence that could properly be given in a case of this kind. This was the subject of two rulings made by me on Day 2 and Day 5 respectively. The first ruling related to the admissibility of certain documents. The second ruling related to the admissibility of the evidence of a number of the witnesses proposed to be called. Both rulings arose in the context of the legal principle (mentioned in para. 6 above) that evidence of the subjective intention of parties or as to their subjective understanding of the meaning of its terms is not admissible as an aid to the interpretation of a written contract. For similar reasons, it is generally impermissible to have regard to conduct of the parties, subsequent to the conclusion of a contract, in interpreting the meaning of any of the terms of that contract.

The ruling in relation to the admissibility of documents.

12. This ruling related to the admissibility of a folder of documents extracted from the discovery made by FBD. In broad terms, the documents comprised internal communications within FBD relating to its potential exposure in respect of business interruption claims resulting from the closure of the public houses in March 2020 as the pandemic began to bite. A reading of a number of the communications in question might suggest that some within FBD considered that the policies provided cover in respect of such claims. FBD objected to the admissibility of the documents

on the basis of a number of well-established rules relating to contractual interpretation namely that expressions of subjective intention are inadmissible as an aid to the interpretation of a contract and that, in accordance with the decision of the Supreme Court in *Re Wogan's (Drogheda) Ltd* [1993] 1 I.R. 157, the conduct of parties to a contract subsequent to its conclusion is inadmissible as an aid to its interpretation.

13. Counsel for the plaintiffs accepted that the documents in issue fall within post contractual conduct and would normally be inadmissible in seeking to interpret the terms of the FBD policy. However, he argued that the documents were admissible in order to rebut the case made in FBD's written submissions in relation to business efficacy. In this context, FBD, in paras. 17-19 of their written submissions had sought to rely on an observation made by O'Donnell J. in the Supreme Court in *Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 ("*the MIBI case*") in support of an argument that the commercial impact of an agreement is a necessary element of the relevant factual background against which the agreement is to be construed.

14. In the *MIBI* case, one of the arguments advanced by the MIBI was that the interpretation of the MIBI agreement advanced by the Law Society would mean that the MIBI had undertaken a potential liability that would be *"potentially ruinous"* for its members. On that basis, the MIBI argued that, in order to give business efficacy to the agreement in question, the Law Society interpretation should be rejected. At para. 24 of his judgment, O'Donnell J. said:

> *"There is no doubt … that if the Agreement has the effect contended for by the Law Society, that it was an extremely foolish agreement to make on a professional level, …. This is not a determinative factor since it is not unknown for commercial parties to make agreements that in retrospect are*

clearly unwise. Nevertheless, the commercial impact of the Agreement is a necessary part of the background since if an agreement is plainly foolish to the point of threatening the financial viability of the companies, then it is necessary to offer some plausible explanation why a prudent party (and in this case that involves all the motor insurers doing business in the State) would enter such an agreement and renew it over a period of 60 years".

15. In the context of this element of the case made by FBD in relation to the interpretation of the policies, counsel for the plaintiffs highlighted the evidence proposed to be given on behalf of FBD by Mr. Paul Sharma, a London based insurance expert whose report had been made available in advance of the hearing. For example, in para. 2.1.10 of his report, Mr. Sharma noted that FBD has attributed no premium income to pandemic risk, held no solvency margin in respect of that risk, and held no provisions for such risk. In para. 2.1.11, Mr. Sharma further suggested that this was not because the occurrence of such a pandemic was thought to be implausible. He noted, in this context, that a pandemic is contemplated in the design of the formula to calculate the solvency margin which insurance companies are required to maintain under EU law. In para. 2.1.12, he suggested that the EU regime, in the case of insurance other than life and health cover, contemplates a *"bespoke identification"* by an insurer and its regulator in the event that there is material pandemic risk in any category of insurance covered by that insurer. In such cases, the regulator is to impose a bespoke add-on to the required solvency margin. On this basis, Mr. Sharma, at para. 2.1.13 expressed the view that the absence of such an *"add-on"* in the case of FBD shows that consequential material loss from a pandemic to the business interruption insurance coverage was not contemplated and he further expressed the view that this was not surprising in the circumstances since it would

"go beyond the boundaries of insurability; an insurer would find it difficult prudentially or purposefully to offer such coverage in any material amount". That is another way of suggesting that an insurer would be foolish to agree to provide such cover.

16. Counsel for the plaintiffs argued that the material in the folder was relevant to any such business efficacy case. Counsel argued that the material was capable of undermining this aspect of the business efficacy argument. Counsel submitted that the material would assist in demonstrating that FBD did contemplate that it was on cover for claims of this kind. Counsel argued that such material is admissible as an exception to the principle established in *Wogan's* that evidence of subsequent conduct is inadmissible as an aid to the interpretation of a contract. Reliance was placed on a passage from the minority judgment of Clarke J. (as he then was) in the *MIBI* case. While Clarke J. was in a minority in relation to the result, it was argued that the majority of the court did not dissent from this paragraph which was, moreover, consistent with views expressed by members of the Court of Appeal in their judgment in the same case. The paragraph in question is para. 11.30 where Clarke J. said:

> *"Before leaving the business efficacy argument it is also appropriate … to touch on the question of the notes to the financial statements of the MIBI …. [I]t seems to me that those notes are of particular relevance in the context of the business efficacy argument. It is true, of course, that the unilateral view of one party is not relevant to the construction of an agreement. Agreements are to be construed objectively. However, it seems to me that the established view of a party can be of some relevance in considering the weight, if any, to be attached to a business efficacy argument. The whole point of such an argument is that it is said that a particular construction should not be*

favoured because it should be assumed that a reasonable business person would not have entered into an agreement which was contrary to business sense. Such an argument is normally made by a party who asserts that, from its perspective, an agreement construed in a particular way would not have made sense and that it should be implied that the party would not have entered into such an agreement unless the text is clearly to the contrary. But if the very party whom it might be said would not have entered into an agreement of a particular type can be shown to have believed that it had entered into an agreement of that very type, then such an argument is, in my view, significantly undermined. I say that notwithstanding the fact that events occurring after a contract has been concluded cannot ordinarily be used to construe the meaning of the contract at the time it was entered into for that exercise again has to be conducted on an objective basis and in the light of the circumstances prevailing at the time in question. However, if it truly is to be said that it would not have made business sense for the MIBI (and the insurers who are members of it) to have agreed to cover the liabilities of an insolvent insurer then it is surely highly surprising that they appear to have believed, for a significant number of years leading up to the Setanta collapse, that they had done just that. If it would have been so contrary to business sense to have entered into such an agreement, then it is surprising in the extreme that the MIBI actually thought that it had done so".

17. In light of the approach taken by Clarke J. in the *MIBI* case, I came to the conclusion, in my ruling on Day 2 of the hearing, that the *Wogan's* decision did not preclude the admission of the evidence on which the plaintiff sought to rely in order to address the business efficacy argument advanced on behalf of FBD. In making that

ruling, I stressed that I was not to be taken as suggesting anything in relation to the weight to be attributed to the material. Subsequently, in the course of his opening submissions, on the afternoon of Day 2 of the hearing, it was confirmed by counsel for FBD that FBD was not proposing to rely on the business efficacy argument. On that basis, the folder of material was not admitted into evidence and the business efficacy argument was not pursued by FBD. That meant that a significant portion of the proposed evidence of Mr. Sharma was no longer relevant.

The second ruling

18. This ruling was given on Day 5 of the hearing. The ruling was given in respect of what began as a challenge by the plaintiffs to the admissibility of the evidence of a number of the FBD witnesses but, in the course of the hearing of that application, counsel for FBD argued that a similar issue arose in relation to some of the evidence proposed to be called on behalf of the plaintiffs. As it transpired, during the course of the hearing of the application, the parties agreed that a number of witnesses on both sides would not be called. These included Mr. Declan Feely (a loss adjuster who both the Lemon & Duke and the Sean's Bar plaintiffs proposed to call), Mr. Dean Carley (a health and safety consultant) and Mr. Shane Santry (an architect) who had furnished witness statements on behalf of the Lemon & Duke plaintiffs and four expert witnesses who FBD proposed to call namely Mr. Colin Scott (an accountant), Mr. Des Swan (a loss adjuster), Professor Stephen C. Inglis and Professor William Cookson (both medical witnesses who had provided reports relating to Covid-19). The Leopardstown Inn and Sinnotts plaintiffs also decided not to call Mr. Andrew King (a chartered accountant and chartered loss adjuster) who had provided a witness statement. On that basis, all of the witness statements of these witnesses were excluded from the evidence. In addition, FBD did not call a witness

as to fact namely Mr. Sean Fox (a regional sales inspector). It was not necessary to call Mr. Fox in circumstances where the Leopardstown Inn plaintiff did not pursue a claim based on representations previously alleged to have been made to it by Mr. Fox on behalf of FBD.

19. There was also agreement between the parties that certain aspects of the witness statement of Mr. Alan Grace (an insurance expert called on behalf of the Leopardstown Inn and Sinnotts plaintiffs) and Mr. Peter Sreenan (an insurance expert called on behalf of FBD) would not be pursued. The only continuing dispute was in relation to the following:

(a) The evidence of Mr. Christopher Hills, an English insurance expert;

(b) The evidence of Mr. Paul Sharma. In his case, counsel for FBD confirmed that FBD did not propose to pursue the material covered in sections 5 and 6 of Mr. Sharma's report. Section 5 addressed the EU Solvency II regime which is ultimately a legal matter. Accordingly, it was a matter that should properly be addressed by counsel rather than by an expert witness. Section 6 addressed the consequences that might flow from an adverse finding against FBD. On the basis of the confirmation given by counsel that the business efficacy argument would not be pursued, it would not have been appropriate for s. 6 of the report to be addressed in evidence. However, FBD wished to include s. 4 (dealing with the insurability of risk) and also s. 7 (dealing with the adequacy of point of sale disclosure made by FBD to the plaintiffs and addressing guidance issued by the European Insurance and Occupational Pensions Authority (*"EIOPA")* based in Frankfurt). Counsel for FBD also suggested that sections 2 and 3 should be admitted

in evidence since they provided relevant introductory material and thus enabled sections 4 and 7 to be properly understood;

(c) Although agreement had been reached that much of Mr. Sreenan's witness statement would not be admitted into evidence, counsel for FBD indicated that FBD wished to rely upon one paragraph of the statement namely para. 3.4.

20. The plaintiffs opposed the admission of any aspect of the reports of Messrs. Hills, Sharma and Sreenan. Their application was put forward on two grounds. They argued that the evidence was inadmissible. In the alternative, they argued that, to the extent that it could be said to be admissible, it should nonetheless be excluded on the basis that it was not reasonably necessary within the meaning of O.39 r.58 (1) of the Rules of the Superior Courts.

21. Order 39 r.58 (1) (which is in very similar terms to CPR 35.1 of the English Civil Procedure Rules) provides as follows:

> *"Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings".*

22. Because the Irish rule uses similar language to CPR 35.1, it is useful to consider the English authorities on that provision. One of the authorities to which I was referred is the decision of Hildyard J. in the *RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch). In para. 18 of his judgment in that case, Hildyard J. said:

> *"The burden of establishing that expert evidence is both (i) admissible and (ii) reasonably required (i.e. not just potentially useful) is on the party which seeks permission to adduce the evidence concerned".*

It follows from that approach that, if a report is not admissible, that is the end of the inquiry; the report will be excluded. Conversely, if the report is admissible, that does

not necessarily mean that the party proffering the evidence is thereby entitled to call the witness. It is still necessary to show that the report is reasonably required, the burden falling on the party proffering the evidence to establish that it is both admissible and also that it is reasonably required.

23. In my ruling on Day 5, I took the view that, having regard to the approach taken in the English authorities, the first question to be addressed is whether the evidence in issue was admissible. I drew attention in this context to the basic fact that the principal issue with which the court is faced is the interpretation of an insurance policy. That requires the court to consider the text of the policy in the context of the relevant factual and legal backdrop. The case law (addressed in more detail below) establishes that the factual backdrop includes any relevant objective material that was reasonably available to the parties at the time the policy was put in place. In the case of the reports of Mr. Hills and Mr. Sharma, counsel for the plaintiffs suggested that, what FBD sought to do, was to have regard to material which would never meet the test of being reasonably available to both parties to the insurance policy. Counsel referred to the observation made by Lord Neuberger in the UK Supreme Court in *Arnold v. Brittons* [2015] UKSC 36 at para. 21 where he said:

> *"When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."*

24. Counsel for the plaintiffs argued that the reports of Mr. Sharma and Mr. Hills were inadmissible because of the highly technical nature of the evidence proposed to

be given by them which it was submitted would simply not have been available to anyone in the position of the plaintiffs in this case. The arguments in relation to para. 3.4 of Mr. Sreenan's report were somewhat different.

25. In response, counsel for FBD argued that, in the case of Mr. Hills, his report simply provides evidence as to market practice, albeit a very specialised market. Counsel argued that the evidence of the market was admissible as part of the factual context and he drew attention to the way in which Mr. Grace, in his report on behalf of the Leopardstown Inn and Sinnotts parties had referred, for example, to other policies available in the market and the language which is used in those policies. He also relied on the way in which an insurance expert, the late Mr. Denis Bergin, gave evidence in *Analog Devices v. Zurich Insurance* (High Court, unreported, 20th December, 2002, Kelly J.) as to the language used in standard exclusion clauses contained in a variety of all risks policies of insurance. Counsel also suggested that the existence of the market described by Mr. Hills in his report would have been readily available to any of the plaintiffs through a broker. While counsel for the plaintiffs argued that the latter point was not relevant here (in light of the evidence from the Chief Underwriting Officer of FBD that 84% of FBD policies were sold directly by FBD), that seemed to me to go to the weight of the evidence rather than to its admissibility. In my ruling on Day 5, I indicated that, if it is established that the existence of this market was known to brokers in Ireland, then it seemed to me to follow that the evidence of Mr. Hills is admissible on the basis that it formed part of the background reasonably available to the parties. However, as indicated in para. 22 above, that is not the end of the inquiry. As the language of O.39 r.58 (1) makes clear, the party proffering the expert evidence must also show that the evidence is reasonably required.

26. Again, English case law is helpful in relation to this issue. In *British Airways v. Spencer* [2015] EWHC 2477 (Ch), Warren J. addressed the approach to be adopted in determining whether expert evidence is reasonably required in the context of the similarly worded CPR 35.1. In para. 68 of his judgment in that case, Warren J. said:

> "68. *... the court must ask itself the following important questions:*
>
> *(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.*
>
> *(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it ….*
>
> *(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account."* (underlining in original)

27. Having regard to what is said by Warren J. in that passage, it is also necessary to consider what he said in para. 63 of his judgment in the same case. There, he addressed the factors that can be taken into account as follows:

> *"63. …. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the*

issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."

28. In the case of the evidence of Mr. Hills, I took the view that no one could go so far as to say that it was necessary that it should be admitted. In my ruling on Day 5 I indicated that my *prima facie* view was that the evidence was of limited value. I further indicated that, in contrast to *Analog* (dealt with at a later point in this judgment) (where the court was dealing with a negotiated policy and where the plaintiff was a significant multinational with its own insurance department) the position is quite different in this case where we are dealing with a standard form policy of insurance and where, if it was established that the material in Mr. Hills' report was reasonably available through a broker, only 16% of policies were sold through a broker. Having regard to those factors, I took the view that *prima facie*, the evidence of Mr. Hills must carry less weight. In those circumstances, the proportionality factors identified by Warren J. in *British Airways* at para. 63 required to be considered. I took the view that there were factors which weighed in favour of allowing Mr. Hills to give evidence. These were: (a) the effect of a judgment either way on the parties and (b) the value of the claims. Having regard to the sheer number of claims, these factors clearly carried significant weight. Insofar as the third factor identified by Warren J. was concerned, I was told that FBD is to pay the party and party costs of the plaintiffs irrespective of the outcome of proceedings. While that

leaves the other parties with some exposure to additional costs (i.e. solicitor and client costs) that factor seemed to me, in the circumstances, to be outweighed by the first two factors. Insofar as the fourth factor identified by Warren J. was concerned (namely delay) it was very helpfully confirmed by counsel for FBD that there would be no direct examination of Mr. Hills which would obviously reduce the length of time spent on his evidence. I was also assured by all counsel that the entire of the evidence would be completed by Day 8 of the hearing. In those circumstances, I took the view that, on the assumption that it could be shown that the material was reasonably available to brokers in Ireland, FBD should be entitled to call Mr. Hills as an expert. At a subsequent point in the hearing, it was established, through the cross examination of Mr. Grace (the insurance expert called on behalf of the Lemon & Duke and Sinnotts plaintiffs) that knowledge of the existence of policies of the kind discussed by Mr. Hills would be reasonably available to brokers in Ireland. In those circumstances, I was satisfied to hear the evidence of Mr. Hills.

29. In the case of Mr. Sharma, as noted previously, the relevant sections of his report were sections 4 and 7 together with the introductory material. In my ruling on Day 5, I expressed the view that there was no basis to conclude that s. 7 constituted admissible evidence from an expert. While I accepted that Mr. Sharma has very extensive regulatory experience, s. 7 of his report is concerned with the application of the European Union (Insurance Distribution) Regulations 2018 (S.I. No. 229 of 2018) and the Consumer Protection Code and with documents which FBD was obliged under the 2018 Regulations to issue to policy holders. The meaning, the effect and the application of the Regulations are matters of law for the court. Thus, notwithstanding the extensive experience of Mr. Sharma, I concluded that his evidence on such issues was not admissible. While counsel for FBD had stressed that

Mr. Sharma, in this section of his report, dealt not only with the Regulations themselves but with guidance issued by EIOPA, I came to the view that such guidance could be addressed by counsel in their submissions and an expert was not required for that purpose. I therefore concluded that section 7 of his report was inadmissible.

30. Insofar as s. 4 of Mr. Sharma's report was concerned, this was largely based on a study published by Europe Economics entitled "*Studies on Issues Pertaining to the Insurance Production Process"* published in 2016 and a work by Berliner published in 1982 entitled *"Limits of Insurability and Risks".* In section 4 of his report, Mr. Shanahan used these texts to suggest that pandemic risk was not insurable. It is important in this context to recall that, following my first ruling on Day 2 of the hearing, counsel for FBD confirmed that FBD was no longer making a case based on business efficacy (i.e. by reference to the commercial consequences for FBD flowing from an interpretation of the insurance policy in favour of the plaintiffs). Section 4 of Mr. Sharma's report may well have been relevant to that issue. In light of the confirmation given by counsel for FBD, that issue was no longer live. Thus, the commercial consequences for FBD were no longer relevant in relation to the debate as to the admissibility of s. 4 of Mr. Sharma's report. The basis on which the plaintiffs opposed the admissibility of the report was confined to a contention that the material contained in that section of his report could not be said to form part of the relevant factual matrix against which the policies of insurance are to be construed. On behalf of the plaintiffs, it was strongly argued that this highly specialised material was not reasonably available to persons in the position of the plaintiffs and was therefore not admissible, as part of the relevant factual matrix, as an aid to the construction of the bilateral contracts between the plaintiffs and FBD represented by the policies of insurance. In this context, it should be noted that, in the written submissions delivered

on behalf of FBD, it was suggested that some of the conclusions reached by Mr. Sharma were reasonably available to the policy holders. However, in the course of the oral argument on this issue, counsel for FBD moved away from that position and instead suggested that the evidence was admissible by reference to the commercial purpose of the policy which counsel argued was a different concept to business efficacy. In this regard, counsel for FBD drew attention to the observations of Lord Neuberger in *Arnold v. Brittons* at para. 15 where he said:

> *"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd ..., para 14. And it does so by focussing on the meaning of the relevant words, ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen ".*

31. Counsel for FBD suggested that it is clear from this passage from the judgment of Lord Neuberger that commercial purpose is different to business efficacy and is to be assessed as a separate and distinct factor from the factual matrix. However, as I explained in my ruling on Day 5, the reference by Lord Neuberger to

the *Reardon Smith* decision is important. That was a case in which the seminal speech was given by Lord Wilberforce and there is one passage from his speech which has been frequently quoted and approved in judgments in this jurisdiction including in the judgment of Kearns J. (as he then was) in *Emo Oil Ltd v. Sun Alliance & London Insurance Plc* [2009] IESC 2 at p. 13. The passage quoted by Kearns J. from *Reardon Smith* is as follows:

> *"No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the surrounding circumstances but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.* ***Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties. What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."*** *(*emphasis added).

In my view, the last two sentences in the passage are particularly important in light of the issue which I was required to decide. The views expressed by Lord Wilberforce there provide support for the position adopted by the plaintiffs that not only is the

ascertainment of commercial purpose an objective exercise but it is also to be considered by reference to the position of what reasonable persons would have in mind in the situation - not of one of the parties only - but of both parties to the contract.

32. Furthermore, although this was not a point that I mentioned in the course of my ruling on Day 5, the suggestion that the issue of commercial purpose could be assessed by reference to material available to one side of a bilateral contract is at odds with the approach that is taken in relation to the other elements of the relevant context. Thus, at a later point in the hearing, I was referred to the observations of Hildyard J. in *Lehman Bros International (Europe) v. Exotix Partners llp* [2020] BUS LR 67. At pp. 91-92, there is a useful summary of the principles which apply in determining what material can be said to be reasonably available to the parties for the purposes of establishing the factual matrix against which a contract is to be construed. In that case, Hildyard J. said:

> *"110. ...the question as to what knowledge or information is to be treated as being 'reasonably available' to the parties for the purposes of constructing the words they used remains, to my mind, a particularly difficult one. .... the test of 'reasonable availability' is not always easy to apply and requires restraint in its application: and all the more so given the almost unlimited information and knowledge now available through the internet.*
>
> *111....*
>
> *112. However, as pointed out in Lewison on 'The Interpretation of Contracts' p. 166, there is other authority, and it seems more consistent with the objective approach, to support a widening of the scope beyond what the parties actually*

knew. I attempted the following summary in Challinor v Juliet Bellis & Co., at para. 279:

'(1) At least where there is no direct evidence as to what the parties knew and did not know, and as a corollary of the objective approach to the interpretation of contracts, the question is what knowledge a reasonable observer would have expected and believed both contracting parties to have had and each to have assumed the other to have had, at the time of their contract;

(2) that includes specialist or unusual knowledge which only parties entering into a contractual engagement of the sort in question might reasonably be assumed to have; and it also includes knowledge which it is to be inferred, from the nature of the actions they have in fact undertaken, that they had or must have had;

(3) however, it does not include information that a reasonable observer would think that the parties merely might have known: that would open the gate too far to subjective or idiosyncratic speculation;

(4) the fact that material is readily available or notorious may support an inference as to what the parties actually knew;

(5) but (subject to (6) below) where it is demonstrated that one or more of the parties did not in fact have knowledge of the matter in question such knowledge is not to be imputed; nor is the test what reasonable diligence would or might have revealed: in either case that would be inappropriately to introduce impermissible concepts of constructive notice or a duty … to make inquiries or investigations;

(6) the exception is that a reasonable person cannot be assumed to be in ignorance of clear and well known legal principles affecting or incidental to the contractual engagement in question.'"

33. It is clear from that passage that, in considering the factual information reasonably available to the parties, the courts seek to identify what a reasonable observer would have expected and believed would be available to **both** contracting parties. In my view, it would be inconsistent with that principle, if the commercial purpose of a contract were to be assessed by reference to information which was not reasonably available to both parties.

34. Thus, even if it be the case that consideration of commercial purpose is a factor to be considered separately to a consideration of the factual matrix, it seems to me that material which is available to one party only could not properly be considered with a view to establishing the commercial purpose of a contract. It would be necessary to establish that the material was reasonably available to both parties. That seems to me to follow from the bilateral nature of a contract. Its purpose cannot be considered by reference to the position of one party only. In contrast to the position in relation to Mr. Hills, there was no suggestion that the material contained in ss. 4 and 7 of Mr. Sharma's report would have been reasonably available to brokers in Ireland. FBD did not identify any other basis upon which it might be said that this material was reasonably available to persons in the position of the plaintiffs. In circumstances where no sufficient case had been intimated on behalf of FBD that the material in s. 4 of Mr. Sharma's report was reasonably available to persons in the position of the plaintiff's here, I concluded, on Day 5 of the hearing, that FBD had failed to discharge the burden on it to establish that s. 4 of the report was admissible. I also formed the view that, even if it could be said to be admissible, it was difficult to see how its

admission would not trigger an entitlement on the part of the plaintiffs to refer to the internal FBD communications the subject of the ruling made by me on Day 1. That material arguably suggests that a number of people within FBD considered the risk to be insurable. In those circumstances, it seemed to me that the observations made in para. 11.30 of the judgment of Clarke J. in the *MIBI* case applied *mutatis mutandis*. While that paragraph dealt with business efficacy rather than commercial purpose *per se*, the underlying rationale would appear to be equally applicable to commercial purpose.

35. In circumstances where I reached the conclusion that neither section 4 nor section 7 of Mr. Sharma's report were admissible, it followed that the introductory material also had to be excluded since the only basis on which it was said to be of relevance was to assist with an understanding of the concepts discussed in sections 4 and 7.

36. The final issue addressed in my ruling on Day 5 related to para. 3.4 of Mr. Sreenan's report which was the only paragraph which was still being tendered on behalf of FBD. I formed the view that the first two sentences of para. 3.4 were admissible. There, Mr. Sreenan said:

> *"I have worked in the insurance industry for 43 years, 32 of which were in the broking sector. In speaking with clients about the availability of BI cover for 'infectious diseases', never once was cover for losses resulting from a global pandemic requested by a client".*

37. I reached the conclusion that this aspect of his statement was admissible. While there was an issue as to its weight, it seemed to me, nonetheless, to pass muster by reference to the four factors addressed by Warren J. in para. 63 of his judgment in the *British Airways* case.

38. However, I formed the view that no sufficient case had been made out by FBD for the inclusion of the next two sentences in Mr. Sreenan's report where he stated:

> *"The demand for the cover was driven by the prospect of a localised outbreak, such as legionnaires' disease closing a premises for a short period of time with a resulting loss of trade to a competitor. It was understood that the cover provided by the extension was limited and only applied to a localised outbreak of the disease. The modest premium charged by insurers reinforced that understanding".*

39. I was of the view that the first part of that element of his statement appeared to be a conclusion drawn from other material but that other material had not been identified in the witness statement. Without an explanation for the conclusion reached by Mr. Sreenan, I could not see any basis upon which he could be entitled to give that evidence. Insofar as the second sentence is concerned, I could not see how Mr. Sreenan could purport to give evidence as to the understanding of others. Furthermore, the identity of the persons who held that understanding was not stated and the policies of insurance in respect of which the understanding was purported to be held was not disclosed. No basis was identified to me in the course of the submission which would enable me to form the conclusion that those aspects of Mr. Sreenan's statement were admissible. In the circumstances, I reached the conclusion that this aspect of Mr. Sreenan's report should not be admitted.

40. However, I was prepared to admit the final sentence in the same paragraph of Mr. Sreenan's report where he said:

> "*In fact, very often the extension was added to the policy free of charge as a 'frill' or an extra enhancement to an insurance offering."*

41. I formed the view that this evidence was admissible as evidence of market practice. It was consistent with the kind of evidence given by Mr. Bergin in the *Analog Devices* case.

The witnesses who gave evidence at the hearing

42. The following witnesses gave evidence at the hearing:

(a) Mr. Stephen Cooney, a director of Hyper Trust Ltd, the owner of the Leopardstown Inn;

(b) Mr. Noel Anderson, managing director of Inn on Hibernian Way Ltd, the owner of Lemon & Duke;

(c) Mr. Christopher Kelly, the managing director of the Chris Kelly Group and a director of Aberken Ltd, the owner of Sinnotts;

(d) Mr. Alan Grace, an insurance expert called on behalf of the Leopardstown Inn and Sinnotts plaintiffs with more than 38 years' experience of the insurance industry in Ireland principally in the underwriting of commercial risks;

(e) Mr. Philip Byrne, a director of Leinster Overview Concepts Ltd, the owner of Sean's Bar;

(f) Mr. Paul Shanahan, a business development executive employed by FBD who dealt directly with Mr. Anderson in relation to the placing of insurance with FBD in respect of the Lemon & Duke bar;

(g) Mr. Peter Sreenan, an insurance expert with 35 years' experience of the insurance industry in Ireland principally as a broker with Coyle Hamilton/Willis where he handled a portfolio of large corporate clients operating in a range of sectors including manufacturing, retail and hospitality;

(h) Ms. Kate Tobin, an actuary and the chief underwriting officer of FBD since 2018 having previously been chief underwriting officer of the Irish branch of Zurich Insurance;

(i) Mr. Tom O'Brien, a chartered accountant (with significant experience of the hospitality sector) called as an expert by FBD to express an opinion on what the trading environment for public houses might have looked like over the *"lockdown"* period from 15th March, 2020 to 29th June, 2020 on the hypothesis that there was no imposed closure such that pubs remained open but where the Covid-19 pandemic remained present together with government restrictions on travel;

(j) Mr. Christopher Hills, an insurance expert called by FBD. Mr. Hills has 45 years' experience of the London insurance market specialising in tailor made insurance products. He was also involved, more recently, in the development of a form of pandemic insurance cover; and

(k) Mr. Mark Lewis, the managing director of C. Lewis UK Ltd, who was called as an expert by FBD. Mr. Lewis has been involved on behalf of clients in the settlement of business insurance claims. More recently, he was involved on behalf of insurers in assessing business interruption claims in the UK arising from the Covid-19 pandemic.

The plaintiffs

43. Although relatively detailed witness statements have been provided by each of the directors of the plaintiff companies who gave evidence, I do not believe that it is necessary, for the purposes of this judgment, to address all of the detail contained in the witness statements and transcripts. It may be necessary, in due course, at the quantification stage of these proceedings to return to some of that detail.

44. Insofar as the Leopardstown Inn is concerned, it was established in the evidence of Mr. Stephen Cooney that the Leopardstown Inn is a large landmark suburban pub located in Leopardstown, County Dublin which comprises five bars and a function room (together with three smoking areas and a small off-licence) and upstairs restaurant. The total floor area is approximately 14,000 sq. ft. Prior to 2018, the Leopardstown Inn was insured by Aviva. This insurance had been put in place through a broker. However, at the end of November 2017, a meeting was arranged between Mr. Cooney and Mr. Sean Fox of FBD (at the latter's request) following which it was agreed that, at the next renewal date, the Leopardstown Inn and a number of other bars owned by the same group of companies would be insured by FBD.

45. Prior to the issue of the first FBD policy in respect of the Leopardstown Inn, FBD sent, under the 2018 regulations, a statement of suitability to Mr. Cooney together with a quotation for the premium and a further document required under the 2018 Regulations namely the Features & Benefits document which, under the heading "*Consequential Loss (Business Interruption)",* noted that, among the standard extensions, was *"Human notifiable diseases, murder or suicide".* According to Mr. Cooney (who was not challenged on this evidence) he was aware, in his capacity as a publican with a significant food trade, of the need for business interruption cover if there was an outbreak of disease. He described the cover available from FBD as *"very good".* While he said this factor was not on the top of his list in taking out insurance, it was something that he took into account. That said, it is important to bear in mind that, insofar as the interpretation of the terms of the FBD policy is concerned, the law excludes from consideration the previous negotiations of the parties and their subjective intention. The court takes an objective approach in

determining the meaning of a contractual provision. Mr. Cooney subsequently discussed the proposal with his brokers and, together, they examined each aspect of cover. A conclusion was reached that the FBD policy provided more comprehensive cover than was available with Aviva and, on that basis a decision was made to proceed with the FBD proposal. Thereafter, the cover with FBD was renewed. The relevant policy in place at the time of the imposed closure in March 2020 was policy number 06130051/04/01 in respect of the period 1st December, 2019 to 30th November, 2020. The premium was €42,770.00 of which €6,009.61 was stated, on the face of the policy schedule, to be allocated to section 3 of the policy.

46. Although the Leopardstown Inn is situated on the southern fringe of Dublin (near the Stillorgan Reservoir) a map showing a 25-mile radius around the Leopardstown Inn demonstrates that the entire city and county of Dublin together with southeast Meath, eastern Kildare and North Wicklow fall within the relevant 25-mile radius. This is the most densely populated area in the State. It is also an extensive area comprising, in round terms, 1,963 square miles.

47. Insofar as Sinnotts is concerned, it was established in evidence that Sinnotts is a large sports bar with a significant food trade and a total capacity of 600 people. Having regard to its city-centre location on South King Street, Dublin 2, it has a strong tourist trade. However, during the day, its principal source of business is from workers in nearby offices. There are 14 large TV screens for the purposes of showing live sports events. The bar attracts both rugby and soccer fans for major rugby international and provincial matches and also for soccer internationals and Premier League matches.

48. Sinnotts has been insured with FBD since 2006. The insurance was placed with FBD after the broker who previously acted for Aberken Ltd moved employment

to FBD. Mr. Christopher Kelly of Aberken Ltd gave evidence that, in 2015, he spoke with a broker with a view to sourcing cheaper insurance elsewhere. However, although a quotation was secured from a rival insurer, after examination of the terms of the policy, a decision was made to stay with FBD as it was perceived to offer more comprehensive cover. The policy in place at the time of the imposed closure in March 2020 was policy number 02939315/04/01 in respect of the period from 21st October, 2019 to 20th October, 2020. The premium was €49,875.00 of which €7,161.87 was attributed, on the face of the policy schedule, to section 3 of the policy dealing with consequential loss.

49. Insofar as Sean's Bar is concerned, it is situated in Athlone and is claimed to be the oldest bar in Ireland dating back (so it is said) to approximately 900 AD. This claim has been used to market the bar to tourists as a noteworthy stopping off point approximately midway between Dublin, to the east, and the Wild Atlantic Way, to the west. According to the evidence of Mr. Philip Byrne of Leinster Overview Concepts Ltd, the premises also has a good local trade with traditional music in the bar every night of the week. While the capacity of the bar is of the order of 350/400 people, Mr. Byrne suggested, in evidence, that the highest number present at any one time would be 300 customers.

50. Sean's Bar has been insured with FBD for some time. However, in March 2019, Mr. Byrne spoke to his broker about the possibility of obtaining alternative insurance. After reviewing the policies available on the market, Mr. Byrne decided to go with the FBD proposal as it offered consequential loss coverage. The relevant FBD policy ran from 23rd March, 2019 to 22nd March, 2020 and this has since been renewed. The premium was €19,100 of which €2,673.61 was attributed, on the face of the policy schedule, to section 3 of the policy dealing with consequential loss.

51. It is of some significance that, in the case of each of the Leopardstown Inn, Sinnotts and Sean's Bar, there was no negotiation of the policy terms relating to the ambit of cover in respect of business interruption. The FBD policy was presented in each case as a standard form policy. The only level of negotiation which took place was in relation to whether every section of the policy was to be included, as to the extent of the cover required under each section and the extent of the indemnity period required in respect of section 3 of the policy. Thus, in the case of all three premises, a decision was made not to seek cover in respect of sections 4 or 5 (dealing with household goods and all risks respectively). Likewise, it was necessary, in each case, to agree the sum to be insured in respect of gross profit for the purposes of s. 3 of the policy. In the case of the Leopardstown Inn, a figure of €3 million was agreed as the sum insured in respect of gross profit and the indemnity period agreed was eighteen months. In the case of Sinnotts, the sum insured in respect of gross profit was €3,145,000 and the indemnity period agreed was 24 months. In the case of Sean's Bar, the sum insured in respect of gross profit was €1.4 million while the indemnity period agreed was twelve months.

The Lemon & Duke policy

52. The circumstances in which the FBD policy was put in place in the case of Lemon & Duke is quite different. Uniquely, in that case, the policy was put in place following the making of a specific representation in relation to the business interruption cover available under the terms of the standard form FBD public house insurance policy. It should be noted that quite detailed evidence was given by Mr. Anderson on behalf of the Lemon & Duke plaintiff in relation to the sequence of dealings which took place between him and a number of officers of FBD. I do not believe that it is necessary to make findings in relation to each element of the detailed

interactions which took place. I will confine myself to what I believe are the relevant findings that require to be made.

53. The Lemon & Duke bar is situated at the corner of Duke Lane and Lemon Street in Dublin 2. This is a city-centre location approximately halfway between Grafton Street to the west and Dawson Street to the east. It is open for breakfast, lunch and dinner and it also operates as a late night venue. The average age of its clientele is in the region of 30-35 years.

54. Mr. Anderson explained how he came to put a policy in place with FBD. Mr. Anderson confirmed that, prior to the events described below, he had never previously raised any specific inquiry with brokers or anyone else about insurance cover for infectious diseases. However, as explained further below, this position changed quite starkly as Mr. Anderson considered media reports covering the impact of the arrival of the virus in Italy. By way of background, he stated that he has been a council member of the LVA for a number of years and that, at the time of the events in issue, he was vice chairman of the LVA. During the month of February 2020 he became increasingly concerned about the outbreaks of Covid-19 in other European countries and spoke about its implications for the Irish public house trade to other members of the LVA and fellow publicans most of whom were initially sceptical about his concerns. In the meantime, the existing insurance policy in place for the Lemon & Duke bar was due to expire on 28th February, 2020. A new policy was put in place on 20th February with Allianz. However, Mr. Anderson was informed by his broker on 25th February, 2020 that the Allianz policy would not provide cover if all bars were shut down due to a government closure or something similar. There would, however, be cover in the event that there was an outbreak on the premises of Lemon & Duke subject to a limit of €250,000. Mr. Anderson did not regard that as sufficient having

regard to his concerns. Those concerns were amplified when, on 26th February, 2020, he read an article published in Business Insider regarding the outbreak of Covid-19 in Italy. This article detailed empty supermarkets and also described a lockdown of a number of towns in Lombardy and Veneto in an attempt to limit the spread of the disease. Mr. Anderson was also conscious that there was a very extensive lockdown in China. Against that background, Mr. Anderson said he was, at this point, *"very anxious to insure ourselves against the disease".* He began to ask around amongst fellow publicans and was informed by the operator of the Long Hall bar in South Great Georges Street that he believed the FBD policy covered an outbreak of Covid-19 and he subsequently provided a copy of the relevant section of the FBD policy to Mr. Anderson. When he read the terms of Section 3 of the policy, Mr. Anderson said that he was excited and he made enquiries of his broker as to whether he could now *"pull back from Allianz".* Mr. Anderson, nonetheless, confirmed, under cross-examination, that, having read this section of the policy, he was aware that cover related to an imposed closure of the premises.

55. As it happened, Mr. Anderson was acquainted with Mr. John Reade, the head of business insurance at FBD. Mr. Anderson explained that he had met Mr. Reade on a number of occasions. As noted at an earlier point in this judgment, FBD is the sponsor of the LVA annual general meeting and dinner. Mr. Anderson stated that he had sat together with Mr. Reade at the top table at the dinner on at least two occasions. Mr. Anderson telephoned Mr. Reade on the morning of 28th February, 2020 and asked him directly whether FBD was providing cover in respect of Coronavirus and also whether FBD would be interested in insuring the Lemon & Duke bar. According to Mr. Anderson, Mr. Reade informed him that FBD would *"love to insure you"* but that he would get back to Mr. Anderson in relation to

whether cover was available in respect of Coronavirus following an internal meeting which was due to take place the same day.

56. In the meantime, Mr. Reade asked Mr. Anderson to send over details of any previous claims history. Subsequently, Mr. Reade rang back at about lunchtime on the same day and told Mr. Anderson that he had *"good news, that FBD were covering the Coronavirus but only for public houses and not for restaurants"***.** Mr. Anderson informed Mr. Reade during this conversation that, if a decision was made to insure Lemon & Duke with FBD, a side letter would be required confirming that cover would be available in respect of Coronavirus. Mr. Reade was not called as a witness by FBD to controvert this evidence.

57. Following this telephone conversation, a meeting was set up at the Lemon & Duke premises with Mr. Paul Shanahan an FBD business development executive. That meeting took place on 2nd March, 2020 when Mr. Shanahan visited the Lemon & Duke. According to Mr. Anderson, Mr. Shanahan informed him that his understanding was that Mr. Anderson *"wanted a price and a side letter confirming cover for Coronavirus".* There was a difference between Mr. Anderson and Mr. Shanahan in relation to this aspect of Mr. Anderson's evidence. Mr. Shanahan thought that the conversation about a side letter took place later on that day when, in the course of a telephone call, Mr. Shanahan quoted a premium of €27,000. I do not believe, however, that this difference as to what is no more than a small point of detail is, in any sense, material. What is clear is that, prior to Mr. Anderson agreeing to place the insurance with FBD, he requested a *"side letter"* and this resulted in an email from Mr. Shanahan to Mr. Anderson later on the same day in which the following was stated:

"As outlined, our VFI/DPU policy which our policy will be written under is covering Coronavirus and it is the amount specified on the policy, the pub must be forcibly shut down and cannot be voluntary".

58. In the case of the policy issued to Lemon & Duke, the sum insured in respect of s. 3 of the policy is €3,229,200. The indemnity period is eighteen months. The policy number is 02944919/04/02.

59. There is no longer any dispute between the parties that the insurance was placed with FBD by the Lemon & Duke plaintiff on the strength of the representation contained in the email of 2nd March, 2020. As Mr. Shanahan fairly said in his evidence, *"the fact that Mr. Anderson was told that FBD's policy provided cover for Covid-19 weighed in FBD's favour in Mr. Anderson's decision to take up insurance with FBD"* although Mr. Shanahan also noted that Mr. Anderson was *"also concerned about the price of the premium".* As explained in more detail at a later point in this judgment, FBD subsequently purported to withdraw the representation on 15th April, 2020. Understandably, the withdrawal caused considerable consternation, worry and distress to Mr. Anderson. However, that withdrawal was relatively short lived. In para. 2.2 of the defence delivered on behalf of FBD in the Lemon & Duke proceedings on 10th June, 2020, the representations pleaded at paras. 5 and 6 of the Lemon & Duke statement of claim were admitted and it was also admitted that the Lemon & Duke plaintiff relied on the representation in entering into the policy. In para. 2.2 of the defence, it was expressly accepted that FBD represented and warranted to the plaintiff that the policy (namely policy number 02944919/04/02) would *"cover consequential loss if the Government ordered the closure of the Lemon & Duke public house as a result of the coronavirus outbreak and that the Plaintiff is entitled to rely on the terms and conditions of the policy on the assumption that the*

said representation and warranty is correct". It should be noted that no attempt is made, by the terms of this admission, to limit the relevance of a coronavirus outbreak to a 25 mile radius of the Lemon & Duke premises.

60. This admission by FBD is consistent with the claim made in the statement of claim previously delivered on behalf of the Lemon & Duke plaintiff on 15th May, 2020. In that version of the statement of claim, a declaration was sought to the effect that the Lemon & Duke plaintiff is entitled to an indemnity from FBD arising from the representation *"to the effect that the Plaintiff would be indemnified for consequential loss arising out of any enforced closure of the Lemon & Duke public house as a result of the Coronavirus".* However, on Day 2 of the hearing, counsel for the Lemon & Duke plaintiff intimated an intention to amend the statement of claim. In the amended statement of claim the relief now sought is for a declaration that the Lemon & Duke plaintiff is entitled to an indemnity from FBD arising from the representation *"to the effect that the Plaintiff would be indemnified for consequential loss arising out of Coronavirus in the event of there being an enforced closure of the Lemon & Duke … following same".*

61. Although the claim made in the amended statement of claim refers both to enforced closure of the premises and the coronavirus, the Lemon & Duke plaintiff, in the course of its closing submissions, has sought to make the case that the representation extends to consequential loss arising as a result of the coronavirus albeit that cover has to be initially triggered by an imposed closure. There is a significant difference between this approach and the previous position adopted in the unamended version of the statement of claim. As explained below, the closure of public houses at the behest of the Government in light of the presence of Covid-19 in Ireland (which is the immediate subject of the claim made in these proceedings) was

for a period running from March 2020 to June 2020. However, the impact of the Covid-19 pandemic has continued long beyond that period of closure. In the written submissions delivered on behalf of the Lemon & Duke plaintiff, the terms of the admission made by FBD in its defence are analysed and complaint is made that, in substance, FBD is seeking to confine the representation to consequential loss arising solely as a result of the closure of Lemon & Duke and not loss arising as a result of the coronavirus. Counsel for the Lemon & Duke plaintiff argued that the plain words of the written representation together with the evidence *"clearly establishes that the representation extends to consequential loss arising as a result of the coronavirus, albeit that there must be the trigger of a forced closure".* In substance, the Lemon & Duke plaintiff is seeking to obtain an indemnity in respect of the broader effects of the pandemic and is not confining its case (based on the representation) to the effects on its business arising from the closure of the public house in the period from March 2020 to June 2020 as a result of the outbreaks. In making this case, the Lemon & Duke plaintiff relies on the language of the representation contained in the email of 2nd March, 2020 but also seeks to rely on the conversations between Mr. Anderson and Mr. Reade and between Mr. Anderson and Mr. Shanahan. It is contended that all of these conversations amounted to representations to the effect that the Lemon & Duke plaintiff would have the benefit of cover for consequential loss sustained as a result of the coronavirus.

62. I do not believe that there is any basis upon which the ambit of the written representation contained in the email can be expanded by reference to any of the conversations which took place between Mr. Anderson and Mr. Reade or between Mr. Anderson and Mr. Shanahan. It is clear from the sequence of events and from the evidence that Mr. Anderson did not rely on any oral statements made by either Mr.

Reade or Mr. Shanahan. It was quite clear from Mr. Anderson's evidence that, insofar as his decision to place the insurance with FBD was concerned, he was not prepared to act on the basis of any oral representation made to him. His evidence was emphatic that he wanted a *"side letter".* He was not prepared to take out a policy of insurance with FBD in the absence of such a side letter. It was only after the side-letter was received (i.e. the email of 2nd March, 2020) that he agreed to proceed with the FBD policy. Moreover, his evidence was that, on receipt of the email of 2nd March, he was *"absolutely delighted and relieved".* He also said that: *"it was exactly like we discussed … . It was extremely clear. It was exactly what I was looking for. I was thrilled".* Thus, it was on the basis of this email, and not on the basis of any oral representation, that Mr. Anderson agreed to place the insurance with FBD.

63. As noted above, there is a dispute between the Lemon & Duke plaintiff and FBD as to the meaning of the email. This was an issue that was pursued in the course of the evidence of a number of witnesses. However, the meaning of the email is not to be assessed by reference to the subjective understanding of it by any of the parties to the proceedings. Like any other representation, the meaning of the email has to be determined on an objective basis. McDermott & McDermott in *"Contract Law",* 2nd ed. 2017, at para. 14.07 explain the position succinctly by reference to an observation made by Clarke J. in England in *Raiffeisen Zentralbank Osterriech AG v. Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at para. 82:

> *"14.07 The following statement by Clarke J. in the English High Court has been held to represent the law in this jurisdiction as well:*
>
> > *'In the case of an express statement, 'the court has to consider what a reasonable person would have understood from the words used in the context in which they were used'…. The answer to that question may*

> *depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker and of the person to whom it was made, and the relationship between them'".*

64. In my view, the email is quite clear. It does not represent that cover would be provided in respect of losses sustained solely as a consequence of the impact of coronavirus; it very clearly states that the *"pub must be forcibly shut down and cannot be voluntary".* The email does not state that cover will be available in respect of coronavirus even where there is no forcible shut-down. Likewise, the email does not state that cover is available for the continuing effects of coronavirus even after a shut-down comes to an end. On the contrary, the email clearly envisages two elements – namely the existence of the virus and a forcible closure of the Lemon & Duke premises. There is nothing to say that such a closure is merely the triggering event and that cover will continue thereafter even where the forcible shut-down ceases. While the subjective understanding of Mr. Anderson is not strictly relevant, that is precisely how it was described by Mr. Anderson during the course of his direct examination. On Day 5 of the hearing he was asked by counsel for the Lemon & Duke plaintiff what he understood the email to mean and his answer was:

> *"… very clearly I understood it to mean that if the premises were forcibly shut down because of the coronavirus… my business was protected…"*

65. On the same day, under cross examination, Mr. Anderson confirmed the position. In particular, he confirmed that he *"was sold insurance on the basis that if the premises were closed because of the coronavirus, it triggered payment. That is my understanding of it".* That evidence is consistent with an understanding that both factors required to be present namely (a) a closure of the premises (b) because of the coronavirus.

66. That said, on Day 5, the following exchange took place between counsel for FBD and Mr. Anderson:

"Q. Can I suggest to you; you were sold a policy to cover you for closure as a result of a contagious disease?

A. No.

Q. Isn't that right?

A. No, that's not right. I was sold a policy to cover me for the coronavirus and it only kicked in when there was a forced closure. That is my genuine understanding of this.

Q. And that's your reading of the e-mail that Mr. Shanahan sent to you?

A. Correct"

67. In the closing submissions made on behalf of the Lemon & Duke plaintiff, reliance was placed on this exchange as a basis for contending that, although, under the representation, an enforced closure was a necessary trigger to give rise to cover, once that trigger occurred, all of the losses sustained by the Lemon & Duke plaintiff thereafter arising from Covid-19 were covered under the policy including losses sustained after the enforced closure came to an end. In further support of this case, reliance was placed on an exchange which took place while Mr. Shanahan was cross examined by counsel for the Lemon & Duke plaintiff and similarly on evidence given by Ms. Tobin, in in the course of her cross-examination. Reliance was also placed on the terms of the letter sent on 15th April on behalf of FBD purporting to withdraw the representation. In that letter, it was expressly stated that, following receipt of an opinion from counsel, the representation that *"the Business Interruption Section of the Policy contains an indemnity* ***in respect of consequential loss arising from the***

Coronavirus epidemic is hereby withdrawn…" (emphasis added). It was stressed that there is no reference in this letter to enforced closure.

68. I am not persuaded that any of this material is relevant. It is of no assistance to the court to know what Mr. Shanahan or Ms. Tobin may have understood about the terms of the representation made in the email of 2nd March. As outlined earlier, the language of the email must be read objectively. The evidence of Mr. Shanahan as to his subjective intention is not relevant. Likewise, any view expressed by Ms. Tobin is not relevant. Insofar as the letter of 15th April is concerned, it is true that it does not refer to closure. However, in circumstances where it was purporting to withdraw the representation previously made, it is unsurprising that the writer of the letter would not replicate the representation in full. It was sufficient, for the purposes of the purported withdrawal, for the writer of the letter to refer to consequential loss arising from the pandemic. There was no need to be any more explicit. For completeness, I should also make clear that, although the written submissions delivered on behalf of the Lemon & Duke plaintiff make much of an exchange which took place in the course of the cross examination of Mr. Shanahan, I do not believe that the exchange can be said to have the effect contended for. There is a lack of clarity in the exchange which makes it impossible to construe it in the manner suggested by the plaintiff. In the circumstances, I do not propose to set out the exchange here.

69. For the reasons outlined above, I am of opinion that the representation contained in the email of 2nd March, 2020 must be assessed on an entirely objective basis. While the language used is somewhat imprecise, it seems to me that the language carries with it a very clear message that cover is available in respect of coronavirus but that, in addition, the premises must be shut down as a consequence of a forced rather than a voluntary closure. I do not believe that there is anything in the

language of the email to suggest that the closure is simply a trigger and that, once that trigger is engaged, it does not matter that the enforced closure ceases at a later time such that cover will continue to be provided in respect of losses sustained after the period of closure as a consequence of the ongoing impact of the pandemic. That is a gloss which Mr. Anderson has, at one point in his evidence, sought to put on the email. However, that is not, by any means, consistent with the evidence given by him elsewhere including that quoted in paras. 64 and 65 above. The extracts from his evidence quoted in those paragraphs do not treat closure simply as a trigger. While Mr. Anderson does use the word *"trigger"* in the passage quoted para. 65 above, it seems to me that, on any fair reading of his evidence, the message conveyed by him is that both a forced closure and the existence of the disease are necessary before cover is available. Even if I am mistaken in my analysis of his evidence, that does not seem to me to matter. As previously outlined, Mr. Anderson's subjective view as to the meaning of the email is not relevant. An objective approach must be taken.

70. It is important to note that the terms of the representation are not entirely consistent with the terms of the FBD policy. Under the relevant provision of the FBD policy (discussed below) cover is provided in relation to business interruption which arises as a result of a closure of the premises imposed by a government or local authority following an outbreak of infectious or contagious disease either on the premises itself or within a 25 mile radius of it. The email is plainly not qualified in that way. It makes no reference to any requirement as to outbreaks within a geographic radius. An issue arises as to whether a general representation of that kind can override the precise terms of a written contract. In the context of a different issue, FBD, in its closing written submissions, has sought to rely on an observation made by

Charleton J. in *Hoare v. Allied Irish Banks Plc* [2014] IEHC 221 at para. 60 to the effect that:

> *"Where there is an express misrepresentation as to the effect of one term within a written contract …, the argument is not that a person understood clear words differently to how they were expressed in a written agreement, which is an argument likely to fail, or that an entire transaction carefully reduced to words and signed is to no effect, … it is rather that a particular clause was expressly and by probable evidence set at naught by a misrepresentation as to its terms by the party reasonably to be regarded as having authority in terms of the contractual obligation…".*

71. In my view, FBD is not entitled to make that case insofar as there is a difference between the terms of the representation and the terms of the relevant provision of the policy. In the first place, FBD has expressly, by the terms of its defence, accepted that the representation was to the effect that the policy would cover consequential loss if the government ordered the closure of the premises as a result of the coronavirus outbreak and that the plaintiff was entitled to rely on the terms and conditions of the policy on the assumption that the representation to that effect is correct. The defence did not seek to make the case that the government closure had to be as a result of an outbreak within 25 miles of the premises. Secondly, it is quite clear from Mr. Anderson's evidence (which I accept) that he was expressly looking for cover in respect of a closure of the Lemon & Duke premises as a result of a Covid-19 outbreak. In making that request and in the FBD response to that request, there was no reference, on either side, to the need for the outbreak to arise within 25 miles of the premises. It is true that Mr. Anderson had seen the relevant terms of the policy in advance of receipt of the representation. It is also true that, at times during his

cross-examination, he appeared to accept that the representation was on similar terms to the policy. However, at no stage was it put to him that the cover related solely to closures arising from outbreaks within 25 miles of the premises. On Day 5 at p. 76, it was put to him that the cover related to an imposed closure of the premises in respect of an outbreak of a contagious or infectious disease. That is consistent with the admission made in the defence. I therefore do not believe that FBD is entitled to suggest that Mr. Anderson accepted that cover was limited to closures prompted by outbreaks within 25 miles of the premises. Moreover, when it was put to him, on the same day at p. 95, that he had only obtained cover on the basis of the policy, he was adamant that he was sold insurance on the basis that there would be cover if the bar was closed because of the coronavirus. In my view, that evidence is consistent with the terms of the representation contained in the email and with the previous exchanges which took place between Mr. Anderson, on the one hand, and the representatives of FBD, on the other. In these particular circumstances, I have come to the conclusion that the terms of the representation must apply in the case of the Lemon & Duke plaintiff in place of the provision in the policy that cover for business interruption is confined to cases where the imposed closure arises in respect of outbreaks within 25 miles of the premises. In all other respects, it seems to me that the principle described by Charleton J. clearly applies. There is nothing in the terms of the representation or the evidence to suggest that the other provisions of the policy were overridden.

72. At a later point in this judgment, I will address, to the extent necessary, the case made by the Lemon & Duke plaintiff in relation to misrepresentation. I will also address the claim made by it for aggravated damages. At this point in the judgment, I have attempted to confine the findings of fact to those which are relevant to the position of the parties prior to the putting in place of the respective policies of

insurance. It is important to record here that the interactions which took place between Mr. Anderson on behalf of the Lemon & Duke plaintiff and Mr. Reade and Mr. Shanahan on behalf of FBD do not form part of the relevant factual background in determining the meaning to be attributed to the policy terms dealing with business interruption claims. As noted previously, the relevant principles governing the interpretation of contracts exclude any consideration of the negotiations between the parties or any evidence as to their subjective understanding of what has been agreed.

The factors to be borne in mind in construing the FBD policy

73. In construing the policy, the court is required to have regard to the relevant factual and legal background. That was made very clear by the Supreme Court in the *MIBI* case. In this context, there was some discussion at the hearing as to whether the court should first consider the text of the policy before addressing the relevant factual matrix or *vice versa*. FBD suggested that it would be important to start with the context and criticised the approach taken by the Divisional Court in London in *Financial Conduct Authority v. Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) (*"the FCA case"*) where, according to counsel for FBD, there was insufficient consideration of the factual background. I do not believe, however, that it ultimately matters whether one takes, as a starting point, the text of the contract, or the factual and legal backdrop against which it was concluded. What is important is that appropriate consideration should be given both to the text and the context. Although the decisions of the Supreme Court in *Marlan Homes v. Walsh* [2012] IESC 23 and *ICDL v. European Computer Driving Licences Foundation* [2012] 3 I.R. 327 suggest that a court should commence with an examination of the words used in the contract, the subsequent decisions in the *MIBI* case (in particular para. 22 of the judgment of O'Donnell J. and paras. 10.4, 10.9 and 10. 11 of the judgment of Clarke J.) and in

Jackie Greene Construction v. IBRC [2019] IESC 2 seem to me to have adopted a less dogmatic approach. The relevant principle was explained as follows by Lord Hodge (in a manner consistent with the views of Clarke and O'Donnell JJ.) in *Wood v. Capita Insurance Services Ltd* [2017] AC 1173 at pp. 1179-1180:

> *"12. …To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. …".*

74. Bearing that approach in mind, I propose to consider the relevant factual and legal matrix, in the first instance, and then to address, in more detail, the terms of the

contract. I do so purely for convenience. I am not to be taken as endorsing the submission made by counsel for FBD that one should start with a consideration of the relevant background. On the contrary, for the reasons just outlined, it is necessary to give due weight to both the text and the context.

The relevant factual background

75. There are a number of elements of the background that seem to me to be relevant. These include the basic fact that each of the plaintiffs operate busy public houses which are capable of and which do attract significant numbers of customers. They each predominantly provide indoor settings for their customers to congregate and drink alcohol and, in all of the cases save Sean's Bar, to also dine if they wish to do so. Even if Covid-19 had never jumped from its original animal host to humans, the congregation of significant numbers of people in an indoor setting of that kind is plainly relevant in the context of outbreaks of contagious or infectious diseases. As noted previously, three of the public houses in issue are situated in Dublin. As the map illustrating the extent of the 25 mile radius around the Leopardstown Inn demonstrates very clearly, the area encompassed within that radius is the most densely populated area in the State. While I did not have any evidence as to the precise population that falls within that area, I believe I am entitled to take judicial notice of the fact that more than one million people live in County Dublin. In the case of Sean's Bar, the population within a 25 mile radius would be very significantly less. However, within that radius are a number of significant towns in addition to Athlone such as Tullamore, County Offaly. That radius is also likely to take in at least some of the outskirts of Mullingar. The population of Athlone itself is likely to be in excess of 20,000. In the circumstances just described, there can be no doubt but that a 25

mile radius around any of the four public houses in issue represents an extensive and well populated area.

76. It is also part of the relevant factual background that the FBD policy in issue was specifically designed for the public house trade and that, save for the provision of the email of 2nd March in the case of Lemon & Duke, there was no negotiation between the parties as to the terms on which business interruption cover was offered. The fact that it is a standard form policy is of some relevance although I would not go so far as to suggest that this factor makes the background irrelevant. The plaintiffs referred in this context to *AIB Group (UK) plc v. Martin* [2001] UKHL 63 where Lord Millett, at para. 7, observed that:

> *"A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly, the relevance of the factual background of a particular case to its interpretation is necessarily limited. The danger, of course, is that a standard form may be employed in circumstances for which it was not designed. Unless the context in a particular case shows that this has happened, however, the interpretation of the form ought not to be affected by the factual background".*

While I accept that the fact that the FBD policy constitutes a standard form contract is relevant, I do not believe that the factual or legal background can be discarded in the manner suggested by Lord Millett. The fact remains that the policy is a bilateral contract and, as O'Donnell J. explained in the *MIBI* case, it is the function of the court to try and understand from all the available information including the words used what it is that a reasonable person would consider the parties to have agreed. As noted above, it is essential to keep in mind that the FBD policy was designed specifically for

the pub trade. The nature of that trade is therefore a key aspect of the context against which the policy is to be construed. Nonetheless, the lack of negotiation of the terms is relevant. The position was explained as follows by Clarke C.J. in *Jackie Greene Construction Ltd v. Irish Bank Resolution Corporation (In Special Liquidation)* [2019] IESC 2 at para. 5.5:

> *"5.5 … it is clear from the authorities … that part of the relevant context is the nature of the document governing legal rights and obligations whose construction is at issue. The more formal the document the less one would expect to find errors or looseness of language. Contractual documents entered into after careful negotiations between experienced lawyers on behalf of the parties may be seen to operate in a different context to, for example, the informal rules of a small association. In all cases the text is important, but part of the context in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed".*

The only areas involving any element of bargaining were in relation to the sums insured, the types of insurance required (whether, for example, cover was sought in respect of household goods and all risks which were available under ss. 4 and 5 of the policy respectively) and the extent of the indemnity period covered. Thus, the language of the specific terms of the policy addressing the ambit and extent of the cover in issue in these proceedings was not the subject of any negotiation between the parties at least in so far as the Leopardstown Inn, Sinnotts and Sean's Bar are concerned. That said, each of the parties to all four proceedings made a choice in entering into the FBD policy. Each of the plaintiffs could have chosen a rival policy. Equally, FBD could have decided not to quote for the business or to have done so on

different terms. In such circumstances, it seems to me that *"the text in context"* approach remains appropriate.

77. It is clear from the evidence in this case that the form of s. 3 of the FBD policy has not changed since the 1980s when it was included in the predecessor VFI policy. Mr. Alan Grace, the insurance expert called on behalf of the plaintiffs, gave uncontested evidence that FBD is regarded as one of the market leaders in the insurance of public houses and that it has a long association and expertise in the sector combined with direct relationships with its clients which represents a unique model for commercial insurance in the Irish market. In the years since s. 3 was devised, a number of significant outbreaks of infectious diseases have occurred. For example, there was a swine flu pandemic in 2009. We have also witnessed the emergence of SARS in 2003 albeit that it was largely confined, at that time, to the Far East. While Ms. Tobin, in her witness statement, suggested that swine flu was likely to have given rise to only a small number of sporadic cases in Ireland, Ms. Tobin very fairly accepted, under cross-examination, that swine flu was classified as a global pandemic and that there were 3,000 cases in Ireland and 20 deaths attributable to it. Ms. Tobin further explained that what she had said in her witness statement was based on her own personal experience where a number of colleagues with whom she worked in Zurich Insurance had been out of work with swine flu for a time.

78. It is also clear from the evidence that it is a feature of a significant number of policies of insurance available on the Irish market that some level of cover arising from outbreaks of infectious disease is offered as an element of business interruption cover. However, over the course of time, many insurers have introduced limitations or restrictions on the level of cover available. In this context, Mr. Grace gave evidence (which was not significantly contested by FBD) that many insurers will offer

an extension of cover in respect of consequential loss in relation to infectious or contagious diseases but that many of them will apply some or all of the following underwriting criteria/restrictions:

(a) The cover may only be provided on request with inner limits and for an additional premium;

(b) The cover may be restricted to outbreaks at the premises itself. This is a feature of the policies offered by Allianz and RSA;

(c) The cover can sometimes be restricted to an inner maximum monetary limit such as the limit of €250,000 available in the Allianz policy previously held by the Lemon & Duke plaintiff;

(d) Frequently, the cover will usually be limited to human infectious diseases and notifiable infectious diseases.

79. In his evidence, Mr. Grace also explained that, following the SARS pandemic in 2003/2004, some insurers have become more restrictive in their approach to the relevant extension of cover. Some insurers have taken the extension out of their policies completely. Mr. Grace gave evidence that this includes the Aviva Trademark policy. Some insurers have inserted exclusions in respect of certain named diseases (such as SARS and other related respiratory illnesses). Mr. Grace instanced, as an example of this, a policy offered by AIG. Mr. Grace also gave evidence that some insurers (such as Travellers) have simply named the diseases that are covered under the extension so that any outbreaks of any disease not named are not covered. Other insurers have restricted the indemnity period under the extension to, for example, three months in the case of AXA. Mr. Grace explained that all of these measures are designed by insurers to avoid a large and somewhat unknown accumulation of exposure. Mr. Grace said that it was striking that none of these measures were taken

by FBD in relation to the public house policy in question. In contrast, in the case of the FBD Business Complete policy, Mr. Grace noted that inner limits are applied in respect of this extension of €15,000 and cover is also expressly restricted to infectious diseases occurring on the premises of the insured. In addition, this policy also lists the specific diseases that are covered. It seems to me that the evidence of Mr. Grace in relation to these matters forms part of the relevant factual matrix in circumstances where the existence of these policies and their terms constitutes information which was reasonably available to persons in the position of the plaintiff seeking insurance for public house premises in Ireland at the time the policies in issue were put in place. Such material would have been available to the plaintiffs had they searched for it themselves or sought advice from a broker.

80. Under cross-examination, Mr. Grace confirmed that no Irish insurer uses the word *"pandemic"* in a policy of insurance. He explained that *"infectious disease"* is used. He also confirmed that it is possible to obtain cover for pandemic risk *per se* through the London market for particular events or large public gatherings like concerts or sporting events and that, where such cover is sought, it would be on a bespoke basis organised by a broker capable of dealing with the London market. In his evidence, Mr. Hills also confirmed that such cover was available on a bespoke basis in the London market. Mr. Hills confirmed that this was a highly specialised product that responds specifically and exclusively to pandemics and he had no comment to make on whether more generally available policies respond to pandemics. In the course of his cross-examination, Mr. Hills was taken to a Zurich policy available on the English market for shops in which an amendment had been made by Zurich to the business interruption cover available under the policy to expressly exclude loss from any infectious disease which has been declared a pandemic by

W.H.O. While that policy is not available to publicans in the Irish market, it illustrates the way in which insurers can, if they are so minded, restrict cover available for infectious diseases. The ability of insurers to expressly limit their exposure in that way seems to me to be a relevant aspect of the factual matrix.

81. Under cross-examination Mr. Grace confirmed that a key principle for an underwriter is to try to ensure that, in a book of business, the risks are uncorrelated insofar as this is possible and, if there is a degree of correlation between them, the risk is mitigated through reinsurance and other techniques. He explained that, as the business of an insurer grows, its ability to absorb losses increases and this enables the insurer to take on greater risks. He also agreed that the following criteria would be important for an underwriter:

(a) That the risk insured is definable and financially measurable;

(b) That the risk should be a fortuity;

(c) While it might be desirable that risks should be random and independent, an insurer may target a certain sector such that the risks might not be random in those circumstances;

(d) As far as possible, an underwriter will try to achieve independent risks;

(e) An insurer will wish to know its exposure such that the likelihood of risk should be calculable;

(f) It was also put to him that insurers will wish to limit the risk of catastrophically large losses but his answer was that reinsurance is put in place to deal with catastrophic losses;

(g) It was also suggested to him, on cross-examination, that, in relation to pandemics, there is no underlying data that allows an underwriter to calculate the risk to which the insurer is exposed. His answer was that the

insurer will have some data for the extent of the exposure by reference, for example, to the sums insured. This would provide evidence of the total exposure in the worst possible case. Mr. Grace further explained that, in the case of cover for diseases, with the advent of SARS, AIDS and swine flu, insurers took action by limiting the cover available in one or more of the ways summarised in paras. 79-80 above.

(h) Mr. Grace also gave evidence that, one of the techniques used by insurers in relation to cover of the kind in issue in these proceedings is by imposing a geographical restriction.

82. Again, it seems to me that the evidence given by Mr. Grace constitutes material which would have been reasonably available to persons in the position of the plaintiffs albeit that they might have needed to go to a broker to have such material explained to them. In the course of both his direct evidence and his evidence under cross-examination, Mr. Grace also dealt with the language used in a number of other policies available in the Irish market which provide some level of cover in respect of diseases. These policies are examined in more detail below when I look at the specific language used in the FBD policy in issue. At this point, it is sufficient to note that not all of the policies of insurance available on the Irish market require both an imposed closure and an outbreak of disease. An example is the FBD Business Complete policy which provides cover against business interruption resulting from (*inter alia*) one or more of the notifiable diseases listed in the table to para. H of s.2 of the policy. A further example is to be found in the AXA small business insurance policy (targeted at shops, offices and surgeries) which provides cover in respect of business interference arising from any human infectious or contagious disease (excluding AIDS) where a local authority has stipulated that an outbreak of that

disease should be notified to it. A further example is to be found in the AXA Enterprise insurance policy which provides cover for business interruption as a result of the occurrence of one or more specified human infectious or contagious diseases manifested by any person at the premises insured or within a 25 mile radius of it. There is a somewhat similar provision in the AXIS Specialty Europe Contessa Commercial Combined policy save that, in that case, there is no list of the diseases covered. I was also referred to the ERGO commercial insurance policy which, in ss. 9 and 10, provides business interruption cover as a consequence of a notifiable disease manifested on the premises or as a consequence of an outbreak of a notifiable disease within 25 miles of the premises. In the case of the Liberty Insurance GEI commercial combined policy, there is cover in respect of loss arising from business interruption in consequence of (*inter alia*) the occurrence of a notifiable disease at the premises. A similar clause is also included in the QBE Insurance Combined Commercial Insurance policy. Thus, the availability of cover for disease (as opposed to any closure following the outbreak of disease) is, obviously, a relevant element of the factual background. If a publican wished to obtain cover for outbreaks of disease *per se*, it would have been open to a publican to do so.

83. It is also the case that, as Ms. Tobin, the chief underwriting officer of FBD, confirmed in her evidence, no additional premium is charged by FBD for the extension of cover in issue. According to Mr. Grace, the approach of FBD in this regard is consistent with the approach of other insurers whereby the extension of cover is provided as standard without any additional premium being charged. The same point was made by Mr. Sreenan in his report. However, there is nothing in the material which is provided to policy holders to inform them that this element of the cover is provided for free. In the case of at least three of the plaintiffs, the overall

premium paid for the policy is broken down between the various sections of the policies including s. 3 without any suggestion that certain elements of s. 3 are provided at no charge. From the perspective of the policy holder, it would appear that the breakdown of the premium in respect of s. 3 cover is applied in respect of every element of that cover. There is nothing on the face of the policy, or of the policy schedule or any of the other documents issued by FBD in relation to the policy which informs the reader that this element of the cover is provided for free.

The Covid-19 pandemic

84. With the exception of the Lemon & Duke policy, the Covid-19 pandemic could not be said to form part of the factual background to the putting in place of the relevant policies of insurance. The existence of Covid-19 was not known prior to the inception of the relevant policies in respect of the three remaining plaintiffs. The absence of any prior knowledge of the existence of Covid-19 is part of the relevant factual matrix in relation to those three policies. That said, the emergence of a new disease of pandemic proportions was always a possibility. The emergence of SARS had occurred in the relatively recent past and the horrors of the 1918 influenza pandemic and the less severe 1968 influenza pandemic are matters of record and are well known. Thus, the possibility of the emergence of a new disease and the possibility of a pandemic occurring at any time cannot be excluded from the relevant factual background against which the terms of the policies are to be construed. It is therefore instructive to consider how the events relating to the emergence of Covid-19 unfolded. It is also necessary to describe the emergence of the Covid-19 pandemic in order to determine whether the losses which the plaintiffs claim to have suffered are covered under the terms of the FBD policy.

85. On 31st December, 2019, the Wuhan Municipal Health Commission reported a cluster of cases of pneumonia in Wuhan Hubei Province, China to the World Health Organisation (*"W.H.O.").* Subsequently, on 14th January, 2020, W.H.O. issued a press release that referred to a novel coronavirus which, at that stage, it was believed did not transmit readily between humans. However, within a few days, on 22nd January, 2020 W.H.O. issued a further press release to confirm that human-to-human transmission appeared to be taking place in Wuhan. On the following day (23rd January, 2020) Wuhan, a city of more than 11 million people, was cut off by the Chinese authorities. Further lockdowns followed in other Chinese cities.

86. On 27th January, 2020 the first meeting of the National Public Health Emergency Team (*"NPHET")* was convened in Ireland to discuss the novel coronavirus. On 2nd February, 2020 NPHET issued a statement:

> *"Ireland has advanced plans in place as part of its comprehensive preparedness to deal with public health emergencies such as COVID-19 (Coronavirus). These plans have helped us to respond to previous incidents such as pandemic influenza, SARS and MERS.*
>
> *To date, there are no confirmed cases of COVID-19… in Ireland".*

Five days later, on 7th February, 2020, NPHET confirmed that, as of Monday 3rd February, 2020, fifteen suspected cases of infection had been tested. By 11th February, 2020, 65 suspected cases had been tested. However, no case in Ireland had yet been confirmed. On 14th February, 2020, France announced the first coronavirus death in Europe. On 18th February, 2020, NPHET began discussions of W.H.O. guidance on large gatherings of people and suggested that similar guidance would be developed for Ireland. On 20th February, 2020, Covid-19 was made a notifiable disease in Ireland under the Health Act, 1947 (*"the 1947 Act"*). This was done by

means of an amendment made to the Infectious Diseases Regulations, 1981 (S.I. No. 390 of 1981) by which the Minister, in exercise of powers conferred by the 1947 Act, specifies those infectious diseases which are required to be notified to the public health authorities by medical practitioners. The diseases in question include anthrax, brucellosis, malaria, measles, smallpox and tuberculosis. The amendment was effected by the Infectious Diseases (Amendment) Regulations 2020 (S.I. No. 53 of 2020) which specified Covid-19 as a notifiable disease and specified the virus SARS-CoV-2 as its causative pathogen. In this context, medical science makes a distinction between the virus, on the one hand, and the disease that the virus can cause to an infected person, on the other, namely Coronavirus 2019 (i.e. Covid-19).

87. On 23rd February, 2020, the Italian government established a lockdown of eleven municipalities in two northern provinces. On 25th February, 2020, NPHET recommended that the Six Nations Rugby match between Ireland and Italy should be cancelled. On 26th February, 2020, the rugby fixture with Italy was postponed. On 29th February, 2020, the first Irish case of Covid-19 was reported namely a male who had returned to Ireland from Northern Italy. On 3rd March, 2020, the second confirmed case of Covid-19 was identified namely a female who had travelled to Ireland from Northern Italy. Between then and 7th March, 2020, a number of further cases of Covid-19 were confirmed most of them associated with travel from Northern Italy. The precise location of the infected persons was not revealed by the health authorities but, by this time, there were a number of confirmed cases in the East, the South and the West of the country. On 8th March, 2020, NPHET recommended that the traditional events scheduled for St. Patricks Day should not proceed. On the following day, the St. Patricks Day Parade scheduled to take place in Dublin was cancelled. Similar cancellations occurred throughout Ireland.

88. As early as 5th March, 2020, FBD was involved in internal discussions in respect of its potential exposure, under the public house policy, in respect of Covid-19. In an email dated 5th March, 2020 from Mr. Sean Kelleher (deputy chief underwriting officer of FBD) to Ms. Kate Tobin, the chief underwriting officer, he suggested (*inter alia*) that *"there is every chance Policy wordings will be challenged and Cover exclusions or scope may be interpreted differently than as intended".* On the same day, in an email from Ms. Tobin to Ms. Fiona Muldoon (the then chief executive of FBD) Ms. Tobin indicated that there has been a number of customer enquiries about coverage. Ms. Tobin gave evidence that, at this time, she envisaged that there could be events where Covid-19 could trigger the conditions for cover under the policy although she stressed that, in such circumstances, the policy holder would have to show that the particular conditions for cover under the policy had been satisfied. By way of example, she instanced a scenario where a pub had to close because a member of staff had Covid-19 on the premises and the pub was made subject to a closure order for a number of days while the premises were cleaned. She confirmed that it did not occur to her that, because Covid-19 was a transnational disease, cover would not be triggered. It should be noted that the latter evidence was given during the course of her cross-examination by counsel for the plaintiffs who pursued the issue in the context of the case made by FBD, at the outset of the hearing, that pandemic coverage was plainly not contemplated or intended by the FBD policy.

89. In the days which followed Mr. Kelleher's email of 5th March, 2020, the question of potential exposure under the public house policy was the subject of further discussion within FBD. In particular, there was significant debate as to how FBD should respond to queries from policy holders in respect of cover. Thus, on 9th March, 2020, Mr. Kelleher emailed Ms. Tobin (together with a number of colleagues)

in which he suggested the following proposed text for communications with policy holders:

> *"…No Policy coverage exists to protect against Financial Loss arising from the coronavirus/Covid-19 outbreaks. Our Policies have been designed and priced to cover standard risks, not those that are extraordinary such as Covid-19."*

The proposed text also stated that Covid-19 is not a notifiable disease and that:

"Our Pub Policy does not contain an extension for Notifiable diseases but does include a limited coverage for imposed closure following an outbreak on or with (sic) 25 miles of premises. In order for cover to activate it must be an imposed closure following an actual specific localised outbreak and not a general quarantine".

90. Ms. Tobin confirmed in evidence that she did not believe that the first iteration of the proposed text was correct insofar as it suggested that no policy coverage existed to protect against losses arising from a Covid-19 outbreak. In her responding email to Mr. Kelleher of 9th March, 2020, she raised a query to that effect. She also suggested that the text should refer to contagious or infectious diseases rather than notifiable diseases. The suggestion made by Ms. Tobin is consistent with the text of the relevant section of the policy. Ultimately, on 10th March, 2020 Ms. Tobin agreed the following language in an email from her to Mr. Kelleher:

> "*We have been receiving a number of queries on business policy cover over recent days, specifically as relates to business interruption cover relating to the Coronavirus/Covid-19 outbreak. It's important to note that our products have been designed and priced to cover standard foreseeable risks, not those that are extraordinary such as Coronavirus/Covid-19".*

As will be seen from this text, the reference to *"no policy coverage exists"* has been removed. Under cross-examination, Ms. Tobin confirmed that this represented the considered view of FBD at the time. Ms. Tobin was entirely frank and measured in her evidence. She was a very impressive witness. She confirmed, under cross-examination, that it remained her view that cover could be triggered under the policy in respect of Covid-19 if the policy conditions were satisfied. All of that said, it must, again, be kept in mind that the subjective understanding of one party to a contract is not admissible evidence in relation to the interpretation of the contract. I record Ms. Tobin's evidence at this point as part of the chronology of events relating to the unfolding of the Covid-19 pandemic in Ireland.

91. On 9th March, 2020 significant restrictions were introduced throughout Italy in order to slow the spread of the virus. On 11th March, 2020, W.H.O. declared Covid-19 to be a pandemic. Thus, Covid-19 had not been declared to be a pandemic at the time the Lemon & Duke policy was agreed. On the same day, NPHET determined that it was necessary to move Ireland to the *"delay phase"* with additional actions required to be taken to disrupt the spread of Covid-19. The NPHET advice included:

(a) Individuals with symptoms were required to self-isolate for a period of fourteen days;

(b) It was recommended that individuals should reduce discretionary social contacts as much as possible;

(c) Elderly and medically vulnerable people were recommended to reduce contacts outside the home as much as possible;

(d) Mass gatherings involving more than 100 people indoors or more than 500 people outdoors were advised against;

(e) Museums, galleries and tourism sites should be closed;

(f) Schools, crèches, other childcare facilities and higher education institutions should be closed;

(g) Workplace contacts should be reduced where possible and remote working practices should be implemented with teleconferencing where possible. In addition, work times and break times should be staggered, where possible;

(h) There should be restrictions on visiting at hospitals, long term care settings, mental health facilities and prisons. There should also be spacing measures put in place in homeless shelters.

92. On 12th March, 2020, the Taoiseach, in the course of a visit to the United States to mark St. Patrick's Day, made a speech in Washington announcing that all indoor gatherings of more than 100 people and outdoor events involving more than 500 should be cancelled and that, with effect from 13th March, 2020, all schools, colleges and cultural institutions should be closed. The Taoiseach also encouraged people, insofar as possible, to work from home. These announcements had an impact on people's behaviour. This is reflected in the letter sent by Mr. Cooney of Hyper Trust Ltd to his bankers on 14th March, 2020 in which he stated that since the announcement on Thursday 12th March to close schools and limit indoor gatherings, *"we have seen a significant decline in our revenue. We predict this decline to increase over the next number of days as the numbers of those with the virus rise".* In the same email Mr. Cooney stated that *"we are fortunate to have this covered under our business interruption insurance cover".*

93. On 12th March, 2020, there were 27 new cases of Covid-19 confirmed in Ireland of which two were associated with community transmission. On 13th March, 2020, the Department of Foreign Affairs advised that a high degree of caution should be exercised when travelling to European countries. There were a further 20 new

cases of Covid-19 confirmed in Ireland on 13th March, 39 new cases on 14th March, and 40 new cases on 15th March. In the meantime, each of the plaintiffs reported a drop-off in business in the days leading up to 15th March, 2020. During the week ending on 15th March, 2020, a *"close the pubs"* campaign was initiated on social media and one or more video-clips were widely circulated which showed a packed public house reputed to be in the Temple Bar area of Dublin. On 15th March, 2020, the Government requested a meeting with representatives of the VFI and LVA. In advance of the meeting, the VFI issued a press release in which they stated that they would seek *"urgent clarity from Government… in light of events since last Thursday's introduction of guidelines about social distancing for indoor venues".* The press statement quoted Mr. Padraig Cribben, the VFI chief executive as saying:

> *"Publicans have tried their best to implement social distancing guidelines but for many it's proved an impossible task. While we fully support the government's health guidelines our members do require urgent clarity about how to manage the current situation.*
>
> *We stand ready to help in any way we can but the government must give us clear and unambiguous instructions that we can pass on to members. Like all small business owners, publicans are worried about the future.*
>
> *We hope today will bring some certainty about the immediate future. Business supports are essential if the trade is to make a comeback".*

94. On the same day, the LVA also issued a press release in which they stated that they expected clarity would be provided on how public houses should act during the coronavirus crisis following the meeting with Government scheduled for the same day. The press release continued:

"The LVA has been seeking clarity since Thursday with the current social distancing guidelines being unworkable in a pub setting.

The LVA welcomes the responsible actions taken by the majority of Dublin pubs over the weekend, with a large number deciding to close of their own volition and others seeking to follow the guidelines to the best of their ability by limiting numbers, implementing strict hygiene protocols and spacing out tables.

We are also aware of social media reports of a small number of pubs flouting the coronavirus guidance. These pubs have been seriously irresponsible and their behaviour is completely and utterly unacceptable.

From the outset, the LVA has been calling for clear expert guidance from the Government and the Expert Advisory Group to ensure there is a consistent approach for all 7,000 pubs around the country.

Protecting the public health is the overriding priority.

The LVA is fully committed to playing our part. We will absolutely support whatever measures the Government deems necessary at today's meeting".

95. Thereafter, a lengthy meeting took place on the same day between representatives of the VFI and the LVA and representatives of the Government which concluded with a statement issued by the Department of the Taoiseach on 15th March, 2020 in the following terms:

- *"**All pubs asked to close from tonight***
- ***government strongly advises against any 'House Parties'***

  Following discussions today with the … LVA and the … VFI, the government is now calling on all public houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.

> *The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.*
>
> *For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.*
>
> *The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night.*
>
> *While the government acknowledges that the majority of the public and pub owners are behaving responsibly, it believes it is important that all pubs are closed in advance of St. Patrick's Day".* (bold in original)

96. In the course of the cross-examination of Mr. Anderson by counsel for FBD, it was put to him that the LVA actually supported the Government position. Mr. Anderson accepted that this was the case. It was also put to Mr. Anderson that one of the reasons underlying the LVA support for the Government measures was the *"wholly obvious fact that the position in respect of triggering business interruption insurance was something that fed into this position?".* While Mr. Anderson said that he could not speak for the LVA, he acknowledged that this factor was *"very clear to me".*

97. Following the closure of public houses after the Government press release on 15th March, 2020, each of the plaintiffs expected that cover would be available under the FBD policy. However, in the course of a number of interactions which took place in the immediate aftermath of the Government announcement, FBD maintained, *inter*

alia, that the closure of public houses was voluntary and did not take place as a consequence of a forced Government closure. As early as 19th March, 2020, McCann Fitzgerald, acting on behalf of the Leopardstown Inn plaintiff, Hyper Trust Ltd, wrote to FBD calling for an immediate confirmation that cover would be available under the policy. This was met by a holding response from AMOSS solicitors on behalf of FBD. In their response of 20th March, 2020, AMOSS indicated that the issues arising from the pandemic *"are complex and require careful and thoughtful consideration. ... we are consulting with Senior Counsel ..."*. A more detailed response was sent by AMOSS on 27th March, 2020 contending that there had been no imposed closure of the premises; that, in any event, the closure was not caused by outbreaks of the disease within 25 miles of the premises but *"was caused by national considerations resulting from the global pandemic including ... the requirements of social distancing"*. (Although that case continues to be made by FBD, it should be noted that in FBD's response dated 29th June, 2020 to a request for particulars raised by the plaintiff in the Sinnotts proceedings, it was accepted that there had been cases of Covid-19 within 25 miles of Sinnotts before its closure on 15th March, 2020 but it was contended that the imposed closure was not decided by reference to or due to this and did not follow from it. Similar concessions have been made in the Leopardstown Inn and Sean's Bar proceedings). The AMOSS letter of 20th March, 2020 also maintained that the policy could not reasonably be interpreted as extending to a pandemic situation which, it was suggested, was entirely different to localised outbreaks of contagious or infectious diseases that *"might reasonably have been contemplated by the parties when this policy was entered into"*. The case was also made in the letter that the losses sustained by the Leopardstown Inn business were caused by social distancing practices and the widespread public concern regarding the risk of infection.

A similar letter was sent to the owner of Sean's Bar on 8th April, 2020 and to the owner of Sinnotts on 15th April, 2020. A letter in broadly similar terms was also sent to the owner of the Lemon & Duke on 15th April, 2020.

98. On 27th March, 2020, the Minister for Finance and Public Expenditure (as he then was) wrote to the acting chief executive of Insurance Ireland (the representative association of many insurance companies in Ireland) contesting the suggestion made by insurers that the closure of public houses was not a forced closure. In his letter of 27th March, 2020, the Minister stated:

> *"In terms of business interruption insurance you will no doubt be aware of the issues that are being raised by a number of business groups…. The current business interruption issue arose as a result of the Government's … advice that pubs and clubs also close because of Covid-19. On foot of these announcements I am aware that a number of businesses were of the view that their business interruption insurance would cover them for this situation. The feedback that I received, however, is that virtually all insurers are indicating that there is no business interruption cover … for a variety of reasons, including that it is not a specified disease of the policy, that closure has not been due to Covid-19 at the premises and that insurers do not cover pandemics, etc.*
>
> *I fully accept that whether a business can make a claim of this type will depend on the specifics of their policy and that in many instances businesses do not in fact have Covid-19 cover. However, I am concerned that there is a perception … that insurers are not acting honestly or fairly in the best interests of the customer. I believe this is something that your members need to urgently consider in terms of how they will deal with these issues. … I*

understand that some of your members have taken the view that the Government's advice to close businesses is not the same as a Government direction or mandate to do so. Consequently, it appears that some insurers are refusing to pay out claims based on this distinction.

Let me absolutely clear on this point; I fundamentally disagree with any attempts to benefit from such an interpretation and I would like to use this opportunity to confirm my view that Government advice arising from the Covid-19 pandemic amounts to the same thing as a government direction or mandate and that your members should not try to distinguish between these situations in order to avoid payment of claims…."

99. In the meantime, on 20th March, 2020, the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act, 2020 (*"the 2020 Act")* was enacted empowering the Minister for Health to enact Regulations to introduce various restrictions to prevent the spread of Covid-19. Among the powers given to the Minister was a power to prohibit and restrict the holding of certain events and to close premises. On 22nd March, 2020, it was confirmed that, up to midnight on 20th March, 20202, there had been a total of 712 cases of Covid-19 notified in the State. This included 402 cases notified in County Dublin. On 24th March, 2020, the government announced further restrictions to halt the spread of Covid-19 which directed all non-essential retail outlets to close. On 27th March, 2020, the government requested everyone to stay at home from midnight until 12th April, 2020 with only essential travel for food and other essential provisions permitted. People were also permitted to exercise within two kilometres of their homes.

100. On 10th April, 2020, the Taoiseach announced that the measures introduced at the end of March would remain in place until 5th May, 2020. On 7th April, 2020 the

Minister for Health, in the Health Act, 1947 (Affected Areas) Order 2020 (S.I. No. 120 of 2020) issued pursuant to the powers conferred by s. 31B of the 1947 Act) declared that:

> *"The State (being every area or region thereof) is an area where there is known or thought to be sustained human transmission of Covid-19".*

On 1st May, 2020, the measures announced on 10th April were extended until 18th May, 2020 save that the two kilometre limit was extended to five kilometres. On 18th May, 2020, there was some reopening of business as part of the first phase of easing restrictions. This allowed work to recommence on construction sites. On 8th June, 2020, most retailers were permitted to open (with crowd control restrictions in place) as part of the second phase of easing of restrictions. At this point, people were allowed to travel within their county or up to twenty kilometres (whichever was further).

101. Insofar as public houses are concerned, on 29th June, 2020, under the third phase of the easing of restrictions, public houses serving food were permitted to reopen subject to certain restrictions. The Leopardstown Inn and Sinnotts reopened on the same day. On 3rd July, 2020, Lemon & Duke reopened. However, Sean's Bar remained closed. There is a dispute as to whether Sean's Bar could, in conjunction with another premises in common ownership, serve food. Not long after the reopening, problems began to emerge in August. On 7th August, 2020, a series of localised restrictions were enacted for counties Kildare, Laois and Offaly following outbreaks of Covid-19 at meat processing plants located in those counties. On 18th August, 2020 six new restrictive measures were announced for the entire country. These included limiting group sizes for indoor and outdoor gatherings, limiting opening hours, requiring table service only, and advising people to avoid public

transport. While the restrictions in Laois, Offaly and Kildare were lifted later in August 2020, further restrictions for Dublin were introduced on 18th September, 2020 under which Dublin was moved to *"Level 3"* restrictions under which Dublin restaurants and pubs serving food were restricted to serving customers at outdoor seating only. While pubs which did not serve food were briefly permitted to open outside Dublin in the period between 21st September, 2020 and 7th October, 2020, the entire country was moved to Level 3 restrictions on the latter date and travel outside one's county was restricted except for work, education or other necessary reasons. While it is the case that more extensive restrictions were introduced later in 2020, that occurred after the conclusion of the hearing and, in those circumstances, those restrictions are not addressed in this judgment.

The regulatory context

102. The next matter to be addressed is the relevant regulatory context at the time the policies were put in place. It is clear from the approach taken by the Supreme Court in the *MIBI* case that the background law is also to be considered, where relevant, as part of the specific context against which the terms of a contract are to be construed. In para. 12 of his judgment in that case, O'Donnell J. stated that *"a Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements"*. .

103. There was a measure of agreement between the parties that the regulatory context can be taken into consideration. This was confirmed by counsel for FBD in his closing submissions. However, there was a sharp difference between the parties as to the extent to which the regulatory context was relevant and, in particular, as to whether documents issued by FBD in discharge of its regulatory obligations could be taken into account. The plaintiffs contended that these documents could be taken into

account as part of the regulatory context. They also argued that the documents in question fall, in any event, within the ambit of the matters identified by O'Donnell J. in para. 12 of his judgment in the *MIBI* case as constituting either prior agreements or alternatively provisions drafted at the same time and forming part of the same transaction. For completeness, it should be noted that the plaintiffs do not make the case that there was any breach by FBD of its regulatory obligations.

104. The relevant regulatory obligations are to be found in the European Union (Insurance Distribution) Regulations 2018 (S.I. No. 229 of 2018) (*"the 2018 Regulations"*). Regulation 3(1) makes clear that the scope of the 2018 Regulations is to lay down rules for undertaking *"insurance distribution"* which is defined in Regulation 2(1) as meaning *"any activity involved in advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts …".* Regulation 20(1) requires that insurance "*distributors"* (which plainly includes FBD) and their employees must possess appropriate knowledge and ability necessary to complete their tasks and perform their duties adequately. Although some emphasis was placed on this Regulation in the course of the opening of the case by counsel for the plaintiffs, this Regulation is not immediately relevant in circumstances where, as noted above, no case is made that there was a failure on the part of FBD to discharge this duty. The most relevant provision of the 2018 Regulations for the purposes of these proceedings is Regulation 34. Under Regulation 34(1), an insurer must (*inter alia*) provide the customer with objective information about the insurance product in a comprehensible form to allow a customer to make an informed decision on the insurance product proposed. In FBD's case, this requirement has been addressed in the form of a *"Features & Benefits"* document

(discussed below). In addition, Regulation 34(5) requires that information about the insurance product must be provided prior to the conclusion of a contract. In turn, Regulation 34(6) requires that the information should be provided by way of a *"standardised insurance product information document"* on paper or on another durable medium.

105. Regulation 34(7) provides further detail as to what should be contained in the insurance product information document (*"IPID")* required under Regulation 34(6). It requires that the IPID should be a short and stand-alone document, be presented and laid out in a way that is clear and easy to read, and that it should be accurate and not misleading.

106. The plaintiffs have highlighted, in particular, the additional requirements contained in Regulation 34(9) that the IPID should also contain information as to the main risks insured. Insofar as relevant, Regulation 34(9) provides as follows:

> *"The [IPID] referred to in paragraph (6) shall contain the following information:*
>
> *(a) …*
>
> *(b) a summary of the insurance cover, including* ***the main risks insured****, the insured sum and, where applicable, the geographical scope and a summary of the excluded risks;*
>
> *(c) the main exclusions specifying where claims cannot be made;*
>
> *(d) …"* (emphasis added).

107. The plaintiffs have strongly argued that, when one reads the provisions of the IPID issued by FBD in this case and the accompanying *"Features & Benefits"* document in light of the requirements of Regulation 34(9), the description of the perils insured in those documents is of significant assistance when it comes to

construing the description of the relevant peril in the FBD policy. Given the additional obligation imposed by Regulation 34(7) that the IPID should be accurate and not be misleading, the plaintiffs submit that the description of the peril provided in the IPID is particularly helpful in understanding the nature of the perils which are covered under the *"imposed closure"* provisions of s.3 of the FBD policy.

108. In response, counsel for FBD argued that the 2018 Regulations do not prescribe, in any way, the contents of an insurance policy and that, instead, they impose obligations in relation to how such policies are sold and the information to be provided about them. It was also argued that, in any event, the information provided by FBD in these documents is in very truncated bullet point style and that a peril is not always capable of being reduced to one word. Counsel argued that such documents do not attempt to describe the perils insured in *"any meaningful way"* and that it would always be necessary for a policy holder to consult the policy in order to understand the nature of the cover that is provided. Counsel for FBD also submitted that there are significant constraints on what an insurer can include in the IPID. Counsel focused in particular on the provisions of the Commission Implementing Regulation (EU) 2017/1469 ("*the CIR")* which lays down a standardised presentation format for the IPID. Article 3 of the CIR requires that the IPID must fit on two pages of A4 (which can be extended to three pages only in exceptional circumstances). Counsel also referred to the requirement in Article 5 of the CIR that the IPID should focus on *"key information which the customer needs to make an informed decision".* Counsel argued that the IPID was therefore not intended to be complete but selective in the information which it sets out. Counsel also referred to the EIOPA consultation paper published in 2016 prior to the adoption of the CIR which stressed that the

objective of the IPID is to provide information on the main features of the product offered and requires insurers to only include the main features.

109. I fully accept that neither the IPID nor the Features & Benefits document is intended to be comprehensive in its description of the insurance product or of all of the risks covered by such a product. I also accept that, in order to understand the specifics of the cover provided, it will usually be necessary for the policy holder to consult the terms of the policy itself. This seems to me to follow from the fairly obvious fact that the Regulations require the IPID to be a short document. On the other hand, the fact that Regulation 34(7) requires the document to be accurate and not be misleading must surely have the consequence that the information contained in the IPID will not be inconsistent with the terms of the policy. Furthermore, given the express obligation contained in Regulation 34(9) to provide a summary of the insurance cover and the main risks insured, the IPID seems to me to constitute a document which is potentially relevant in assessing the meaning of the terms of a policy of insurance. It is important, nonetheless, not to overstate the utility of the IPID and related documents in this context. In my view, this material is simply a part of what O'Donnell J., in the *MIBI* case, described as the *"broader context"* against which the terms of a contract are to be construed. As O'Donnell J. explained in para. 12 of his judgment in that case, the function of the court is to try and understand *"from all the available information"* what it is a reasonable person would consider the parties to the contract had agreed. The court is required to consider the words used in the contract itself and its context and the court must consider all of the factors and reach a view as to the ultimate weight to be attributed to each of them. Nonetheless, subject to that important qualification, it does seem to me that the provisions of the IPID and the Features & Benefits document form part of the broader

context against which the insurance policy is to be construed. Accordingly, I now turn to consider some relevant aspects of those documents.

Relevant aspects of the IPID and the Features & Benefits document

110. FBD used a standard form IPID and a standard form Features & Benefits document in relation to its public house insurance policy. In the IPID, it was stated that the document provides a summary of key information for the policy. It also stated that the full terms and conditions of cover are outlined in the contract documents. The IPID contains a heading *"What is insured?"* under which there is a brief description of the buildings insurance (which, as previously noted, is covered in s.1 of the policy), the trade contents insurance (covered in s.2) and (*inter alia*) the business interruption cover. Notably, the description of the business interruption cover makes no mention of imposed closure. When dealing with the relevant extension, it simply describes it as "*disease/murder/suicide".* The full terms of the description of the business interruption cover is as follows:

> *"Protects your business from financial impact following a valid property claim.*
>
> *Extensions for prevention of access, engineering risk, suppliers, public utilities, and disease/murder/suicide.*
>
> *Options for loss of gross profit, tax relief, rent and increased costs".*

111. As counsel for FBD emphasised, it is clear from these very terse descriptions of the cover available that one would need to look at the policy to understand the ambit of cover. Counsel instanced, in this context, the reference to *"prevention of access".* Counsel correctly argued that one would need to look at the policy in order

to understand what that covers. For present purposes, it is the reference to "*disease"* which is relevant. As explained in more detail below, FBD have argued in this case that the insured peril is the enforced closure of a public house premises and that the reference in the policy to infectious or contagious diseases is not intended to describe the peril. Yet, there is no reference to closure in the description of the IPID in the relevant description of the business interruption cover available.

112. Similarly, in the Features & Benefits document, there is a description of the standard extensions as including *"human notifiable diseases, murder or suicide".* There is no reference to enforced closure. The Features & Benefits document was furnished as part of a statement of suitability. Regulation 34(2) requires that an insurance distributor shall only propose a contract that is consistent with *"the customer's insurance demands and needs, taking into account the complexity of the insurance product being proposed and the type of customer".* The statement of suitability commenced in the following terms:

> *"This is an important document which sets out the reason why the products or services offered or recommended are considered suitable, or the most suitable, for your particular needs, objectives and circumstances.*
>
> *We are satisfied that the insurance covers set out in this quotation are suitable to meet your insurance requirements".*

The terms of the policy

113. Having outlined the relevant factual and regulatory context, it is now necessary to consider the policy itself. There was no significant dispute between the parties as to the principles to be applied in construing the terms of the FBD policy. In the *MIBI* case, the Supreme Court affirmed that the principles derived from the speech

of Lord Hoffmann in *Investors' Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at pp. 912-913 are to be applied. Those principles are now so well known that it is unnecessary to set them out in full here. It is sufficient to record that the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract. I have previously explained that the law excludes from the admissible background the previous negotiations of the parties and their subjective intention or understanding of the terms agreed. A distinction is to be made between the meaning which a contractual document would convey to a reasonable man and the meaning of the individual words used in the document. As Lord Hoffman explained, the meaning of words is a matter of dictionaries and grammar. The meaning of a contractual document is what the parties using those words, construed against the relevant background, would reasonably have been understood to mean. While words should be given their natural and ordinary meaning, it is possible that the parties may sometimes have used the wrong language in which case, the law does not require judges to attribute to the parties an intention which they plainly could not have had. In the *MIBI* case, O'Donnell J., at para. 12 of his judgment, explained the latter principle in the following terms:

> *"Legal agreements are not poetry intended to have nuances and layers of meaning which reveal themselves only on repeated and perhaps contestable readings. Agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and the agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when*

addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. …"

114. It is also clear from the judgment of O'Donnell J. in the *MIBI* case that, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole. He also made clear that it is wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment, he stressed that it is necessary to understand the entirety of an agreement and then to consider what that means for the issue in dispute. He said:

"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later".

115. As previously noted, the process of interpretation of a contract is entirely objective. In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the *contra proferentem* rule. This was affirmed by the Supreme Court in *Analog Devices v. Zurich Insurance Co.* [2002] 1 IR 272 at p. 282 and in *Emo Oil Ltd v. Sun Alliance and London Insurance plc* [2009] IESC 2. However, in the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, "*usually be an*

approach of last resort" albeit that he also stated that it may be "*more readily resorted to in respect of routine standard form commercial insurance policies".* The precise circumstances in which the rule can be applied were explained as follows by Clarke J. (as he then was) in *Danske Bank v. McFadden* [2010] IEHC 116 at paras. 4.1 to 4.2 as follows:

> *"4.1 The so called, contra proferentem rule, is, of course, only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question. ...*
>
> *4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: The Law of Insurance Contracts, 5th Ed.,.. at para. 15-5:-*
>
> *'In the past some courts were quick to find ambiguity in policies of insurance, in order to apply the canon of construction contra proferentem, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentem ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First there must be genuine ambiguity.'"*

116. Having regard to applicable principles of interpretation of contracts discussed above, it is important to consider the terms of the policy as a whole. It is also

important to keep in mind that the *contra proferentem* principle is only to be applied where other rules of construction fail. The FBD policy opens with what is described as the *"Operative Clause"* which is in the following terms:

> *"The Company AGREES to insure in a manner and to the extent hereinafter provided in the respective Sections specified in the current Schedule and Appendices thereto …in respect of events occurring in the Territorial Limits during the period of insurance specified in the Schedule …".*

117. Thus, the operative clause makes clear that the cover provided in the policy will be as set out in the subsequent sections of the policy in respect of *"events".* Counsel for FBD placed some emphasis on the use of the word *"events"* and suggested that this means that the policy contemplated that the perils all constitute discrete events or happenings. While there is obviously some force in this suggestion, it is important to keep in mind that, as stressed by the Supreme Court in the *MIBI* case, the policy must be read as a whole.

118. As previously explained, s.1 of the policy sets out details of the cover in relation to damage to the public house building including any landlord's fixtures and fittings. The terms of s.1 are not immediately relevant. However, a number of features of s.1 should nonetheless be noted. Counsel for the plaintiffs placed some emphasis on the terms of the *"Public Authorities Clause"* contained on p.4 of the policy as an example of the case where FBD used very specific language to delineate the ambit of cover. The clause is in the following terms:

> *"The Insurance by the Section on 'Buildings" extends to include such additional cost of reinstatement of the destroyed or damaged property thereby insured as may be incurred* ***solely by reason of*** *the necessity to comply with*

Building or other Regulations under or framed in pursuance of any Act of the Oireachtas or with Bye-Laws of any Municipal or Local Authority …"
(emphasis added).

119. Section 1 of the policy ends with special conditions which make clear that s.1 does not cover consequential loss or damage of any kind or description. There is a similar exclusion in para. 16 of the exclusions applicable to ss. 1 and 2 of the policy. Counsel for FBD submitted that the only basis on which consequential loss is covered is where it falls within s.3 of the policy. In my view, that submission is correct.

120. As noted previously, s.2 of the policy deals with trade contents. I do not believe that anything turns on the terms of s.2 (other than the exclusion in relation to consequential loss contained in para. 16 of the exclusions mentioned above) and I therefore do not believe that it is necessary to describe any of its terms.

121. Section 3 of the policy addresses consequential loss. Section 3 commences with a number of definitions including definitions of *"Gross Profits", "Annual Takings"* and of the "*Indemnity Period".* These definitions are of some relevance in relation to the extent of cover available. I therefore propose to consider them at a later point in this judgment. It should, nonetheless, be noted, at this point, that the definition of *"Annual Takings"* refers to a period of twelve months immediately before *"the date of the damage…"* which, arguably, is consistent with the submission made by counsel for FBD that the policy is concerned with the occurrence of events. To the same effect, the definition of the *"Indemnity Period"* speaks of the period beginning with *"the occurrence of the loss or damage…".* However, it must equally be kept in mind that, as explained further below, s.3 of the policy provides for two different types of cover namely (a) cover for consequential loss arising from damage

to buildings or trade contents where liability for that damage has been admitted under s.1 or s.2 of the policy and also (b) cover in respect of what are described in the IPID and the Features & Benefits document as "*extensions" to* cover. Similar language was used by Mr. Grace in his evidence. Although they are not so described in s.3 of the policy, it is clear from a consideration of the relevant terms of s.3 (as set out in para. 125 below) that *"extension"* is an apposite description of this aspect of the cover available under s.3.

122. It is necessary to set out the terms of the cover available under s. 3 in their entirety. However, it is convenient to break the terms of cover down into two parts namely the cover provided in respect of consequential loss arising from loss or damage to the buildings or trade contents, on the one hand, and the extensions of cover, on the other.

123. Insofar as the first aspect of cover is concerned, the policy provides as follows:

> *"The Cover*
>
> *The Company shall indemnify the Insured in respect of:*
>
> *(A) The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business.*
>
> *(B) Increase in cost of working: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or*

diminishing the reduction in gross profit during the indemnity period, but not exceeding the sum which would have been payable under (A) had such additional expenditure not been incurred.

(C) Professional auditors' charges for producing and certifying the particulars or details required by the Company in connection with a claim.

Resulting from the business being affected by loss or damage for which liability has been admitted and payment has been made under Section 1 or 2 of this Policy.

(D) Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage.

Provided that if the sum insured on gross profit be less than the sum produced by applying the rate of gross profit to the annual takings of the business, the amount payable shall be proportionately reduced".

124. The language used in the above extract from s.3 of the policy is principally relevant to an issue which is addressed later in this judgment – namely the effect of the words *"adjusted for the trend and other circumstances affecting the business".* Depending upon the view taken as to the meaning of those words, they have the potential to have a significant impact on the extent of any recovery by any of the plaintiffs under the policy in the event that the court holds that cover is available under the "*extensions"* described below. For present purposes, what is more

immediately relevant is the use of the words *"resulting from …*" in this section of the policy. It is well established that such words ordinarily connote proximate cause which is an important concept in determining liability under insurance policies. While such language is used at this point in s.3, somewhat different language is used elsewhere in the relevant *"extension"* and an issue arises as to whether the use of such different language suggests that the policy had in mind a lesser standard of causation than proximate cause in those parts of the policy where such language is used.

125. The relevant passage in s.3 dealing with the extensions of cover follows immediately after the passage quoted in para. 123 above. The relevant passage is in the following terms:

> *"The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by:*
>
> *(1) Imposed closure of the premises by order of the Local or Government Authority following:*
>
> *(a) Murder or suicide on the premises*
>
> *(b) Food or drink poisoning on the premises*
>
> *(c) Defective sanitary arrangements, vermin or pests on the premises*
>
> *(d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same.*
>
> *(2) Explosion or collapse of steam pipes and/or vessels.*

(3) Prevention of access to or use of the premises following loss of or damage to property in the vicinity of the premises by a peril insured by Section 1 or 2 of this Policy.

(4) Failure of the public supply following loss or damage by any peril insured under s.1 or 2 of this Policy or to property at any:

(i) Electricity generating station or sub-station

(ii) Land based gasworks premises

(iii) Waterworks or water pumping station

of the Public Authority or supply undertaking from which the Insured obtains electricity, gas or water.

(5) Loss or damage by any peril insured under s.1 or 2 of this Policy of or to any property at the premises of a supplier of the Insured".

126. It will be necessary, presently, to focus on a number of specific aspects of the language used in this passage in the policy. Before doing so, there are a number of preliminary observations that might usefully be made:

(a) In the first place, although the *"extensions"* described in the passage are said by FBD to be provided as an "*add-on"* and without any requirement for an additional premium, the circumstances described in the extensions section of the policy are each clearly capable of having an impact (and possibly a significant impact) on the business of an operator of a public house. With the exception of the circumstances described in extension (2), each of the circumstances described could clearly arise independently of

any loss falling within ss. 1 or 2 of the policy. Looked at objectively, the extent of the cover provided in this part of s.3 of the policy would be of obvious interest to any operator of a public house. Thus, for example, the closure of a public house premises by order of a local or government authority following defective sanitary arrangements on the premises is likely to lead to a material interruption in the operation of the business for a period of time. Similarly, under extension (5), the destruction of the premises of a supplier could have very significant consequences for the operator of a public house. For example, if the reputation of the public house with its clientele rested on its ability to source a particular line of craft beers, the destruction of the premises of the supplier of such beers could, in turn, result in the business of the public house being adversely affected to a significant degree. In my view, a reasonable person in the position of the parties would regard the availability of cover described in the extensions as important. The fact that it is said to constitute a gratuitous add-on, does not seem to me to lessen the importance to a public house operator of the cover available under this part of s.3 of the policy. Furthermore, it could not be said that the matters and circumstances described in this part of s. 3 of the policy are any less likely to arise than the circumstances described in ss. 1 or 2 of the policy.

(b) The indemnity available under this part of s. 3 is limited. It is expressly stated to be in respect of the losses described in paras. (A), (B) or (C) in the immediately preceding passage in s.3. Thus, what is covered is the loss of gross profit during the indemnity period calculated in the manner set out in para. (A) together with any increase in the cost of working as

described in para. (B) and any professional auditor's charges for producing and certifying the particulars required in connection with a claim, as provided for in para. (C).

(c) The indemnity available under this part of s.3 of the policy is also limited to losses (within any of paras. (A), (B) or (C)) which are proximately caused by any of the circumstances described in extensions (1) to (5). In this context, the parties were all agreed that the use of the words "*as a result of"* in an insurance policy connotes proximate cause. It will be necessary at a later point in the judgment, to consider proximate cause in more detail and, in particular, whether it applies in the specific context of the word *"following"* in the text of extension 1 (d). At this point, it is sufficient to note that proximate cause is, in the absence of some provision to the contrary in the policy, the default rule in insurance contracts. Specific provision to that effect is made in s.55 (1) of the Marine Insurance Act, 1906 (*"the 1906 Act")* which remains in force today. *Buckley on Insurance Law* (4th ed., 2016, para. 8-73) explains the concept of proximate cause in the following terms:

"The rule of proximity in insurance law, depending as it does on the presumed intention of the parties to a commercial document, is a very simple one. Only the proximate cause of a loss is to be looked to. By 'proximate' cause is not meant the latest, but the direct, dominant, operative and efficient one. If this cause is within the risks covered, the insurers are liable in respect of the loss …. A loss may be the combined

effect of a whole number of causes, but for the purposes of insurance law, one direct or dominant cause must, wherever possible, be singled out".

(d) It is also clear from the terms of this part of s.3 of the policy that it was envisaged that a public house could be the subject of an imposed closure following an outbreak of contagious or infectious disease not only on the premises but within 25 miles of the premises. It may be stating the obvious but this demonstrates very clearly that such a circumstance was expressly envisaged and was insured against. The policy did not confine itself (as it could have done) to closures as a result of outbreaks on premises. In the context of infectious or contagious diseases, it is, perhaps, unsurprising that reasonable people in the position of the parties would envisage that public houses could be the subject of a closure order in respect of outbreaks of contagious disease which arise some distance from the premises given the facility with which an infectious disease could be transmitted within the confines of a public house**.** Thus, if a virulent disease (such as Covid-19) is circulating in the community, a public house could reasonably be envisaged to be a place where infections might more readily be transmitted. This is especially so in light of the sheer scale of the public houses which are the subject matter of these proceedings where large numbers of the public can gather indoors in close proximity with each other and where social inhibitions are likely to be moderated by the influence of alcohol.

(e) It should also be noted that, while the policy clearly places a geographic limit on the area where outbreaks of contagious or infectious disease could

occur, the geographic area is, by any standard, a generous one. As noted above, the area generated by a 25 mile radius extends to 1,963 sq. miles. In the context of pubs situated in the Dublin region, that is a highly populated area.

(f) On the other hand, it is quite clear from the terms of this part of s.3 of the policy that cover is not available solely as a consequence of an outbreak of disease on the premises or within a 25 mile radius. The only circumstance in which cover is available in relation to disease is where the public house is the subject of an imposed closure by a government authority or a local authority *"following"* such an outbreak. This is in contrast to some of the other policies that were addressed in the course of the evidence. Thus, for example, in the FBD Business Complete policy, the relevant extension is available in respect of business interruption resulting from the case or cases of any one of a number of specified notifiable diseases occurring at the premises.

(g) Notably, many of the circumstances described in this part of s.3 can arise as a consequence of occurrences or events which arise entirely outside the public house premises itself. These include an imposed closure of the premises by order of a local or government authority following an outbreak of contagious or infectious disease within 25 miles of the public house, the prevention of access to the public house following loss or damage to property in its vicinity, the failure of the public supply following loss or damage to the supplier of electricity, gas or water to the premises and also loss or damage to the premises of any other supplier of

the insured. Thus, although this part of the policy is characterised as an *"extension"*, it clearly provides valuable cover to the owner of a public house premises in respect of a range of matters which may give rise to an adverse impact on the public house business.

What is the insured peril?

127. In the course of the debate that took place in this case, the parties have used the word *"peril"* as shorthand for the nature of the risk covered by the FBD policy. An insured will only recover under a policy of insurance to the extent that his or her losses were caused by a peril insured under the terms of that policy. The perils will either be described in the policy or cover will be provided on an all risks basis subject to those perils which are specifically excluded. Thus, *Riley on Business Interruption Insurance* (10th ed., 2016) at para. 2.2 explains that:

> *"There are two basic ways in which the policy can specify the perils that can trigger a business interruption claim. Either cover will be based on a list of named perils, or alternatively, cover will be on an all risks basis but with a list of exclusions"*.

In this case, the cover available under the extensions contained in s.3 of the policy was based on a list of named perils. In relation to extension 1 (d), there was a significant disagreement between the parties as to the nature of the insured peril. FBD maintained that the relevant peril for present purposes is the imposed closure. If FBD is correct in that contention, it would substantially reduce the extent of any recovery to which the plaintiffs might be entitled under the policy (in the event that they establish that there is cover under it). For reasons which are explained later, the plaintiffs would have to show, in such circumstances, that the losses suffered by them

stemmed from the closure as opposed to the outbreaks of Covid-19 giving rise to the closure. That could give rise to significant difficulty for them because FBD would be free to contend, in such circumstances, that the losses would have arisen even if the pubs were open during the period in question given the existence of Covid-19 in the community and all of the attendant restrictions (other than closure) which would continue to exist. In contrast, the plaintiffs maintain that the relevant peril is a composite one involving all of the constituent elements of extension 1 (d) namely that the business has been affected by (a) imposed closure (b) by order of a local or government authority, following (c) an outbreak of infectious disease on the premises or within a 25 mile radius. That is the case specifically made, for example, in para. 48 of the written submissions on behalf of the Leopardstown Inn and Sinnotts plaintiffs although it should be noted that, later, in their oral submissions, the plaintiffs went somewhat further and sought to rely on a number of paras. of the judgment of the Divisional Court in the *FCA* case which suggested that a somewhat similar geographic limit in some of the policies in issue in that case was not part of the relevant peril. If the plaintiffs are right in their contention that extension (1) (d) covers a composite peril, this may enable them, in making their case, to rely on each of these elements of the composite peril as causes of their losses at least for as long as the composite peril continued in existence. In making this case, the plaintiffs have drawn attention to the judgment of the Divisional Court in the *FCA* case where the court said, dealing with a somewhat analogous provision, at para. 278 of the judgment that:

> *"The insured peril is a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) 'following' one of (a) to (e), relevantly (b) an occurrence of an infectious or contagious disease. What the insured is*

covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present."

128. The plaintiffs also rely upon the fact that, as discussed above, the relevant extension is not described in the IPID or in the Features & Benefits document as *"imposed closure".* Instead, the IPID simply refers to the relevant extension as dealing with *"disease/murder/suicide"* while the Features & Benefits describes the extension as *"human notifiable diseases, murder or suicide".*

129. Counsel for FBD, in addressing the nature of the peril, stressed that, in contrast to many of the other policies discussed in the course of the hearing, the FBD policy plainly does not provide cover in respect of disease *per se*. Counsel for FBD also placed considerable reliance upon the provisions of the *"Operative Clause"* (quoted in para. 116 above) under which FBD agreed to provide insurance *"in respect of **events**"* (emphasis added). Counsel argued that, in accordance with the *MIBI* decision, the policy has to be read as a whole and that, accordingly, the terms of the extension clause in s.3 of the policy must be read consistently with the Operative Clause at the outset of the policy document. Counsel referred, in this context to the well-known definition of *"event"* given by Lord Mustill in *AXA Reinsurance v. Field* [1996] 1 W.L.R. 1026 at p. 1035 where he said:

"In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way."

130. Counsel for FBD argued that, whereas an imposed closure undoubtedly met that definition, the same could not be said in respect of, for example, the existence of vermin or pests on the premises (as contemplated by para. (c) of the relevant extension). Counsel also referred to the way in which the Divisional Court in the

FCA case held that there could be no cover under a non-damage denial of access ("*NDDA*") clause which stated that cover would be available in respect of *"an incident occurring … within a one-mile radius of the insured premises which results in a denial of access… to the insured premises, imposed by any civil … authority … for more than 24 consecutive hours".* In para. 404 of its judgment in the *FCA* case, the Divisional Court said:

> *"404. In our judgment, the FCA's entire case on the NDDA clause founders on the requirement for 'an incident'. We agree with [counsel for Hiscox] that this word should be given the same essential meaning as 'an event': something which happens at a particular time, at a particular place, in a particular way. The further geographical restriction that the incident occurs "'within a one-mile radius of the insured premises' … seems to us to confirm that this clause is intended to cover local incidents, of which the paradigm examples are a bomb scare or a gas leak or a traffic accident. …".*

131. Counsel for FBD submitted that the way in which extension (1) should be construed is that the imposed closure is the relevant event which constitutes the peril in respect of which cover is available under the policy and that the words which follow are words of qualification or restriction. Thus, not every imposed closure of the premises will give rise to cover. The only forms of imposed closure which will give rise to cover are those which fall within the language which follows the reference to *"imposed closure"* in extension (1). Counsel for FBD submitted that the approach proposed by the plaintiffs involves an *"atomisation"* of the single peril covered by extension (1) into nine separate perils namely imposed closure following

(i) murder on the premises;

(ii) suicide on the premises;

(iii) food poisoning on the premises;

(iv) drink poisoning on the premises;

(v) defective sanitary arrangements on the premises;

(vi) vermin on the premises;

(vii) pests on the premises;

(viii) outbreaks of contagious or infectious diseases on the premises; or

(ix) outbreaks of contagious or infectious diseases within 25 miles of the premises.

Counsel suggested that the *"sub-conditions"* contained in paras. (a) to (d) of extension (1) were intended to restrict the scope of cover and that the argument put forward by the plaintiffs, had the effect of significantly expanding the ambit of cover available.

132. Counsel for FBD suggested that it is useful to test the arguments on either side by engaging in the following *"thought experiment"*:

> *"if the only facts that you had were [that] there has been an imposed closure of the premises and you're asked the question: Does the policy respond? Your answer would have to be potentially, yes, depending on why there is an imposed closure of the premises. But if, on the other hand, the only facts that you had were [that] there has been an outbreak of an infectious or contagious disease within 25 miles, does the policy respond? Your answer would have to*

be no. That isn't and could never be sufficient for there to be cover under the policy.

So that does, I think, demonstrate that in reality, no matter whether we describe this as a compound peril or a composite peril, the trigger for cover is the imposed closure. That is the insured peril here".

133. In my view, the thought experiment is of some utility in demonstrating that extension (1) plainly does not cover outbreaks of disease *per se*. However, I do not believe that the experiment demonstrates that imposed closure is, of itself, a complete description of the peril. Even on the basis of the FBD submissions, it is clear that not every imposed closure will give rise to cover. The imposed closure must follow one or more of the circumstances described in extensions 1 (a) to (d) and, furthermore, in the case of 1 (d), it must arise by order of a local or government authority. Thus, for example, an imposed closure by a landlord (in exercise of a particular power conferred in the landlord under a lease of a public house premises) would not be covered under policy. Likewise, an imposed closure arising from an order of a court under s. 160 of the Planning and Development Act, 2000 requiring the premises to shut down as a consequence of a failure to comply with the condition of a planning permission would not be covered. In order to ascertain what is covered under extension (1) it is necessary to have regard to the entire of the language of the extensions. It is important, in this context, to bear in mind that the opening words of the extensions state, in plain terms, that FBD will indemnify the insured as a result of the business being affected by any of the circumstances described in extensions (1) to (5). In the case of extension (1), it is clear, in my view, that what is covered is not an effect on the business by an imposed closure but an effect arising from an imposed

closure by an order made by either a local authority or a government authority *"following"* one or more of the specific circumstances described in sub-paras. (a) to (d). While counsel for FBD has sought to characterise the circumstances described in sub-paras. (a) to (d) as restrictions or limitations on the cover available, it seems to me that the more natural and obvious way to describe the matters set out at sub-paras. (a) to (d) is that they constitute words of definition of the relevant risk or peril which is covered. Rather than breaking up the clause in the manner suggested by FBD, it seems to me that the clause needs to be read as a whole. In my view, that is how the clause would be read by a reasonable person standing in the shoes of the parties to these proceedings. While the plaintiffs here (with the exception of the Lemon & Duke plaintiff) did not give any great thought to the terms of extension (1) when reaching agreement with FBD, I must approach the matter by reference to how a reasonable person in the position of the parties would do so. When read in that way, it seems to me that one does not pause at the reference to imposed closure and regard everything which follows as a limitation or restriction on those words. One would read the clause as a whole in order to understand the precise perils which are covered by the extension. FBD is essentially telling the policy holder what it will indemnify under this extension. In order to understand what FBD will indemnify, it is necessary to read the entire extension. Counsel for FBD suggested that this was the wrong approach. He submitted that the logical extension of such a reading would mean that, if, for example, extension (1) ended with a proviso such as "*provided that the premises is trading as a public house on the date in which the order is made"* that would mean that the proviso became part of the insured peril. Counsel suggested that this must follow since a proviso to that effect will dictate whether there is cover under the policy or not. He suggested that the logic of the plaintiff's position was that

anything that dictates whether there is policy cover must form part of the insured peril. I do not accept this submission on the part of counsel for FBD. A proviso of the kind posited by counsel is often encountered in a policy of insurance. It will usually be introduced by the words *"provided that"* or a similar formula and would invariably be recognisable as a proviso rather than a description of the peril. For example, in s.7 of the FBD policy there are a number of provisos on p. 28 of the standard form policy which cut down the level of cover available in respect of employers' liability. Similarly, in s.6 of the policy, on p. 27, there are a number of provisos which cut down the level of benefits in respect of bodily injury caused by violent means. While a proviso of that kind is not necessarily to be equated to an exclusion, there is an obvious parallel between them and, save perhaps in an all risks policy, one would never regard the exclusion as part of the description of the peril even though it has the effect of limiting the level of cover available. In contrast, extension (1) in s. 3 of the policy takes a different course. It does not use any language suggestive of a proviso or an exclusion. It simply describes the types of imposed closure which are covered. Any other types of closure that may arise are simply not within the ambit of cover.

134. To interpret extension (1) in this way is consistent with the natural reading of extensions (2) to (5). There can be no doubt that what is described in extension (2) is the relevant peril namely an explosion or collapse of steam pipes and/or vessels. Similarly, it seems to me that extension (3) must also be read in the same way. It covers losses arising from the prevention of access to or use of the premises following loss of or damage to property in the vicinity of the premises by a peril insured by ss. 1 or 2. It will be noted that extension (3) in common with extension (1) uses the word *"following"*. Again, it seems to me that extension (3) must be read as a whole. It is

not simply speaking of prevention of access to or use of the premises. It is speaking of the prevention of access following loss or damage to adjoining property. One needs to read the entire of the clause to understand the peril which is covered. Similarly, the cover available under extension (4) is not any failure of the public supply; it is a failure arising from loss or damage by any peril insured under ss. 1 or 2 of the policy at any electricity generating station or sub-station, land-based gas works premises or waterworks or water pumping station from which the insured obtains electricity, gas or water. For example, a failure of the public supply of any other type would not be covered. Thus, a failure of a public supply because of over demand on the national electricity grid would not be covered. A failure of the public supply cannot therefore be regarded as the relevant peril for the purposes of extension (4). The failure must arise following damage to the relevant generating station or sub-station from which the insured obtains electricity.

135. This construction of the terms of the extensions is also consistent with the approach taken by FBD itself in the IPID and the Features & Benefits document. As noted previously, those documents are required by law to be issued by an insurer prior to the conclusion of a contract. In such circumstances, it seems to me to follow that the documents must be regarded as forming part of the same transaction and therefore, in accordance with the *dicta* of O'Donnell J. in the *MIBI* case, they are part of the relevant context against which the terms of the policy should be construed. It was not suggested by FBD that the documents should be equated with statements of subjective intention such as to make them inadmissible. Having regard to their status under the 2018 Regulations, it would be wrong to treat them as no more than an expression of subjective intention. As noted previously, the IPID, under the heading of *"what is insured?"* describes the extensions in brief terms. In the case of extension (1), the

description given is simply *"disease/murder/suicide".* It is described in somewhat similar terms in the Features & Benefits document save that the adjectives *"human notifiable"* are added to the word *"diseases".* In the case of extension (4) the extension is described as *"damage to public utilities"* which is consistent with the construction of extension (4) suggested above.

136. As discussed in para. 109 above, the IPID and the Features & Benefits document are, necessarily, in very short form and do no more than provide key information in relation to an insurance product. However, as the 2018 Regulations made clear, the Features & Benefits document is required to provide the customer with objective information about the insurance product to enable the customer to make an informed decision. Furthermore, the IPID is required by Regulation 34(7) to be accurate and not be misleading and it is also required by Regulation 34(9) to contain a summary of (*inter alia)* the main risks insured. Thus, while it is, of course, necessary to have regard to the terms of the policy in order to understand the full details of what is insured, the IPID and the Features & Benefits document are clearly intended not to mislead the customer. While I would not regard this as determinative, on its own, the fact that the relevant risk insured under extension (1) is not described in the IPID or in the Features & Benefits document as *"imposed closure"* but rather as "*disease/murder/suicide"* provides support for the construction outlined above. Similarly, the fact that the Features & Benefits document summarises extension (4) as *"damage to public utilities"* supports the view that extension (4) must be read in its entirety in order to understand the risk or peril that is insured. For the reasons outlined in para. 134 above, a *"failure of the public supply"* could not, in my view, plausibly be considered to be the relevant peril. Similarly, it seems to me that, in the context of extension (1) *"imposed closure"* could not be considered to be the relevant

peril on its own. Extension (1), in common with the other extensions, must be read as a whole in order to understand the perils covered by its terms. Thus, in my view, the relevant peril for present purposes as described in extension (1) (d) is a composite one in which (a) an imposed closure (b) by order of a local or government authority (c) follows an outbreak of a contagious or infectious disease either on the premises itself or within a radius of 25 miles. That finding seems to me to be consistent with the view of the majority in the UK Supreme Court in the *FCA* case, as set out in para. 74 of the judgment of Lords Hamblen and Leggatt.

137. This conclusion is also consistent with the argument made on behalf of the owners of the Leopardstown Inn and Sinnotts in their written submissions. However, as noted in para. 127 above, counsel on behalf of the plaintiffs, in the course of their oral submissions, sought to go further and adopted, as part of their submissions, a number of paras. in the judgment of the Divisional Court in the *FCA* case, in particular, paras. 100 to 109 which address the nature of the insured peril in the context of the RSA 3 policy which covered business interruption following *"occurrence of a Notifiable Disease within a radius of 25 miles of the Premises".* The effect of those paras. was succinctly summarised by Lord Briggs (who gave the minority judgment in the UK Supreme Court) at para. 318 as being *"to treat the radius limitation as not defining the insured peril, which* [the Divisional Court] *identified as the COVID-19 pandemic (at least within the whole of the UK), but as a condition for cover which required the disease first to have spread within the radius."* I cannot agree that extension 1 (d) of the FBD policy can be read in that way. For the reasons discussed in paras. 133 to 134 above, when the extensions are read as a whole, it seems to me that the entire of the text of extension 1 (d) constitutes the relevant peril and I cannot see any plausible basis on which the geographic limit can

be excised from the description of the peril. For the reasons discussed further in paras. 140 to 147 below, I accept that the approach taken by the Divisional Court may be relevant to the issue as to whether cover is confined to closures imposed following localised outbreaks only and not to national outbreaks. But I cannot accept that the 25 mile limit is not part of the definition of the peril. I appreciate that, in the majority judgment in the UK Supreme Court, a suggestion was made that, had the RSA 3 policy used the word *"outbreak"* rather than *"occurrence"*, it might have been possible for the majority to reach a similar view to the Divisional Court. However, that suggestion appears to have been made on the basis that an *"outbreak"* was potentially broader or more amorphous than an *"occurrence".* In view of the HPSC definition of *"outbreak"* (which, as discussed in paras. 178 – 179 below, all parties accepted for the purposes of these proceedings), it is clear that even a single instance of a serious disease such as Covid-19 would fall within the meaning of the word. On that basis, this aspect of the majority judgment does not alter my view as set out in para. 136 above as to the scope of the peril. The fact that an *"outbreak"* may involve more extensive instances of disease is a factor that is considered further in the context of the discussion in paras. 140 to 147 below.

138. In arriving at the view set out in para. 136 above, I have not lost sight of the argument made on behalf of FBD that this has the result that, within extension (1), there are nine individual perils (as outlined in para. 131 above). However, I do not believe that the *"atomisation"* of the perils in that way gives rise to inconsistency or absurdity. It is simply a feature of the succinct way in which this aspect of the FBD policy was drafted. It avoids the need to separately enumerate nine individual perils or extensions. I have also not lost sight of the argument made by counsel for FBD that the extensions should be read in the context of the policy as a whole including the

"Operative Clause" set out on p. 2 of the policy and in particular by reference to the use of the word *"events"* in that clause. I accept that, at least in those cases where there are several instances of the disease within the relevant 25 mile radius, an outbreak of disease may not always constitute an "*event*" in the narrow meaning of that word as explained in the *AXA Reinsurance* case. I accept that an ongoing outbreak of disease or an ongoing closure following such an outbreak are certainly capable of constituting what counsel for Royal & Sun Alliance Insurance plc in the *FCA* case characterised as a *"state of affairs"* rather than an *"event"*. However, the same can equally be said about the existence of *"defective sanitary arrangements"* on the premises or the presence of vermin on the premises within the meaning of extension 1(c). Likewise, insofar as extension (3) is concerned, a prevention of access to the premises or a prevention of use of the premises may well, depending upon its duration, more properly be described as a *"state of affairs"* rather than an *"event"*. In those circumstances, when the policy is read as a whole (as it is required to be read in accordance with the principles established in the *MIBI* case) it seems reasonable to conclude that it cannot have been intended by the Operative Clause on p. 2 of the policy to limit the cover available under the policy only to *"events"* of the kind discussed in the *AXA Reinsurance* case. This conclusion is supported by the nature of the clause in issue which, as previously noted, is appositely characterised as an extension to the policy. As an extension, it is not surprising that the relevant peril may be of a different character to the perils described in other sections of the policy or in the first part of s. 3 (quoted in para. 123 above). It is also important to bear in mind that the word *"events"* as used in the Operative Clause must be read in the context of the whole of that clause. The argument advanced by FBD fails to give full meaning to the whole of that clause and in particular to the opening words of the clause under

which FBD agreed to insure *"in the manner and to the extent hereinafter provided in the respective Sections…".* Those words clearly signal that, in order to understand the extent of the insurance available under the policy, it is necessary to consider the individual sections of the policy. When one has regard to the relevant part of s.3 of the policy dealing with the extensions, it seems to me to be clear that it was not intended to be confined, in every case, solely to *"events"* within the meaning suggested by Lord Mustill in *AXA Reinsurance.* On the contrary, it seems to me that, consistent with the finding made by the Divisional Court in the *FCA* case, in the context of the RSA 4 policy under consideration in that case, the word *"event"* appears to be used as shorthand for what follows in the policy. In the case of the RSA 4 policy, clause 2.3 provided cover *"in the event of interruption or interference to the Insured's Business"* as a result of *(inter alia)* notifiable diseases. Clause 17 of the definitions defined a *"Covered Event"* as meaning *"the events as described in Insuring Clause 2.1, 2.2, 2.3 or 2.4 …".* At para. 145 of its judgment, the Divisional Court rejected the argument of counsel for Royal & Sun Alliance that cover was for *"events"* and not for *"states of affairs"* which it was acknowledged pandemics would constitute. The court said:

> *"145. As we understood it, this argument was principally directed to supporting RSA's argument that cover was provided only for the occurrence of a relevant insured event…. We did not consider that this point had force in relation to RSA 4. It is true that Definition 17 is of 'Covered Event', and that it refers to the matters in the Insuring Clauses as 'events'. That appears simply as a shorthand for what is in the various insuring clauses, some of which … are more specifically identified as 'specified causes"….Certainly, we do not regard Definition 17 as importing any additional requirement or re-definition*

of what constitutes an insured peril beyond what is set out in Clause 2.3 itself. Moreover, a consideration of the matters within Clause 2.3 indicates that the insurance in that clause is not simply against the effects of a matter which may happen at one time and be swiftly over. The cover in respect of the deposit of radioactive isotopes … which is part of the cover under Clause 2.3 (viii) … is an example. While the deposit may occur at a particular time, the cover will extend to the effect of the presence of the …isotopes over a period of time."

139. It seems to me that the same rationale applies equally here. As noted above, the prevention of access to premises or the use of premises within extension (3) following damage to property in the vicinity of the premises, may well last some time particularly if, for example, the property in the vicinity is a warehouse containing hazardous material which is released by a fire. The clean-up of the area might last a significant period of time before the premises could be reused and the public readmitted. In such a case, it would be difficult to describe the prevention of access as falling within the definition of an *"event"* as described by Lord Mustill in *AXA Reinsurance*. It is more readily described as a *"state of affairs".* Thus, there can be no doubt that such a state of affairs is covered under extension (3). Given that fact, it must follow, when the policy is read in a consistent way, that the reference to *"events"* in the operative clause cannot be construed in the narrow way suggested by FBD. In order to give effect to the terms of the extensions, it is necessary, in the specific context of the FBD policy, to construe the word "*events*" as extending to the states of affairs described in the extensions contained in s.3 of the policy.

Is the cover available limited to closures arising solely from localised outbreaks?

140. The next issue which requires consideration is whether, assuming the other conditions of cover to have been satisfied, the cover available under extension (1) is

confined to imposed closures arising solely from localised outbreaks of contagious or infectious diseases. This issue arises in circumstances where the imposed closure ordered in March 2020 arose in response to a national situation where cases of Covid-19 had arisen in many different areas around Ireland and where the government was concerned that the difficulty in maintaining social distance within public houses meant that public houses would have to be closed. The plaintiffs argue that all that is required is that there should be an occurrence of a case of the disease within the 25 mile radius prescribed by the policy. They submit that each occurrence was part of a wider picture which dictated the response of the government and they argue, in the alternative, that each of the individual occurrences was a separate but effective cause. In respect of the latter consideration, the plaintiffs have relied on the analysis carried out by the Divisional Court in the *FCA* case. At para. 112 of its judgment in that case, the Divisional Court, in the course of dealing with the RSA 3 clause (which was a disease clause rather than a composite clause such as extension 1 (d) of the FBD policy which requires both an imposed closure and the existence of a disease) observed:

> *"112. Alternatively, although we regard this as being less satisfactory, each of the individual occurrences was a separate but effective cause. On this analysis they were all effective because the authorities acted on a national level, on the basis of the information about all the occurrences of COVID-19, and it is artificial to say that only some of those which had occurred by any given date were effective causes of the action taken at that date; and still more artificial to say that because the action was taken in response to all the cases, it could not be regarded as taken in response to any particular cases."*

141. In response, counsel for FBD drew attention to the distinction between the disease clause under consideration in that paragraph of the judgment of the Divisional Court and the policy here which requires an imposed closure following an outbreak either on the premises or within a 25 mile radius. Counsel also highlighted the hesitation expressed later in the *FCA* judgment in relation to the Hiscox 4 policy (which was closer in concept to the policy in issue in these proceedings). FBD also submitted that the interpretation advocated by the plaintiffs would involve the court giving no meaning to the clear geographical restriction incorporated in the insuring clause. In this regard, the case was made on behalf of FBD that it is necessary to construe extension 1(d) in a manner which is consistent with each of extensions 1(a) to (c). In the case of each of those extensions, counsel argued that the relevant *"trigger"* for the imposed closure is confined to an event *"on the premises"*. Thus, for example, if there was a murder on a premises next door to the public house following which the pub was closed, there would be no cover under extension 1(a) because the closure did not occur following a murder *"on the premises"*. It was submitted on behalf of FBD that there is no reason why, because the language of para. (d) extends to a limited radius beyond the premises (i.e. within 25 miles of the premises) the impact of that geographical circumscription should be accorded any less weight in interpreting the clause than the restriction *"on the premises"* in respect of paras. (a) to (c) of extension (1). It was also submitted that extension 1(d) could have said, but did not say *"on the premises* ***or in the State****"* (emphasis added). Counsel argued that the closure order made in March 2020 is to be contrasted with the localised restrictions imposed in August 2020 in respect of Counties Kildare, Laois and Offaly following particular outbreaks associated with meat plants in those counties. In such circumstances, FBD maintained that no credible suggestion can be

made that a reasonable person would have understood the cover available under extension 1(d) would extend to closure following any outbreak of a disease other than a closure following an outbreak of disease in the specified localised area. FBD contended that the construction urged by it is consistent with the *"fundamental principles"* of insurance. Counsel for FBD said that:

> *"It is one thing to price risk and insure an imposed closure due to an outbreak of disease within a particular locality. It is quite another to price risk and insure imposed closures due to nationwide outbreaks of disease which, by definition, are outbreaks likely to result in closure simultaneously of all premises within the State at a nationwide level."*

Leaving aside whether it was open to counsel to make that argument having regard to the abandonment by FBD of the business efficacy issue, the argument might, at first sight, appear to have merit. However, on closer analysis, I do not believe that it carries much weight in circumstances where a 25 mile radius around any of the three pubs located in Dublin would capture very significant numbers of public houses in the Dublin region extending over an area of 1,963 square miles. While there was no evidence given as to the number of public houses in that area or as to the numbers of public houses insured by FBD, it is reasonable to assume that the number of pubs insured by FBD in that area of 1,963 miles is not insignificant. FBD appears to have a substantial presence in the Dublin market. It also has a relationship with the LVA as evidenced by its sponsorship of the annual general meeting and dinner of the LVA. Moreover, its appetite to expand in the Dublin market is well evidenced by the approach it took in relation to its dealings with the Lemon & Duke plaintiff even after the coronavirus had arrived in Europe. In addition, as the evidence of Mr. Grace demonstrates, there are a wide range of measures by which an insurer can spread or

ameliorate its exposure in relation to an accumulation of risk including, for example, reinsurance (a measure that Mr. Grace particularly stressed).

142. Nonetheless, the policy does contain a geographic restriction. As counsel for FBD observed, it would have been possible for the policy to omit any geographical restriction at all in which case the territorial limits of the policy would have applied and would have extended to the entire State. In this context, counsel for FBD highlighted the evidence given by Mr. Grace, the insurance expert, that one of the methods used by insurers to keep risks within manageable boundaries was by imposing a geographical restriction. However, Mr. Grace also identified a substantial number of other techniques that can be used including restricting the diseases which may give rise to cover or by restricting cover to outbreaks on the insured premises itself or to restricting to an inner maximum monetary limit the cover available. A further technique was to provide the cover only on request with both inner limits and for an additional premium. Furthermore, as emerged in the course of the evidence of Mr. Hills, it would be open to an insurer to exclude cover in respect of a pandemic disease.

143. In my view, it is important to have regard to the language used in extension 1(d). The language clearly responds to outbreaks of disease both on the premises or within 25 miles. As noted in para. 140, the area encompassed by a 25 mile radius around each premises is extensive and, in the case of pubs situated in the Dublin area, embraces a very significant part of the population of the State as a whole. As explained at a later point in this judgment *"outbreak"* is capable of consisting of a relatively small number of cases or, where the pathogen is particularly serious, a single instance of disease. That said, it is inherently more likely that public houses would be the subject of a closure order in the case of outbreaks off their premises

where there is a substantial concern about the potential for infection arising from the outbreak. As noted in para. 126 (e) above, I believe that public houses would likely be perceived by reasonable persons in the position of the parties to the FBD policy to be places where disease can be easily transmitted. While that is so, it is equally likely that reasonable persons in that position would also consider that an extreme step such as a closure of public houses would only occur where there were significant numbers of infections occurring in the community or where, having regard to the nature of the disease itself, there was a pressing concern that significant numbers of infections would be likely to occur if closures of public houses were not ordered. Thus, it seems to me that the language used in extension 1(d) must envisage that, in the case of off-premises outbreaks, the outbreaks are likely to be of a highly significant kind.

144. It also seems to me to be relevant that there is significant movement in and out of large urban areas such as Dublin every day. The so-called commuter belt now extends well beyond the 1,963 square miles falling within the 25 mile radius around the Leopardstown Inn. It is therefore highly unlikely that, if there was serious concern about numbers of infections with a particular disease, that concern would be confined to the 25 mile radius around each of the three pubs in question.

145. Having regard to the considerations outlined in paras. 143 and 144 above, I do not believe that FBD is correct in suggesting that reasonable persons in the position of the parties would have understood the cover available under extension 1(d) to have extended solely to closures following an outbreak of disease in the specified localised area and not beyond that area.

146. While it is clear that, for cover to be available under extension 1(d), there must be an outbreak of disease at least within 25 miles of the premises, there is no suggestion in the language used that outbreaks occurring simultaneously outside that

radius would deprive the insured of cover. It would have been a simple and straightforward matter for FBD to so provide in its policy. As the plaintiffs argued, extension 1(d) could have referred to outbreaks of disease *"on the premises or* ***wholly*** *within 25 miles of same".* In this context, it is noteworthy that, in s. 6 of the policy (dealing with cover in respect of injuries sustained by an employee of the insured as a result of a robbery or hold-up), FBD took care to carefully prescribe the type of bodily injury which was covered namely *"injury* [which] *shall solely and independent of any other cause"* result in the forms of damage set out in paras. A to E of the accompanying table. Thus, it would have been a simple matter for FBD to make clear that extension 1(d) was intended to apply solely in respect of closures following an outbreak of disease in the specified localised area. It would equally have been a straightforward matter for FBD to expressly exclude cover where there was a nationwide outbreak or to exclude cover for pandemics in the same way as was seen in the Zurich policy put to Mr. Hills in the course of his cross-examination.

147. In all of the circumstances, I have come to the conclusion that reasonable people in the position of the parties to the FBD policy would not have understood the cover available under extension 1(d) to have been confined solely to closures following a localised outbreak of disease within the specified 25 mile radius. Nonetheless, in order for the relevant peril the subject of extension 1 (d) to apply, there must be an outbreak of a contagious or infectious disease either on the premises or within a 25 mile radius. But, in my view, once that element of the peril is satisfied, the fact that there are also outbreaks outside that radius does not *per se* disapply the extension. The existence of such outbreaks outside the 25 mile radius may, however, make it more difficult to demonstrate a causative connection between the imposed

closure and the localised outbreaks and that is an issue that is addressed in paras. 148 and following paras.

The meaning of the word "following"

148. In addition to the requirement that there must be an outbreak or outbreaks within 25 miles of the insured premises, there are also a number of other elements to the insured peril which must exist before extension 1 (d) can be said to apply. In this context, the next issue of interpretation that arises relates to the meaning of the word *"following"* in extension (1) of the policy. The same language is also used in extensions (3) and (4). The question which arises is whether the use of the word *"following"* means that an imposed closure of the premises by order of a government or local authority must have been proximately caused by an outbreak of contagious or infectious disease on the premises or within 25 miles of the premises or whether the word should be interpreted as imposing some lesser standard of causation. In addition, it was argued on behalf of the owner of Sean's Bar that the word *"following"* should be given a purely temporal meaning such that, all that is required is that an imposed closure should occur at some point in time after an outbreak of disease within the relevant 25 mile radius.

149. Each of the plaintiffs maintain that extension 1(d) is unambiguous in its terms but, in the event that the court finds, when *"following"* is read in context, that the word has more than one meaning, the plaintiffs rely on the *contra proferentem* principle and they contend that, in such circumstances, the meaning most favourable to the insured should be adopted by the court. The plaintiffs also say that, even if the court concludes that the word *"following"* must be read as a synonym for *"as a result of"*, that requirement is, in any event, satisfied, on the facts. At this point, however, I am simply considering the proper interpretation of the words used in extension 1(d).

It will be necessary to address the issue of causation once all relevant issues of interpretation have been considered.

150. The plaintiffs also relied on a number of findings made by the Divisional Court in the *FCA* case as to the meaning of the word *"following"* in some of the policies of insurance in issue in that case. There was a dispute, however, between the parties as to the meaning that was attributed to the word *"following"* by the Divisional Court.

151. On behalf of FBD, it was argued that the word *"following"* should be interpreted, in the same way as the words *"as a result of"* which, it was accepted by all parties, ordinarily impose a proximate cause requirement. In the alternative, even if the word *"following"* suggests a looser connection than the proximate causation standard, FBD maintains that there is no sufficient causal connection, on the facts, between the government closure and an outbreak of disease within 25 miles of the plaintiffs' respective premises.

152. This dispute between the parties as to the meaning of the word *"following"* is potentially significant in the context of causation. If the policy requires that an outbreak of disease within 25 miles of the respective premises must be the proximate cause of the government closure order, then, if the plaintiffs are to recover under the policy, it must be shown that those outbreaks were the direct or dominant cause of that order.

153. Other than the *FCA* case, none of the parties was in a position to identify any authority on the meaning of the word *"following"* in the context of an insurance policy. The only additional authority to which I was referred was a decision of the New South Wales Supreme Court which addressed the meaning of the word *"following"* in the context of a document regulating rights under a pension trust. That

case is examined in more detail below. I was also referred to the definition of *"following"* in the Oxford English Dictionary which contains three relevant but different definitions, depending on the context in which the word is used:

(a) The first is temporal : *"that comes after or next in order or in time; succeeding, subsequent, ensuing";*

(b) The second, which was relied upon by FBD, is *"ensuing as an effect or consequence, resulting".*

154. However, the Oxford English Dictionary also includes a third definition of *"following"* when used as a preposition where it was defined as: *"as a sequel to, in succession to (an event), after".* A number of examples are given. The first example is taken from the Evening News published on 11th December, 1947 namely:

"*The prologue was written by the company following an incident witnessed by them during anti-Jewish demonstrations following the hanging of two British soldiers in Palestine".*

155. A second example of the use of the word as a preposition was taken from the Observer published on 24th March, 1968 namely *"used car prices are going up, following the Budget".*

156. The standard definition of the term *"preposition"* is a word governing (and usually preceding) a noun or pronoun and expressing a relation to another word or element. On that basis, it is well arguable that the word *"following"* as used in extension (1) of s. 3 of the policy is used as a preposition. It is used as a word governing the nouns which follow in sub paras. (a) to (d) and it expresses a relation between what is contained in the opening words of extension (1) and the words which follow in subparas. (a) to (d). That said, whether or not the word *"following"* is used as a preposition, the meaning to be given to the word must be derived from a

consideration of the way in which it is used in the contract in question. Grammatical errors are not uncommon in contractual documents. Furthermore, while dictionary definitions are of some assistance, the meaning to be given to a word in a contract is to be assessed by a consideration of the contract as a whole construed against the relevant factual and legal background. In this context, the plaintiffs have placed considerable emphasis upon the way in which the words *"as a result of"* are used in the opening words of the extensions to s. 3. Furthermore, in the earlier part of s.3, the policy uses language *"resulting from…".* The plaintiffs argue that, in circumstances where FBD chose, in extensions (1) (3) and (4) to use a different formula to *"resulting from"* or *"as a result of",* FBD must be taken to have intended to give a different meaning to the word *"following"* than the well-established meaning of *"as a result of"* or *"resulting from"* which are generally accepted to connote proximate cause.

157. As noted above, I was also referred to a decision of the New South Wales Supreme Court namely the judgment of Windeyer AJ in *Cadbury Pty Ltd v. Mercer Investment Nominees Ltd* [2011] NSWSC 622. The clause in issue in that case stated that, if a senior executive left the service of the employer before normal retirement date *"following a change of control",* a lump sum would be payable. One of the issues that was debated in that case was whether the word *"following"* in that context meant that there had to be a causative connection between the change of control and the departure from service or whether all that was required was a temporal connection in that the departure followed, in point of time, after the change of control. Windeyer AJ came to the conclusion, in para. 26 of his judgment, that there was *"no doubt"* that there was ambiguity. He referred, in this context, to the definitions in the Oxford English Dictionary which were in similar terms to those quoted in paras. 153 to 154

above. He noted, however, that the plaintiff argued for a causative meaning. Otherwise, it would result in a windfall payment being made to senior executive members leaving employment for reasons entirely unconnected with a change of control of the relevant company. Nevertheless, while Windeyer AJ said that this consideration might support a causative construction, it was not necessarily obvious as the additional benefit payable to the employee decreased the closer the employee gets to retirement age and the younger the employee is the more reason there might be for staying with the company. Ultimately, Windeyer AJ came to the conclusion that, on a consideration of the terms of the relevant document as a whole and without resorting to the *contra proferentem* principle, a temporal meaning was more likely. At para. 28 of his judgment he said:

> *"As a matter of impression, I consider 'after' a more usual meaning of 'following' than causative words such as 'because of' or 'as a result of'. But more importantly, although not referred to by counsel, other provisions appearing in the relevant Annexure are significant. In Part 2 … which deals with contributions and benefits …, clause 2.4.1 refers to benefits payable … on ceasing Employment (other than* ***due to*** *the Member's death or Total … Disablement … and clause 2.4.2 deals with … Members who cease employment " due to the Member's death or Total … Disablement …'. Perhaps more significantly, in Part 3 of the Annexure which deals with contributions and benefits …, clause 3.7.2 deals with benefits payable upon 'the retirement of a … Member … before the Normal Retirement Date* ***as a result of*** *the Total … Disablement of the Member' … As clear causative words have been used in closely related provisions, I think this points to 'following' … having a temporal meaning. …".* (bold in original).

158. Counsel for FBD argued that the word *"following"* in extensions (1) (3) and (4) of the policy could not plausibly be construed as a temporal connection because it would not import any limit on the period of time between closure and the circumstance giving rise to closure. Thus, counsel argued, for example, in the context of extension (1) (a), that, if the word *"following"* is given a purely temporal meaning, there could be a murder on the premises many months or even years prior to its closure and that it could not have been intended by the policy that a subsequent closure of the premises would trigger cover even where the closure was not causatively connected to the murder. On the other hand, counsel for the owner of Sean's Bar argued that the word *"following"* in its ordinary and natural meaning, when used in the manner set out in the extensions to s. 3 of the policy, connotes a close temporal connection. In response, counsel for FBD argued that this involves reading words into the policy namely that the word *"following"* should now be read as *"closely following".* Furthermore, if it meant *"closely following",* that raised a further question as to the extent of the temporal connection connoted by the word *"following".* Is it days or weeks or months? Counsel for FBD strongly urged that it cannot be correct to read the language of the extension as importing no causative connection between the government imposed closure and the outbreak of disease. Counsel argued that one could, on the hypothesis advanced on behalf of the owner of Sean's Bar, have an outbreak of disease on the premises of a public house which did not cause any imposed closure but where, for example, the pub is shut down six months later because it has lost its licence or because it is the subject of an injunction restraining a nuisance. On that hypothesis, the policy would still respond. Furthermore, in looking at the meaning of the word *"following"* in extension (4) of the policy, one could, on the Sean's Bar construction, have an interruption of supply

of electricity (as a consequence of building works next door to a pub) which could trigger cover if, at any time within the previous month or perhaps the previous year, there had been damage to an ESB station.

159. In my view, counsel for FBD is correct in suggesting that the word *"following"* as used in s. 3 of the policy must have been intended to have some causative element. It is difficult to envisage how reasonable people in the position of the parties to the FBD policy would have considered that *"following"* was intended to have a purely temporal meaning. If a purely temporal meaning were to be given to the word *"following"* it would mean that cover would be available under extension (4) in the event of an interruption in supply of electricity in the circumstances outlined in the hypothetical example put forward by counsel for FBD. I do not believe that any reasonable person would consider that extension (4) was intended to provide cover in such circumstances. In short, that would be too good to be true. If that is so in the context of extension (4), it seems to me that the word *"following"* as used in extension (1) should be construed in a consistent way. I have therefore come to the conclusion that the word *"following"* as used in this section of the policy was not intended to have a purely temporal meaning. However, that does not dispose of the issue. It is still necessary to consider what meaning should be given to the word *"following"* and, in particular, to determine what degree of causation it connotes. It is important to recall that, elsewhere in s. 3 of the policy, FBD chose language which, indisputably, connotes proximate cause namely "*resulting from"* and "*as a result of".* The decision to use a different formula in extensions (1), (3) and (4) suggests that something else was intended by the use of the word *"following***".**

160. It is useful to contrast the approach taken in the FBD policy with the language used in analogous policies available in the Irish market. In the course of the hearing, I

was referred to the language used in a number of policies available on the Irish market. Remarkably, very few of these policies use the word *"following"* in either a disease clause or in a denial of access clause. For example, extension 4 of the Argenta policy provides cover *"in consequence of"* infectious disease or in consequence of the closing of the premises *"as a result of"* defects in the sanitary arrangements or an infestation of vermin. The word *"following"* is used in the AXA Enterprise Insurance Policy but purely as an adjective. In the same policy there is cover in respect of denial of access *"as a result of"* damage to property within a one-mile radius of the premises which prevents or hinders access to the insured premises. There is also cover for non-damage denial of access in respect of any loss *"resulting from"* interference with the business where access to the premises is restricted *"arising directly from"* actions taken by the police or other authorities. In the case of the Contessa Irish Axis policy, cover is provided in respect of interference *"in consequence of"* an outbreak of infectious disease within 25 miles of the premises. There is also cover for non-damage denial of access where there is interference with the business *"in consequence"* of prevention of access.

161. In the case of the Chubb *"Republic of Ireland Commercial Package"* policy, there is cover for non-damage denial of access in respect of losses *"resulting from"* interference with the business *"in consequence of"* a number of defined circumstances. There is also cover for loss *"resulting from"* interruption with the business *"following"* the intervention of a public body authorised to restrict or deny access arising from a number of causes including the occurrence of a notifiable disease. This is one of the only policies that uses the word *"following"* but it is used with reference to the intervention of a public body rather than with reference to the occurrence of a notifiable disease. In the case of the ERGO *"Eire commercial*

wording 2019", cover is provided in respect of losses "*directly resulting from"* interference with the business *"in consequence of"* a number of defined circumstances including notifiable disease within 25 miles of the premises. In the case of the GEI Commercial Combined policy there are a number of extensions including one providing cover in respect of infectious diseases which states that cover is provided in respect of loss *"resulting from"* interference with the business *"in consequence of"* any occurrence of a notifiable disease at the premises. Similarly, in the case of the QBE Commercial Combined Insurance policy, clause 3.3.4 provides cover in respect of loss *"resulting from"* interference with the business *"in consequence of"* a number of specified circumstances including any occurrence of a notifiable disease at the premises.

162. FBD did not use the word *"following"* in the context of the extensions available under the FBD *"Business Complete"* policy in respect of either prevention of access or occurrences of disease. In the case of prevention of access, the relevant extension states that cover is provided in respect of business interruption *"resulting from*" damage to property in the vicinity of the premises obstructing access to the premises. In the case of disease, the relevant extension also states that cover is provided in respect of business interruption *"resulting from"* a number of matters including a case of a (listed) notifiable disease at the premises. In the case of the Allianz business policy, there is an extension in respect of notifiable disease which covers loss *"resulting from"* interference with the business *"in consequence of"* any occurrence of a notifiable disease at the premises *"which causes restrictions on the use of the premises"* on the order or advice of a competent authority. In the relevant extension dealing with prevention of access, cover is provided in respect of interruption with the business *"in consequence of"* a number of named factors. In the

case of the RSA policy, cover is provided in respect of closure or restrictions placed on the premises on the advice of the Medical Officer of a public authority *"as a result of"* a notifiable human disease. Cover is also provided in respect of the closing of the premises by order of a public authority for the local area *"consequent upon"* defects in the drains or other sanitary arrangements.

163. Under the AIG Commercial Combined policy, there is an extension providing cover in respect of any occurrence of a notifiable disease "*which causes restrictions*" on the use of the premises on the order or advice of a competent local authority. In the case of the Travelers policy, cover is provided in respect of loss resulting from interference with the business "*in consequence of*" damage to the surrounding area. There is also an extension in respect of losses *"directly resulting from"* interference with the business "*in consequence of"* infectious disease at the premises *"which results in"* closure of the premises by an order of an appropriate competent authority or *"in consequence of"* an outbreak of an infectious disease within sixteen kilometres of the premises.

164. The only other policy which uses the word *"following"* in the context of a prevention of access or a disease clause is the AXA *"shops, offices and surgeries"* policy which provides cover in respect of losses resulting from interruption with a business *"following"* any human infectious or contagious disease (excluding AIDS) where the local authority has stipulated that the outbreak should be notified to it and which has been manifested by any person in the relevant shop, office or surgery or within a 40 kilometre radius of it.

165. This brief survey of the language used in a variety of policies available on the Irish market demonstrates that there is a range of language available to insurers in framing the business interruption cover offered by them. While the language of each

policy would have to be carefully construed in order to determine its true meaning, it will be noted that, in many of the policies, the language used is *prima facie* consistent with proximate cause. Thus, for example, the words *"in consequence of"* have been held to be consistent with the requirement of proximate cause. In this context, MacGillivray on *Insurance Law* (14th ed., 2018) at para. 21-004 cites as authority for this proposition the decisions in *Ionides v. Universal Marine Insurance Co*. (1863) 14 C.B. (N.S.) 259 and *Liverpool and London War Risks Assurance Ltd v. Ocean Steamship Co.* [1948] A.C. 243. More recently, the same view was taken in England in *TKC London Ltd v. Allianz Insurance Plc* [2020] EWHC 2710 (Comm).

166. The difficulty in this case is that FBD did not choose to use language with an established or *prima facie* meaning. It chose instead to use the word *"following"*. At the time these four policies were incepted there was no direct authority, in an insurance context, as to the meaning of that word. Its meaning has, however, since been the subject of discussion in the judgment of the Divisional Court in the *FCA* case**.** In that case, the word *"following"* was used in a number of policies which were analysed by the court. In the case of the RSA 3 policy, the relevant extension was a pure disease clause which did not require any imposed closure. The clause stated that insurers would indemnify the insured in respect of an interference with the business during the indemnity period *"following"* the occurrence (*inter alia*) of a notifiable disease on the premises or within a radius of 25 miles. The relevant definition of the *"Indemnity Period"* for this purpose stated that it constituted the period during which the results of the business *"shall be affected in consequence of the occurrence …"*. The FCA argued that the word *"following"* should be given a meaning that required more than a purely temporal relationship. The FCA submitted that it should be construed as requiring a causal connection to the business interruption but not

necessarily importing a requirement of proximate causation. On the other hand, the insurers argued that the word *"following"* must denote proximate causation by reason, *inter alia*, of the use of the words *"in consequence of"* in the definition of the Indemnity Period. The Divisional Court rejected the approach suggested by the insurer and, instead, came to the conclusion that the case made by the FCA was correct. The matter was addressed in paras. 95-96 of its judgment as follows:

> *"95.… we consider that this imports more than merely a temporal relationship. We consider that the FCA is correct to say that it involves a requirement … of … a causal connection to the business interruption, but not necessarily one of proximate causation. While it is the case that courts tend to avoid drawing nice distinctions between causative phrases in an insurance context, and that it is often appropriate to infer that the intention of the parties was to refer to the established test of proximate causation, it does not appear that it is appropriate to construe 'following' … as having that meaning. … we do not consider that it is a link between the loss and the peril, which is the central case where it is generally to be inferred that the parties intended a test of proximate causation. In any event, it appears to us that, in context, it was used to denote a looser form of link than that of proximate causation. Its natural meaning does not itself import such a link, and it makes good sense that a word implying a looser link should be used in recognition of the fact that, of the matters referred to within [the] Extension … **[disease]** and **[murder or suicide]** would not of themselves directly cause interruption to … the business, but would in almost every case have such an effect only via the reaction of the authorities and/or of the public. …*

96. We were not persuaded by RSA's arguments to the effect that the word 'following' must denote proximate causation by reason of … the definition of 'Indemnity Period' … and in particular … the words 'shall be affected in consequence of the occurrence '. The phrase 'in consequence of', RSA submitted, must be read as requiring proximate causation. In our view, however, the phrase is used simply to refer to the requirement that the interruption should 'follow' one of [the occurrences listed in para. (a) to (d) of the Extension] ….'Following' on any view … imports some causal connection and as we see it, the phrase 'in consequence of' is intending to refer to the same connection. It is significant that, within the definition of 'Indemnity Period', what is envisaged is that the 'occurrence …' shall have business interruption or interference as a 'consequence'. But, as we have already said, the 'occurrences' in (a) and (d) would not have a direct effect on the business. 'In consequence of' is accordingly intended to embrace, at least, indirect causation".

167. It will be seen from that extract from the judgment of the Divisional Court that, in arriving at its conclusion as to the meaning of the word *"following"* the Divisional Court carefully examined the language of the clause in issue both with regard to the meaning of the word *"following"* and the meaning of the words "*in consequence of*". It was submitted on behalf of FBD in this case that, in para. 96 of its judgment, the Divisional Court equated the meaning of the word *"following"* with the meaning of the words "*in consequence of*". Counsel argued that, in accordance with the usual or *prima facie* meaning of the latter phrase, this meant that, in substance, the court found that the word *"following"* should be interpreted as requiring proximate cause. I do not believe, however, that this submission withstands

scrutiny. It is quite clear from para. 95 of the judgment that the court in the *FCA* case concluded, by reference to the language of the clause in issue, that the word *"following"* should not be construed as requiring proximate causation. It is also quite clear from para. 96 of the judgment that the court in that case attributed a different meaning to the words "*in consequence of"* to that which is classically given to that phrase in an insurance context. That is clear, in particular, from the last sentence in that paragraph where the court explains that, in the context of the particular clause in issue, the words *"in consequence of"* should be intended to embrace indirect causation.

168. The Divisional Court addressed what it considered must be established to satisfy the looser causal standard applied by it by reference to the word *"following",* at paras. 111 to 112 of the judgment:

> *"111. If, as we consider to be the case with RSA 3, what is required by the word 'following' is a looser causal relation than proximate cause,* ***we would regard that as being clearly satisfied by the occurrence of a case of the disease within the radius if that occurrence was part of a wider picture which dictated the response of the authorities and the public which itself led to the business interruption…****. Even if the word 'following' imports the requirement of proximate causation we would consider that, given the nature of the cover as we consider it to be, this is to be regarded as satisfied in a case in which there is a national response to the widespread outbreak of a disease. In such a case we consider that the right way to analyse the matter is that the proximate cause of the business interruption is the … Disease of which the individual outbreaks form indivisible parts.*

> *112. Alternatively, although we regard this as being less satisfactory, each of the individual occurrences was a separate but effective cause. On this analysis they were all effective because the authorities acted on a national level, on the basis of the information about all the occurrences … and it is artificial to say that only some of those which had occurred by any given date were effective causes of the action taken at that date; and still more artificial to say that because the action was taken in response to all the cases, it could not be regarded as taken in response to any particular cases. … [Counsel for the FCA] pointed to the information which the government was acting upon, and a number of SAGE minutes, which show that the government response was the reaction to information about all the cases in the country, and that the response was decided to be national because the outbreak was so widespread. …"* (emphasis added).

169. Insofar as I can see, other than the passage highlighted in bold in para. 168 above, there is no detailed explanation of the nature of the *"looser causal relation than proximate cause"* in the judgment of the Divisional Court. Nonetheless, it is important to bear in mind that the approach taken by the Divisional Court should not be regarded as an outlier. There have been cases where, depending upon the language used in a particular policy, courts have decided that a lesser standard than proximate cause has been adopted under the particular insurance policy in issue. There is a useful discussion of some of these cases in the judgment of Christopher Clarke J. in *Beazley Underwriting Ltd v. Travelers Companies Inc.* [2012] 1 All ER (Comm) 1241 at pp. 1269-1272. In each case, it is necessary to consider the language used in the relevant policy.

170. Counsel for FBD, understandably, seeks to distinguish the approach taken by the Divisional Court in respect of RSA 3 on the basis that, in contrast to the present case, the clause in issue was a pure disease clause with no requirement that there should be an imposed closure. However, the Divisional Court examined a large number of different policy wordings including clauses which required an imposed closure. These included the Hiscox 1-4 policy wordings. Each of Hiscox 1-3 provided cover in respect of business interruption due to restrictions imposed by a public authority following (*inter alia*) an occurrence of any notifiable human infectious disease. There was no requirement that the disease should occur within any geographical area. At para. 272 of its judgment, the Court accepted that the restrictions imposed by the public authority must *"follow"* the "*occurrence"* of the notifiable disease and that this *"imports some sort of causal connection".* The court therefore appears to have taken a similar approach to that adopted in relation to the RSA 3 disease clause.

171. In the case of Hiscox 4, the policy required that the occurrence of the notifiable disease should take place within one mile of the insured premises. Nonetheless, the court reached a similar conclusion in relation to Hiscox 4. In para. 273 of the judgment, the court expressed itself as doing so *"with more hesitation".* There was a dispute between the parties to these proceedings as to why the court expressed itself in that way. Counsel for the plaintiffs suggested that the hesitation was prompted by the requirement that the disease should manifest itself within such a narrow radius of one mile from the insured premises. In contrast, counsel for FBD suggested that the hesitation stemmed from the existence of a geographical limitation and that it did not matter whether the limitation was one mile or 25 miles. I do not believe that it is necessary for me to reach any conclusion on this debate. Equally, I

do not believe that it necessary to reach any conclusion in relation to a number of criticisms made by FBD in relation to the logic employed by the Divisional Court in para. 273. I am not concerned with the very obvious difficulty faced by the Divisional Court in the *FCA* case in relation to whether it could be said that the government imposed closure in that case *"followed"* an occurrence of the disease within the very narrow confines of a one-mile radial distance around the insured premises. As noted previously, it has been accepted by FBD in the Leopardstown Inn, Sinnotts and Sean's Bar proceedings that there were occurrences of Covid-19 within 25 miles of those premises. The question which I have to consider in this case is whether it can be said that the government imposed closure *"followed"* those outbreaks and, for that purpose, I must construe what level of causation is intended by the use of the word *"following"* in the FBD policy which specifies a 25 mile radius. I therefore do not believe that any useful purpose will be served by addressing the debate which has arisen between the parties in relation to para. 273 of the judgment of the Divisional Court.

172. In the FBD submissions, there is also considerable criticism of the approach taken by the Divisional Court in relation to the RSA 1 policy wording which covers losses as a result of a closure on premises *"as a result of a notifiable human disease manifesting itself at the premises or within a radius of 25 miles…".* I do not, however, believe that this aspect of the *FCA* judgment is of any assistance to me in relation to the present case since it uses quite different language. For the same reason, I see no assistance in the approach taken in the *FCA* judgment in relation to the Hiscox non-damage denial of access clause (which is also debated in the FBD submissions). The language used in that clause is different in that it specifically requires that an *"incident"* should occur within a one-mile radius of the insured

premises which results in a denial of access. The language is utterly different to the present case and, moreover, the word *"following"* is not used. Similarly, I do not believe that it is necessary to spend time on the approach taken by the Divisional Court in relation to the Zurich *"action of competent authorities"* clause (which is also addressed in the FBD submissions). While that clause used the word *"following"* (which the Divisional Court concluded does not, in the context of that particular policy, require proximate causation) the language of the clause is so different to the present case that I do not believe that this aspect of the judgment is of any assistance. What the judgment of the Divisional Court demonstrates is that, consistent with the classic approach applied in Ireland to the interpretation of contractual provisions, it is always necessary to construe the specific language used in a policy in order to understand the meaning of the words used. As the Irish case law shows, that process will also involve a consideration of the relevant factual and legal context.

173. Having outlined the approach taken in the *FCA* case, I now set out my conclusions as to how the word *"following"* should be construed in the context of extensions in s. 3 of the FBD policy and in the specific context of extension 1 (d) in particular. As noted previously, the default position is that, unless an insurance policy otherwise provides, an insurer will be liable only for losses which are proximately caused by a peril insured against. This is the effect of s.55 (1) of the 1906 Act unless, as the sub-s. states, the policy *"otherwise provides"*. That the default rule can be displaced by the language used in an individual insurance policy is confirmed by the case law. The question which arises here is whether the language of the policy *"otherwise provides"* by the use of the word *"following"*. For the reasons previously discussed in para. 159 above, I do not believe that the word *"following"* can be given a purely temporal interpretation. It seems to me that some element of causal

connection is intended by the use of the word *"following"*. However, when one considers the way in which the word is used in context, I believe that it is clear that the word *"following"* is not intended to denote proximate causation. This seems to me to follow from the way in which, in close juxtaposition to the use of the word *"following"*, one finds the words *"as a result of"* and *"resulting from"*. The words *"as a result of"* have a clear proximate cause connotation. No more than 17 words intervene between the use of the words *"as a result of"* and the use of the word *"following"*. Furthermore, only ten lines separate the use of the word *"following"* from the words *"resulting from"*. Like Windeyer AJ in the *Cadbury* case I believe it is highly significant that, when it came to describe extension (1), FBD chose a different formula to either *"as a result of"* or *"resulting from"*. This is to be contrasted, for example, with the approach taken in the RSA 1 clause considered in the *FCA* case which referred to *"loss as a result of…closure or restrictions placed on the premises* ***as a result of*** *a notifiable human disease…"* (emphasis added). It is also notable that, elsewhere in the policy, FBD used language which very clearly signifies a proximate cause requirement. Thus, for example, in the Public Authorities Clause in s.1 of the policy, it is stated that the insurance available under s.1 extends to include the additional cost of reinstatement of damaged property *"as may be incurred solely by reason of the necessity to comply with building or other Regulations …"*. Similarly, in s. 6 of the policy, it is made clear that cover in respect of bodily injury means injury which *"solely and independently of any other cause result in"* one or more of the specific types of injury identified in the table of benefits. It is also noteworthy that words such as *"resulting from"* appear in s.4 of the policy dealing with unauthorised use of credit cards while the words *"as a result of"* appear in s. 6 and the policy also uses, on several occasions, the words *"caused by"* in respect of

several of the perils which are specifically insured under it. These are not, of course, the only words which could be used to illustrate a proximate cause requirement. As the review of the policies available in the Irish market illustrates, the words *"in consequence of"* are frequently used. While it is true that these words do not always mean that proximate cause is intended, the case law suggests that this is the usual meaning of those words.

174. Against the backdrop of the considerations outlined in para. 173 above, I believe that it is reasonable to conclude that the choice of the word *"following"* was deliberately intended to signify something other than proximate cause. This is also consistent with the ordinary meaning of the word *"following"* even when used in a causative way. The causative definition contained in the Oxford English Dictionary uses the words *"ensuing as* ***an effect*** *or consequence, resulting".* That definition falls short of the proximate cause requirement of a dominant or effective cause. This is to be contrasted with the ordinary meaning of the word *"result"* which is defined in the Shorter Oxford English Dictionary as *"****the*** *effect, consequence, issue, or outcome of some action, process, or design"* and which is defined in the Chambers Dictionary as *"to follow as a consequence; ... to be* ***the*** *outcome ...".* The ordinary meaning of *"result"* or *"resulting"* is therefore much more consistent with a proximate cause requirement than the use of the less forceful word *"following".* For completeness, I should add also say that the use of the less forceful word *"following"* also supports a conclusion that the FBD policy does not require that the *"but for"* standard of causation (as explained further below in paras. 203 (a) and 205 to 213) should be applied in so far as the causative link between the outbreaks and the imposed closure is concerned. There is an elaborate discussion of that issue in the U.K. Supreme Court judgment in the *FCA* case. That seems to have been prompted by an argument made

by insurers in that case. Although FBD strongly argued that the *"but for"* standard must be applied in the context of the causative link between the losses claimed by the plaintiffs and the peril, no equivalent argument was made on behalf of FBD in relation to the link between the outbreaks and the closure. In my view, FBD were right to take that approach. It is difficult to see how the use of the word *"following"* could be construed as requiring a *"but for"* standard to be applied to the link between outbreaks and imposed closure.

175. For all of these reasons, I have come to the conclusion that the word *"following"* as used in extension (1) of the FBD policy should be construed as requiring that the matter described in para. (d) (namely the outbreak of disease within a 25 mile radius of the insured premises) should be a cause, but not necessarily the dominant cause, of the imposed closure. This is the standard which I propose to apply in the first place in considering whether there is a sufficient causative link between outbreaks of Covid-19 within the relevant 25 mile radius and the government imposed closure of 15th March, 2020. Lest I am wrong in that approach, I will also consider the same issue by reference to the proximate cause standard. For completeness, it should also be noted that, in due course, I will also have to separately consider proximate cause in the context of the extension 1 (d) peril as a whole. This is a separate exercise that arises as a consequence of the use of the words *"as a result of"* in the opening language of this part of s. 3 of the policy (quoted in para. 125 above).

The meaning of the word "by".

176. In the course of the submissions made on behalf of FBD, considerable emphasis was placed on the word *"by"* as used in the opening words of the extension provisions contained in s.3 of the policy. It was argued that the word *"by"* should be construed as requiring proximate cause. Such an interpretation was given to the same

word in the *TKC* case. In para. 4.4 of FBD's written closing submissions, it was argued that the effect of the use of the word *"by"* is that cover is available solely for losses proximately caused by imposed closure. The case was made that the clause does not say that it covers loss as a result of the business being affected by imposed closure and /or affected by infectious disease.

177. In my view, I do not believe that the use of the word *"by"* can be construed in that way. I fully accept that the opening words of the extension require that the losses must be proximately caused by one or more of the perils which are subsequently defined in extensions (1) to (5). That conclusion seems to me to follow not so much by the use of the word *"by"* but by the use of the words *"as a result of ..."* which precede the word *"by"* in the opening language of this part of s. 3 (quoted in full in para. 125 above). I am not persuaded that the word *"by"* adds anything to that conclusion. In my view, FBD is wrong to suggest that cover is only available in respect of losses proximately caused by imposed closure. That fails to describe the full terms of the peril which is described in extension (1) (d). As explained above, that peril is a composite one which involves both an imposed closure and an outbreak of infectious disease which is a cause (in the manner outlined above) of the imposed closure. All of the elements of the composite peril must be borne in mind.

The meaning of "outbreak".

178. In the Shorter Oxford Dictionary, an *"outbreak"* is defined as *"a sudden occurrence; an eruption; an outburst (of emotion, action, energy, disease, etc)".* That definition is not particularly helpful. The Health Protection Surveillance Centre (*"HPSC"*) website provides a more relevant definition as follows:

> ***"****An outbreak of infection or foodborne illness may be defined as two or more linked cases of the same illness or the situation where the observed number of*

cases exceeds the expected number, or a single case of disease caused by a significant pathogen (e.g. diphtheria or viral haemorrhagic fever). Outbreaks may be confined to some of the members of one family or may be more widespread and involve cases either locally, nationally or internationally".

179. Given the position of HPSC as the competent body in the State for the surveillance of communicable diseases, it seems to me that its definition of *"outbreak"* is of particular utility in interpreting the terms of an Irish policy of insurance. In my view, reasonable persons in the position of the parties to the FBD policy would consult the HPSC definition if they were in any doubt about the meaning of the word *"outbreak"* as used in the policy. None of the parties to the proceedings objected to the court availing of the HPSC definition in its interpretation of the policy.

The ambit of cover available under Extension (1) (d)

180. Having regard to the conclusions which I have reached in relation to the constituent elements of extension (1) (d), I believe that the extension responds to business interruption claims where that business interruption is shown to have been proximately caused by a government imposed closure which, in turn, has had as one of its causes, an outbreak (as defined above) of an infectious or contagious disease within 25 miles of the insured public house premises. Although the proximate cause standard applies to that extent, it seems to me, for the reasons outlined above that it is not necessary for the insured to also establish that the outbreak was the proximate cause of the imposed closure so long as the outbreak was **a** cause. Furthermore, it is clear from the definition of *"outbreak"* that a single instance of a serious disease such as Covid-19 within the 25 mile radius would be sufficient to satisfy the definition, so long as the single instance can be shown to be have been a cause of the closure.

181. For the reasons explained in paras. 143 to 147 above, the fact that there are cases outside the relevant 25 mile radial distance which may also have been a cause of the government imposed closure does not seem to me to be relevant. The policy responds once the closure had, as one of its causes, an outbreak within a 25 mile radius of the public house in question. As previously noted, it was accepted in the Sinnotts and Leopardstown Inn proceedings that, for the purposes of those proceedings only, there had been outbreaks within 25 miles of each of those premises prior to the government imposed closure.

182. In the case of Sean's Bar, there was a similar concession made by letter dated 1st July, 2020 from the solicitors for FBD in response to a request that FBD should discover all documents evidencing or recording the outbreak of a contagious or infectious disease within 25 miles of Sean's Bar from 1st March, 2020. In that letter, the following concession was made:

> *"Strictly without prejudice to any other proceedings … and solely in the interests of narrowing the issues between these parties … for the purposes of the trial, the Defendant accepts that there had been cases of Covid-19 within 25 miles of the Plaintiff's premises before its closure on 15 March, 2020 but the imposed closure was not decided by reference to or due to this, and did not follow from it.*
>
> *In circumstances where the Defendant is prepared to admit the foregoing factual issue, the discovery sought is not relevant or necessary".*

183. Thus, for the purposes of these proceedings, there is therefore no factual dispute between the parties that there had been cases of Covid-19 within 25 miles of each of the plaintiffs' premises before 15th March, 2020. I should add, for

completeness, that, having regard to the terms of the representation described in para. 57 above, that the 25 mile radius has no application in the case of the Lemon & Duke.

184. However, there are significant differences between the parties in relation to causation and that is the next subject to which I now turn.

Causation

185. There are a number of aspects to the debate about causation. The first relates to whether it can be said that the government imposed closure followed (in the sense explained above) the admitted outbreaks of Covid-19 within 25 miles of the insured premises. That is the first step in the relevant causal chain in respect of the cover available in respect of extension 1 (d) as described in para. 180 above. If the plaintiffs succeed in surmounting that obstacle, the next link in the causal chain which arises is whether the plaintiffs can show that their businesses have suffered losses as a result of the government imposed closure which followed (in the causative sense previously explained) the outbreaks. In relation to the latter issue, it should be borne in mind that the policy uses the words *"**as a result of** the business being affected by … imposed closure of the premises …"* (emphasis added). There was no dispute between the parties that the use of the words *"as a result of …"* imposed a proximate causation requirement.

186. I deal first with whether there is a sufficient causative link between the outbreaks within 25 miles of the plaintiff's premises and the closure of 15 March. As outlined previously, in addressing this issue, I will proceed on two alternative bases namely:

(a) That the word *"following"* should be interpreted as requiring a looser causal connection than proximate cause (i.e. that the outbreaks within a 25 mile radius were a cause of the closure); and

(b) On the basis that the word *"following"* should be construed as requiring that the closure was proximately caused by those outbreaks.

Were the outbreaks within a 25 mile radial distance of the plaintiffs premises a cause of the government imposed closure?

187. Subject to an argument that was raised in FBD's closing submissions (dealt with below) the case made by FBD was that the government decision to close public houses was prompted not by a localised outbreak of disease but by reason of concern at a nationwide level. In the closing oral submissions made on behalf of FBD, counsel contrasted the approach taken by the government on 15th March, 2020 with the subsequent decision made on 7th August, 2020 when a series of localised restrictions were enacted for counties Kildare, Laois and Offaly. Counsel argued that, in the latter case, there had been a local lockdown imposed specifically because there had been a surge in cases in those counties linked to outbreaks in various meat plants and that, in such circumstances, one could see that the imposed closure was causatively connected to a specific outbreak at a specific location and counsel submitted that this was *"demonstrably missing"* from the closure order of 15th March, 2020.

188. In my view, the example cited by counsel for FBD illustrates that, where there are particular localised outbreaks, a targeted approach can be taken to address those outbreaks and to order closure of particular businesses where such closure is considered necessary by reference to those local outbreaks. In contrast, the fact that the government, in March 2020 took the view that it was necessary to close down public houses on a country-wide basis illustrates the widespread nature of the outbreaks. This is pre-figured in the minutes of the NPHET meeting of 11th and 12th March, 2020 which noted that, as of 11th March, 2020, cases had been reported

geographically in several areas across the country. The same minutes record that NPHET had noted the number of cases admitted to hospital requiring ICU care and that a number of clusters of infection had been reported. The minutes also record the view taken by NPHET that:

> *"Given the current epidemiological situation in Ireland and the advice of the ECDC, the NPHET agreed that it was now necessary to move to Delay Phase and that additional actions to disrupt the spread of COVID-19 are now required".*

189. While NPHET, at its meeting on 11th and 12th March, 2020 did not specifically address the position of public houses, the minutes show that there was considerable concern about the level of social interaction more generally.

190. In my view, it is clear that each outbreak of the disease in the State was instrumental in the government decision to close down all public houses wherever they were in the State. In circumstances where FBD accepts, for the purposes of these proceedings, that there were outbreaks within 25 miles of each of the plaintiffs' premises, those outbreaks were, at minimum, a cause of the decision to close each of the public houses the subject matter of these proceedings. As the Divisional Court observed in para. 111 of its judgment (quoted in para. 168 above) each occurrence of the disease was part of a wider picture which dictated the response of government which led to the interruption in business. As the Divisional Court said in para. 112 of its judgment, the alternative way of looking at the matter is to regard each of the individual occurrences as a separate but effective cause of the government closure.

191. Thus, in circumstances where the word *"following"* means that an outbreak of disease must be a cause (but not necessarily the proximate cause) of a government imposed closure, that test is plainly satisfied on the facts. There was, however, an

additional argument raised in the closing written submissions delivered on behalf of FBD. That argument centred on the language used in the government announcement of 15th March, 2020 which suggested that the government decision was prompted by the difficulty outlined by the LVA and VFI in implementing the published guidelines on social distancing in a public house setting. The government press release continued in the following terms:

> *"The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.*
>
> *For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.*
>
> *The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night".*

192. In the written closing submissions on behalf of FBD, the case was made that the terms of the government announcement are explicit in identifying, as the reason for the closure, the difficulty (outlined to the government by the LVA and VFI) in implementing the published guidelines on social distancing in a public house setting. On that basis, it was argued that it is clear that the imposed closure was not caused in consequence of any outbreak within 25 miles of any of the plaintiffs' premises. In the course of the closing oral submissions on behalf of FBD, I raised with counsel that I had not understood this case to have been made in the course of the hearing and that my understanding had been that FBD's argument centred on the contention that the

government decision on closure could not be said to have been caused by any particular localised outbreak of the disease. Counsel did not dissent from that proposition. Counsel did, however, make the case that the plaintiffs bear the onus of demonstrating that there is a causative link between the imposed closure and an outbreak within 25 miles of their respective premises. Counsel argued, in this context, that the approach taken by the Divisional Court in paras. 111 and 112 of its judgment were not in point because the court was dealing, in those paragraphs, with a pure disease clause. Counsel argued that the same analysis does not apply to a composite clause which requires an imposed closure following (in a causative sense) an outbreak of disease within a 25 mile radius of the insured premises. Counsel argued that the plaintiffs have failed to discharge the burden of proof on them to establish the required causal connection.

193. In my view, while I entirely accept that extension (1) (d) of the FBD policy requires the plaintiffs to prove that localised outbreaks of the disease were a cause of the imposed closure, I believe that the necessary causal connection is plain. It is clear from the minutes of the NPHET meeting on 11th and 12th March, 2020 that social distancing was seen as essential in light of the level of transmissibility of the disease. The minutes record the advice given by the European Centre for Disease Control (*"ECDC"*) that social distancing measures should be implemented early in order to mitigate the impact of the epidemic and to delay the epidemic peak given the then current epidemiology and risk assessment and the expected developments in the next following days and weeks. The minutes also record the decision taken by NPHET that, given the current situation in Ireland and the advice of the ECDC, it was now necessary to move to the delay phase and that additional actions to disrupt the spread of Covid-19 were required. That fed into the decision by NPHET in relation to a

range of social distancing measures that were required and which, in turn led it to recommend the closure of schools, third level colleges, museums, galleries and tourism sites. It is very clear that the recommendation of these measures was prompted by the fact that there were now outbreaks of the disease in Ireland and that social distancing measures were required to disrupt the spread of the disease. In other words, the social distancing measures were necessitated by the level of disease in the community. They would not have been necessary but for the presence of the virus. That level of disease was manifested by the number of outbreaks of disease which had occurred. All the government press release does is to record that, in a public house setting, social distancing measures are unrealistic in light of the fairly obvious fact that pubs are designed to promote social interaction in a situation where, as the press release notes, alcohol reduces personal inhibitions. The difficulties encountered in a public house situation would not be a problem if the outbreaks of disease did not exist. Thus, at minimum, the outbreaks of disease were a cause of the government decision to require public houses to close.

Would the result be any different if "following" is to be interpreted as requiring proximate cause?

194. I do not believe that the result would be any different if one was to interpret the word *"following"* as requiring proximate cause. As Buckley explains at para. 8-71, proximate cause is not the first or the last or the sole cause of a loss; it is the dominant or effective or operative cause. The approach to be taken was discussed by the Supreme Court in *Ashworth v. General Accident Fire and Life Assurance Corporation* [1955] I.R. 268. In that case, the ship *"Mountain Ash"* was insured against the perils of the sea. The ship suffered damage in a storm. However, at the time of the storm, the ship had deliberately been beached on the Wicklow coast, in

circumstances where the engine of the ship overheated, in the course of a voyage from Wexford to Ringsend where it was intended repairs would be carried out. Thus, at the time of the storm, the ship was in an unseaworthy condition requiring repairs. The question which arose was whether the proximate cause of the damage sustained by the ship was (a) the storm (which would have been covered, as a peril of the sea, under the policy) or (b) the unseaworthy condition of the ship which was expressly excluded by virtue of the application of s. 39 (5) of the 1905 Act. Citing the approach taken in the *Leyland Shipping* case (discussed below) Maguire CJ explained the concept of proximate cause as follows at p. 289:

> *"It was made clear in the Leyland Case … that proximate cause has a special connotation in marine insurance cases. It does not mean the cause nearest in time. The cause which is truly proximate is that which is proximate in efficiency, says Lord Shaw at p. 369. Applying his words to this case it seems to me that the state of unseaworthiness which drove the Mountain Ash upon the beach remained the efficient cause of her loss and although other causes sprang up, they did not destroy or impair the cause which brought her up on the beach and which culminated in her loss. To use a figure from another case, she remained in the grip of her unseaworthiness until she was cast into a position whence it proved impossible to retrieve her…."*.

The relevant principle is well illustrated by the decision in *Gray v. Barr* [1971] 2 QB 554 which is cited by *Buckley*. In that case, the defendant, Barr, arrived at the home of Gray, armed with a loaded shotgun in search of his wife who he alleged had been having an extra-marital affair with Gray. When Barr entered the house, Gray was standing at the head of the stairs. Gray told Barr that his wife was not there. Barr refused to accept Gray's word and went up the stairs, holding the gun and demanded

to see for himself whether she was there. He refused to put the gun down and leave. When Barr was near the top of the stairs, he intentionally fired one shot into the ceiling to frighten Gray. When he got to the top of the stairs, Gray grappled with Barr who fell backwards. In the course of his fall, he involuntarily fired a second shot which unintentionally killed Gray. A question arose as to what was the proximate cause of Gray's death. In particular, the question was whether the proximate cause of Gray's death could be said to be accidental, in which case, it would have been covered by a policy of insurance with Prudential Assurance. This argument was rejected by a majority of the Court of Appeal of England & Wales. Lord Denning MR posed the question, at p. 566 of the report, as to what was the cause of Gray's death. Was it the deliberate act of Barr approaching Gray with a loaded gun (in which case there would be no cover) or was it the fall and subsequent discharge of the gun (which, being accidental, would have been covered under the relevant policy of insurance). He continued:

> *"The immediate cause was the second act when the gun was accidentally discharged: but the dominant cause was the first act when Mr. Barr went up the stairs with a loaded gun determined to see into the bedroom. Which of these causes is the relevant cause for the purpose of the policy?"*

195. At p. 567, Lord Denning referred to the principle stated by Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (which was also applied by the Supreme Court in *Ashworth*) where, at p.369 of the report in that case, Lord Shaw had explained that proximate cause was not to be construed in a temporal sense:

> *"What does 'proximate' here mean? To treat proximate as if it was the cause which is proximate in point of time… out of the question. The cause which*

is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed".

196. I should explain, at this point, that, in the *Leyland Shipping* case, a ship was torpedoed during the First World War. Sea water entered the hull but did not sink the ship. Subsequently, a storm erupted and the ship sank. It was held that the proximate cause of the loss was the torpedoing (which, as an act of war, was not covered under the policy) and not perils of the sea (which were insured under the relevant policy). As Black J. explained in *Ashworth*, at p.297, the House of Lords took the view that, at all times the ship was *"in the grip"* of the original casualty, namely the torpedoing.

197. Having referred to the approach taken in the *Leyland Shipping* case, Lord Denning continued as follows in *Gray v. Barr* at p. 567:

"Applying this principle, I am of opinion that the dominant and effective cause of the death was Mr. Barr's deliberate act in going up the stairs with a loaded gun determined to see into the bedroom. The whole tragic sequence flows inexorably from that act. It was because of that loaded approach that Mr Gray grappled with Mr Barr. It was because of the grappling that Mr Barr fell and the gun went off. There was no new intervening cause at all."

198. While the facts in *Gray v. Barr* are utterly different to the present case, the underlying principle is equally applicable here. While FBD, in its closing written submissions, has suggested that the inability to apply social distancing measures in public houses was the cause of the government imposed closure, that is to overlook the basic fact that, were it not for the outbreaks of disease which had occurred, social

distancing would not have been required at all. Applying the approach outlined in the cases, it seems to me that the real or effective or dominant reason for the imposition of the closure of public houses in Ireland was the existence of the outbreaks. Those outbreaks made it necessary to move to the delay phase described in the minutes of the NPHET meeting of 11th and 12th March, 2020 and the need to impose social distancing measures. Much like the torpedo in the *Leyland Shipping* case or the loaded shotgun in *Gray v. Barr*, the dominant cause was the underlying outbreaks of disease. Of course, I appreciate that FBD goes further and says that it is impossible to link the government closure with any individual outbreaks of disease and therefore, according to FBD, it is impossible to say that the government decision was caused by the outbreaks which are admitted to have occurred within the relevant 25 mile radial distance around the four public houses in question. However, as the Divisional Court said in para. 112 of its judgment, it is artificial to say that, because the action was taken in response to all of the cases of Covid-19, it could not be regarded as taken in response to any particular cases. In support of that finding, the Divisional Court referred to the minutes of the equivalent body to NPHET in England & Wales namely SAGE which showed that the government response there was a reaction to information about all the cases in that jurisdiction and that the response was decided to be national because the outbreak was so widespread. The same rationale is evident from the NPHET minutes of the meeting of 11th and 12th March which was so close in time to the government decision taken on 15th March. Those minutes show concern about widespread outbreaks of the disease. There is no suggestion that the outbreaks were limited to any localised geographical area (as subsequently occurred in August 2020 in the case of the Laois, Offaly and Kildare local lockdown).

199. That there can be more than one proximate cause of an event is confirmed by the analysis of the law carried out by Black J. in the Supreme Court in the *Ashworth* case. This is acknowledged by FBD in its written submissions. It is also consistent with the approach taken by the Court of Appeal of England & Wales in *Miss Jay Jay (i.e. J.J. Lloyd Instruments Ltd v. Northern Star Insurance Co. Ltd* [1987] 1 Lloyd's Rep. 32). That case concerned damage suffered by a yacht as a result of a combination of two factors namely (a) faulty design and construction (which was not insured under the relevant policy of insurance) which rendered the yacht unseaworthy and (b) adverse weather conditions (which were insured as a peril of the sea). The Court of Appeal held that both were proximate causes and, since unseaworthiness had not been excluded under the policy, the insured was entitled to recover under the policy of insurance. The result would have been different had there been a sufficient exclusion of cover in respect of defective design. There was an exclusion in respect of defective design but only where the loss was incurred *"solely"* in remedying the faulty design. On the basis that the damage was due to a combination of factors, it was held that the exclusion did not apply. The owner of the yacht was therefore entitled to recover under the policy even though the insured peril was only partly the cause of the loss. The position was explained as follows by Slade LJ at p. 40:

> *"On a commonsense view of the facts both these two causes were, in my opinion, equal, or at least nearly equal, in their efficiency in bringing about the damage.*
>
> *In these circumstances, if the policy had contained a relevant express exception which related to loss caused by the unseaworthiness of the vessel, the plaintiffs' claim might well have been unsustainable. …*

> *However, since the instant policy contains no relevant exception relating to loss caused by unseaworthiness …, different principles apply. The legal position in such a case is stated thus in Halsbury's Laws of England …:*
>
> *'It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover'.*
>
> *No authority has been cited to us which leads me to suppose that this passage incorrectly states the relevant law … The crucial point is that in the contingencies envisaged in the passage, for the purpose of applying the provisions of the policy and s. 55 of the Act, the loss is treated as proximately caused by the cause insured against, notwithstanding the presence of a concurrent cause not covered by the policy".*

This passage is consistent with the analysis of the case law undertaken in Ireland by Black J. in *Ashworth* at pp 298-299. It seems to me that the principle identified in *Miss Jay Jay* is equally applicable in this case. While there are more causes (i.e. outbreaks) operating here than the two causes identified in *Miss Jay Jay*, the fact remains that, like in *Miss Jay Jay*, they are each equal in force and they operated in combination to lead to the imposition of the closures. There is no relevant exclusion in the FBD policy. As noted earlier, there is no provision excluding liability in so far as closure arising also from outbreaks outside the 25 mile radius are concerned. Thus, once the local outbreaks within that radius were an efficient cause of the closure, that is sufficient to satisfy the proximate cause test in relation to that issue even if each of the other outbreaks in every other part of the country were also efficient causes of the closure. To paraphrase Slade LJ, each of the outbreaks were equal in their efficiency

in bringing about the closure ordered on 15th March, 2020. I am therefore of opinion that, even if the word *"following"* connotes proximate cause, that test is satisfied. In my view, the plaintiffs have succeeded in establishing that the outbreaks within 25 miles of their respective premises were each a proximate cause of the government decision of 15th March. That does not, however, dispose of all of the issues on causation.

Further causation issues

200. As outlined in para. 185 above, it is also necessary to consider the question of causation more generally and in particular to consider whether the interruption of the plaintiffs' business as a result of the composite peril (comprising the imposed closure following the outbreaks) was the proximate cause of the plaintiffs' loss. The opening words of the extension clearly envisage that it is only losses which arise *"as a result of"* the business being affected by the peril described in extension (1) (d) that are covered under the policy. As already explained, it is agreed that those words denote proximate causation.

Was the composite peril the proximate cause of the plaintiffs' losses?

201. At this stage of the proceedings, it is not possible to make any definitive finding as to whether all of the plaintiffs' losses were proximately caused by the composite peril embodied in extension 1 (d). At the quantum hearing, the court will have to hear detailed evidence from each of the plaintiffs as to the individual losses sustained by them before it could reach a determination on that issue. However, it is improbable that the closure following the outbreaks in question is not, at least, an effective (i.e. proximate) cause of some of the claimed losses. To state the obvious: if pubs are closed for business, they are unable to trade and make a profit. FBD has sought to argue that the effective cause of the loss is the public reaction to the

emergence of the Covid-19 disease. It may be that the closure following the outbreaks in issue is not the only effective cause of loss but, as the approach taken in *Miss Jay Jay* shows, that will not necessarily mean that the plaintiffs are unable to recover under the FBD policy at least in those cases where the effective causes overlap and where it is not possible to distinguish between the effects of one from the effects of the other. As noted previously, there is no relevant exclusion in the FBD policy which rules out such an approach.

202. This is well illustrated by the decision in *Miss Jay Jay* (discussed above) and also in the judgment of Tomlinson J. in *IF P & C Insurance Ltd. v. Silversea Cruises Ltd.* [2004] Lloyds' Rep. 217. The principle applied in those cases ensures that the right to an indemnity is not defeated once it is shown that the insured peril is a proximate cause of the insured's loss. In the latter case, the plaintiff insured the defendant cruise line under a policy of insurance that covered loss of business resulting from a State Department advisory regarding (*inter alia*) terrorist activities either actual or threatened that negatively impacted cruise bookings. Following the terrorist attack on the World Trade Centre in New York on 11th September, 2001, the US State Department issued several advisories warning US citizens about the increased risk of terrorist attacks. In the aftermath of the 11th September attacks, there were a large number of cancellations by intending passengers. A claim was made under the policy and an issue arose as to whether the proximate cause of the cancellations was the advisories or simply public reaction to the attack on the World Trade Centre. Notwithstanding expert evidence called by the insurer suggesting that a distinction could be made, Tomlinson J., at p. 205, came to the conclusion that it was impossible to divorce anxiety derived from the attack from anxiety caused by the State Department warnings. In circumstances, where both were concurrent causes of

the downturn in bookings and since there was no relevant exclusion in relation to losses caused by the attack, Tomlinson J. held that the cruise line was entitled to an indemnity. There is an obvious parallel between the facts of that case and the present proceedings where FBD claims that public reaction to the disease would lead to a fall-off in business in any event even in the absence of an imposed closure. Given my finding that the relevant peril is not imposed closure *per se* but the imposed closure following the outbreaks of disease within 25 miles, it becomes even more difficult to distinguish the effects of the composite peril from the effects of public reaction to the existence of the disease. There is an inter-relationship between them in circumstances where the existence of the disease (at least in so far as the outbreaks within the 25 mile radius are concerned) is an inherent element of the composite peril. Nonetheless, FBD has argued that a business interruption claim in respect of loss of profit is different from a claim of damage to a ship (such as occurred in *Miss Jay Jay*) and FBD has made the case it is possible to disaggregate the impact of the composite peril on the plaintiffs' business from the impact on their business of societal reaction to the pandemic. Disaggregation is an issue that I address further below. The only observation I need to make at this point is that FBD's suggested basis for distinguishing *Miss Jay Jay* is inconsistent with the approach taken in the *Silversea* case which was subsequently upheld on appeal. That case, like the present one, was not concerned with damage to a ship but with a business interruption claim to recover lost profits. I therefore do not accept FBD's argument to that effect.

The additional causation issues argued by FBD

203. Although the onus is on the plaintiffs to demonstrate that their losses were factually and proximately caused by the peril described in extension (1) (d), it is

useful to consider the remaining causation issues by reference to the contentions advanced by FBD in relation to causation. In this context, FBD contends as follows:

(a) In the first place, it is contended that a *"but for"* test is a necessary, but insufficient, requirement for the causation analysis. In making this case, FBD suggests that the *"but for"* test addresses factual causation to which the law adds a legal overlay of proximate cause. In its closing written submission, FBD says that it is necessary to ask: is the insured peril a cause in fact (a *"but for"* cause) of the losses claimed or some of those losses? If the answer to that question is in the negative, FBD submits that there can be no recovery under the policy *"since the insured event has not factually caused any of the loss".* FBD asserts, in this context, that a substantial part of the losses claimed by the plaintiff would have occurred in any event even in the absence of the occurrence of the insured peril. The way in which the matter is put in responses provided by FBD to requests for particulars raised by some of the plaintiffs was in the following terms:

"Quite aside from the formal Public Health Measures adopted by the Government, many individuals have altered, and will alter, their behaviour in order to avoid contracting Covid-19. This alteration of behaviour includes limiting their contact with large groups of people and maintaining physical distance from other individuals. Therefore, irrespective of the Public Health Measures, this behavioural reaction would have had a significant impact on the plaintiff's business …"

Consistent with the terms of FBD's defence in all of these cases, it is said that the losses stem not from the closure (which FBD argued is the

relevant peril) but by reason of measures to reduce the risk of transmission such as social distancing, the general shutdown, travel restrictions and the economic slowdown;

(b) FBD also maintains that, in any event, the plaintiff's claims must, in accordance with the terms of the policy, be *"adjusted for the trend of or other circumstances affecting the business"* (to quote from the relevant passage in s.3). FBD maintains that the issue of *"trends and circumstances"* arises in the context of business interruption insurance by reason of the fact that it is a contract of indemnity and therefore is intended to put the insured in the position it would have been in if the interruption or interference had not occurred. FBD refers, in this context, to the useful explanation provided by Buckley, *op. cit.*, at para. 18-04:

> *"Subject to the limits and conditions of the policy, the purpose of this form of insurance is to put the insured in the position that he would have been in had there been no interruption to the business due to an insured peril. It follows, therefore, that any payment under the policy in respect of any loss of profits will be liable to tax. The extent of the losses generally calculated, in accordance with the terms of the policy, by reference to the performance of the business in the preceding financial year, with adjustment for any variations or trends in the business…".*

(c) FBD also maintains that, there is no cover in respect of any period after the government imposed closure ceases. In this context, it is clear from para. (a) of s.3 of the policy that the obligation of FBD to indemnify the insured is in respect of the loss of gross profit *"during the indemnity*

period". The indemnity period is defined as the period *"beginning with the occurrence of the loss or damage"* and ending not later than the specific period agreed between FBD and the insured *"during which the results of the business shall be effected (sic) in consequence of the loss or damage".* The case made by the plaintiffs is that the loss continues even after the imposed closure ceases. However, FBD maintains that the *"loss or damage"* is confined to loss or damage caused by the insured event and that the imposed closure of the premises could not be said to cause loss or damage affecting the results of the business of any of the public houses in question subsequent to their re-opening. FBD maintains that, once the imposed closure ceases, any loss suffered thereafter is attributable to the ongoing effects of Covid-19 which is not insured under the policy. In contrast to some other policies available in the market, the FBD policy does not cover losses which arise from disease *per se* but only losses which arise from an imposed closure following outbreaks of disease.

204. While bearing in mind that the onus rests on the plaintiffs, it is nonetheless useful to address the remaining causation issues by reference to each of the arguments raised by FBD as summarised above albeit in the context of my finding that, contrary to the case made by FBD, the relevant peril is not closure *per se* but the composite peril described above.

"But for" causation

205. In my view, FBD is correct in suggesting that a *"but for"* test usually applies in determining whether the losses claimed by an insured under a policy of insurance were caused by the insured peril. In other words, the usual rule is that an insured is entitled to be indemnified by the insurer in respect of those losses which the insured

can prove would not have arisen but for the eventuation of the insured peril. This is no more than an application of the ordinary rule of causation generally applied in tort and contract cases. In the context of contract law, the relevant principle is summarised as follows by *McDermott & McDermott, op. cit.*, at para. 23.229 where the authors say:

> *"The plaintiffs may only recover damages for those losses which were caused by the defendants' wrong and 'the onus is on … plaintiffs to prove their loss'. The general test is the 'but for' test. In other words, the plaintiff must show that the loss would not have occurred but for the defendants' breach. …".*

In an insurance context, the losses insured under the policy will be those which would not have been suffered but for the occurrence of the relevant peril covered under the policy. Thus, to take a hypothetical example, losses that might be suffered by one of the plaintiffs, during the period of closure, as a consequence of the refusal of the renewal of a dance licence or the departure of a key member of staff to a rival business would not be recoverable since they would have arisen, in any event, even if there had been no imposed closure due to outbreaks of Covid-19.

206. If the *"but for"* test is to be applied without modification in the case of the plaintiffs, it is capable of creating significant problems for them. It could be argued that the plaintiffs cannot satisfy the test because they cannot show that all of their losses arose but for the imposed closure arising from the outbreaks within 25 miles of their premises. It could be said that many of those losses would have arisen in any event by reason of the matters relied upon by FBD as outlined in para. 203 (b) above which can be summarised as societal reaction to the Covid-19 pandemic. At the same time, it can be argued that there is a patent inter-relationship between both factors and an issue arises as to whether, for the purposes of causation, one can realistically distinguish between the effects of the peril, on the one hand, from the effect of

changes in societal behaviour, on the other. Both have a common thread – namely the outbreaks of Covid-19. In my view, that is a relevant consideration in this context.

207. As a number of authorities demonstrate, the *"but for"* test should not be applied in a blinkered or mechanical way. The position was well explained by Lord Nicholls (albeit in a tort context) in *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 at paras. 73-74 as follows:

> *"73. ... 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."*

208. Largely for the reasons explained by Lord Nicholls, the courts, in tort cases have accepted that there are situations where the "*but for*" test is inappropriate and where fairness and reasonableness require that there should be a relaxation in the standard of factual causation required. No reason has been advanced as to why a similar approach should not also be taken in contract cases. In *Orient-Express Hotels*

Ltd v. Assicurazioni General SpA (UK) [2010] EWHC 1186 (Comm) Hamblen J. (as he then was) referred, in this context, to statements by the authors of *Clerk & Lindsell on Torts* and *McGregor on Damages* to similar effect to the observations of Lord Nicholls and he also indicated his view that, in principle the same approach should be taken in contract cases. I agree.

209. However, in the *Orient-Express* case, Hamblen J. ultimately decided not to modify or relax the *"but for"* approach. There was significant debate in this case and in both the Divisional Court and the U.K. Supreme Court in the *FCA* case in relation to whether the decision taken in *Orient-Express* is correct. It was overruled by the UK Supreme Court but that does not prevent FBD from arguing that the judgment of Hamblen J. should nonetheless be followed here. In my view, it is unnecessary to reach any conclusion on that issue. The decision can, and should, be readily distinguished. It was an appeal under the UK Arbitration Act from a decision of an arbitral tribunal which had determined that the owners of a hotel in New Orleans could not recover certain losses under the business interruption section of a policy arising from loss of business sustained as a consequence of the devastation wreaked by Hurricane Katrina to the city of New Orleans and that its claim was limited to losses attributable to the damage suffered by the hotel itself. On appeal to the High Court of England and Wales, the owner of the hotel made the case that fairness and reasonableness required an amelioration of the *"but for"* test. The owner also submitted that, where there were two causes of the loss, it is sufficient that one of the causes was a peril insured, provided that the other cause is not excluded. The owner relied on the decision in *Miss Jay Jay* in support of that contention. Hamblen J. appeared to be open to that submission. Nonetheless, Hamblen J. held that he would not interfere in the arbitration award. He took that view, first, because the policy

expressly provided for a *"but for"* approach. Secondly, he held that the application of any fairness and reasonableness requirement was a matter for the tribunal rather than for the court on appeal (which was limited to questions of law). Thirdly, he was concerned that the argument made by the owners of the hotel had not been made to the arbitral tribunal. Lastly, he was not satisfied, on the particular facts, that fairness and reasonableness required that the *"but for"* test should not be applied. Those factors are sufficient, in my view, to distinguish that case from the present. Unlike Hamblen J, I am deciding this case at first instance. I am not constrained by the way in which the case was run in some lower tribunal.

210. In the *Orient-Express* case, the insured relied upon the following observations by *Hart and Honore on Causation in the Law* (2nd ed.) at pp. 123-124 which, with reference to the discussion in para. 206 above, appear to me to be particularly apposite:

> *"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…: 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….*

> …***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 the circumstances a legal system should treat each as the cause rather than neither, as the sine qua non test would require…"*** (emphasis added).

211. In my view, the passage highlighted in the extract from Hart and Honore sets out an entirely sensible and appropriate approach that should be taken where loss is sustained as a result of two or more interrelated events which are each capable of causing the loss but where it is not possible to say that, but for any one of them, the loss would not have been incurred. It ensures that the *"but for"* test is not taken to extremes and applied in an unduly mechanical way which could give rise to manifest injustice. If that approach were not taken, it could leave the injured party without a remedy notwithstanding that it has suffered loss or damage as a consequence of the actions in question. In an insurance context, such an approach seems to me to be particularly appropriate having regard to the principle underlying the *Miss Jay Jay* line of authority addressing concurrent proximate causes. While the concepts of proximate cause and *"but for"* causation are different, the *Miss Jay Jay* principle appears to have been developed to deal with cases where there was more than one interdependent cause and where it could not be said that any one cause was predominant over the others. Thus, in cases such as *Silversea* where it is not possible to determine whether a loss sustained by the plaintiff was caused but for the occurrence of the insured peril, on the one hand, or some other interdependent or interrelated non-insured (but not excluded) cause, on the other, it seems to me that the insured peril should be regarded as a sufficient cause for the purposes of the "*but for"*

test. This seems to me to be the only fair and reasonable approach to take in the circumstances. If this approach is not taken, the application of the *"but for"* test could lead to recovery being denied to an insured under a policy notwithstanding that the insured peril was an effective cause of the loss sustained by the insured. That result would seem to be inconsistent with the approach taken in the concurrent cause cases where it was recognised as early as 1877 in a case cited by Slade L.J. in *Miss Jay Jay* that *"any loss caused immediately by the perils … is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it"* (per Lord Penzance in *Dudgeon v. Pembroke* (1877) 2 App. Cas. 284 at p. 297).

212. FBD has argued that the approach taken in *Miss Jay Jay* can be distinguished on a number of bases. In the first place, FBD argues that, in that case, both concurrent causes were *"but for"* causes. Leaving aside whether that is, in fact correct, FBD's argument overlooks the fact that a similar approach was also taken in *Silversea* where it was found by Tomlinson J. that it was impossible to say whether the losses claimed there were caused by the State Department advisory or public reaction to the 11th September attacks on the World Trade Centre. In that case, it could be argued that the advisory was not a *"but for"* cause of the loss because public concern and caution following the underlying attack would still have led to at least part of the loss. FBD also argues that, in *Miss Jay Jay*, there were *"only"* two concurrent causes and in its January 2021 submissions, it also strongly criticises the U.K. Supreme Court decision for the way in which it contemplates that an insured can recover even where there are *"multiple"* causes. However, that argument overlooks the fact that, in this case, only two competing causes of the losses were, in essence, contended for – namely the peril, on the one hand, and the alteration of societal behaviour in reaction to Covid-19, on

the other. Thus, the criticisms made by FBD, in its January 2021 submissions, of the approach taken by the majority in the U.K. Supreme Court to causation, in the context of multiple potential causes, seem to me to be beside the point. Thirdly, as noted in para. 202 above, FBD argues that a business interruption claim for lost profits can not be treated in the same way as damage to a ship. I have already rejected that argument as inconsistent with the *Silversea* decision. It also seems to me to be wrong as a matter of principle. While there may, of course, be particular elements of lost profits which can be shown to be solely attributable to an individual cause, that becomes more difficult when there are obvious overlaps between the relevant competing or concurrent causes (depending on how one analyses them). As noted previously, in this case, the common thread between the peril on the one hand and societal reaction on the other is the presence of Covid-19.

213. Accordingly, in this case, to the extent that there are overlapping proximate causes of the plaintiffs' losses, one of which is the composite peril and the other is the alteration of societal behaviour in response to Covid-19, it seems to me that, subject to what I say below in relation to the issues of the appropriate counterfactual and disaggregation, it is appropriate, in those cases where societal behaviour is shown to be as much a cause as the composite peril, to apply the approach suggested in the passage from *Hart & Honore* quoted in para. 210 above and to modify the *"but for"* test to that extent.

The appropriate counterfactual

214. The application of the *"but for"* test leads into the next issue – namely what would have been the position of the business of each of the plaintiffs but for the occurrence of the insured peril. This is frequently referred to as the *"counterfactual".* In order to assess whether losses have been sustained as a consequence of the insured

peril, it is necessary to construct a picture as to what would have been the position of each of the plaintiffs' businesses in the absence of the occurrence of the peril which was insured under the FBD policy.

215. In the course of the hearing, it was accepted by all parties to these proceedings that, in identifying the appropriate counterfactual it is necessary to strip out the insured peril. This is because the object of the exercise is to identify what would have been the position of the business of the insured in the event that the insured peril had never occurred. As noted earlier, the plaintiffs contend that the insured peril here is a composite one which involves not just a government imposed closure but also the existence of outbreaks of Covid-19. FBD had sought to argue that imposed closure was the relevant peril. For the reasons previously discussed, I have come to the conclusion that the FBD argument should be rejected. In my view, the insured peril is the imposed closure which *"follows"* (in the sense previously explained) the outbreaks of disease within the 25 mile radius. Having regard to that finding, it follows that FBD is incorrect insofar as it has suggested that the appropriate counterfactual should be taken to be a situation where each of the plaintiffs' premises would remain open but the premises would continue to be affected by the impact of outbreaks of Covid-19. That would have significant consequences for the plaintiffs because it would have the potential to significantly curtail what they could recover under the policy. On FBD's hypothesis, the premises would continue to be affected by society's behavioural reaction to the outbreaks of disease including a desire of many people to limit their contacts and maintain physical distance from others. In my view, that would not properly strip out the composite nature of the insured peril. In this context, having regard to the terms of extension (1) (d), it is clear that the peril envisages outbreaks of an infectious or contagious disease which are sufficiently

serious to warrant intervention by the authorities by means of an order to close public houses within a 25 mile radius. For as long as the closure endures, the outbreaks are an inherent element of the peril and, for that reason, it seems to me that, for the duration of the period of closure, both the closure and the effects of outbreaks of the disease must be stripped out of the counterfactual. Whether that involves a stripping out of all of the effects of the disease or only the effects of the outbreaks within a 25 mile radius is a separate question.

216. The plaintiffs make the case that the correct counterfactual is a world without an imposed closure and which is not affected by Covid-19. The plaintiffs say that this is consistent with stripping out each element of the composite peril. That approach is also largely consistent with the view taken by the Divisional Court in the *FCA* case albeit that the order in that case confines the counterfactual geographically to the United Kingdom. However, at first sight, that approach appears to be inconsistent with the description of the insured peril in extension 1 (d), which refers to outbreaks within a 25 mile radius. As noted earlier, all parties were agreed that, in identifying the correct counterfactual, it is necessary to strip out all elements of the insured peril. What the plaintiffs' argument, at first sight, appears to overlook is that the insured peril is defined by the terms of the FBD policy not by reference to outbreaks of infectious or contagious disease *per se* but by reference to outbreaks which occur within a radial distance of 25 miles from the insured premises.

217. In the *FCA* case, the Divisional Court did not regard the geographic limitation as part of the insured peril. For that reason, in defining the counterfactual, it did not have regard to the 25 mile radius. In the context of composite clauses (which the Divisional Court regarded as a hybrid of disease and prevention of access clauses) the court came to the conclusion, in para. 278 of its judgment that it was necessary to strip

out each of the interconnected elements *"including in this instance the **national** outbreak of Covid-19"* (emphasis added). As the balance of the judgment illustrates, it took that approach whether or not the policy made any reference to a geographical limitation.

218. Having regard to the conclusion which I reached as to the nature of the composite peril in extension 1 (d), the approach taken by the Divisional Court does not assist in scoping the extent of the elements to be excluded from the counterfactual. Furthermore, the parameters of the counterfactual relevant to the composite peril as found by me were not the subject of debate in the course of the hearing. It was an issue which was apparently raised in the report of Mr. Andrew King an expert who the Leopardstown Inn and Sinnotts plaintiffs, at one stage, proposed to call as a witness. It appears from the report of Mr. Mark Lewis (who was called by FBD) that, in his report, Mr. King proposed three possible counterfactuals for the purposes of measuring losses namely:

(a) Scenario 1 involving no closure and no Covid-19 (which is the scenario canvassed by the plaintiffs in argument);

(b) Scenario 2 involving no closure but in a world where Covid-19 (and all of its attendant restrictions) exists. This was the scenario which was advanced by FBD; and

(c) Scenario 3 involving no closure and no Covid-19 in the relevant policy area. This seems to broadly coincide with the counterfactual which I envisage would apply having regard to my finding as to the nature of the peril. However, since Mr. King's report was never admitted in evidence, I have no knowledge of the elements which he believed should be stripped out of the counterfactual.

219. When Mr. Lewis was called as a witness on Day 7 of the hearing, counsel for FBD suggested, at the outset of his evidence, that it would not be necessary to address Scenario 3 in circumstances where Mr. King had not given evidence. Counsel stated that he assumed that the omission of Mr. King's evidence meant that Scenario 3 was no longer being put forward by the plaintiffs. However, later on the same day, when counsel for the Leopardstown Inn and Sinnotts plaintiffs commenced his cross-examination of Mr. Lewis, he stated that it was not correct that the plaintiffs were *"abandoning"* Scenario 3. Counsel for those plaintiffs explained that, while Mr. King's evidence had not been led, the question of the correct counterfactual is a matter of law and it would be a matter for submissions to the court. Insofar as I can see, the issue was not subsequently addressed in the closing submissions of any of the parties.

220. In the absence of submissions, I was initially concerned that I did not have any sufficient material available to me to be in a position to give any guidance, in this judgment, as to the parameters of what I might now call the Scenario 3 counterfactual. A number of issues required consideration. How does one construct a counterfactual world in which there is no closure and no outbreaks within a 25 mile radius when the world beyond that 25 mile boundary is still affected by closures and outbreaks of Covid-19? Are the impacts of the existence of the outbreaks beyond the boundary to be factored in or excluded from the counterfactual? However, the U.K. Supreme Court decision in the *FCA* case is of assistance in this context. The judgment of Lords Hamblen and Leggatt has made clear to me that the answer to the issue lies in the approach taken in *Miss Jay Jay.* It will be recalled that the effect of that line of authority is that an insured can recover under a policy in respect of a loss even where one of the proximate causes of the loss is not insured under the policy provided

another interdependent proximate cause of the loss is insured and there is no exclusion in respect of the uninsured cause. As paras. 228 to 230 of the judgment of Lords Hamblen and Leggatt makes clear, the existence of such a concurrent proximate cause has to be factored into the construction of the correct counterfactual. In para. 228 of their judgment, they said that it is wrong to construct a counterfactual solely by reference to the financial position the insured's business would have been in but for the occurrence of the insured peril where the effect of doing so is to ignore the existence of another concurrent proximate cause. That seems to me to be entirely consistent with the approach taken in *Miss Jay Jay* and similar cases and, for that reason, I believe it supplies the clue to the approach to be taken. In the *Miss Jay Jay* line of authority, the insured was held to be entitled to recover under the policy even where not all of the proximate causes of the loss fell within the ambit of the insured perils. There was no suggestion in any of the judgments in those cases that the claim could be defeated or reduced by constructing a counterfactual that stripped out the insured peril only and left the uninsured peril in place. Thus, in this case, to the extent that the effects of the existence of the Covid-19 outside the relevant 25 mile radius may be established to be a concurrent proximate cause of the plaintiffs' losses alongside the closure following the outbreaks within that radius, that concurrent factor, in the absence of a relevant exclusion in the FBD policy, must also be stripped out of the counterfactual.

221. That said, there are limits to what will be excluded. Losses which have no sufficient connection to the composite peril will not be excluded from the counterfactual. Thus, for example, as noted in para. 205 above, losses that arise as a consequence of the refusal of the renewal of a dance licence or the departure of a key member of staff to a rival have no connection with any aspect of the composite peril

and cannot be the subject of a claim. They would never fall within the ambit of the *Miss Jay Jay* principle because they arise solely as a consequence of an uninsured peril. In such cases, there is no crossover with the insured peril. Such losses cannot form part of a claim. Such losses are to be contrasted with losses proximately caused by the overlapping effects of both the composite peril and the public reaction to the dangers of Covid-19 which would exist both within and beyond the 25 mile boundary. Subject to what I say below in relation to disaggregation, the latter losses are capable of attracting the *Miss Jay Jay* principle.

222. Thus, so long as the plaintiffs can establish that the closure following the outbreaks within the 25 mile radius was a proximate cause of their loss, their recovery under the policy will not be reduced just because the change in societal behaviour (whether within or outside that radius) as a result of the pandemic was also a proximate cause. In such event, the attitude of the general public will be stripped out of the counterfactual along with the specific elements of the composite peril. Having regard to these considerations, I do not believe that it is necessary to invite further submissions as to the parameters of the counterfactual. Having regard to the *Miss Jay Jay* principle, the relevant counterfactual will require the stripping out not only of the elements of the composite peril but also any other causes of the losses which are found to be concurrent proximate causes in the sense explained in para. 216 above. In reaching this conclusion, I do not believe that it is necessary to adopt all of the reasoning set out in the judgment of Lords Hamblen and Leggatt in the *FCA* case. While my thought process has been prompted by what they said in paras. 228 to 230 of their judgment, my conclusion has been reached by reference to the considerations outlined above which seem to me to be consistent with the *Miss Jay Jay* line of authority.

223. The relevant counterfactual in the case of the Lemon & Duke plaintiff requires separate consideration. It seems to me that the Lemon & Duke plaintiff is in a different position to the other plaintiffs in so far as the insured peril is concerned and consequently in so far as the counterfactual is concerned. It is not affected by the issue debated in paras. 215 to 222 above. In its case, the defence delivered on behalf of FBD admits the representation which had been made to the Lemon & Duke plaintiff. In addition, FBD, in its defence, accepts that the defendant represented and warranted to the plaintiff that the relevant FBD policy would cover consequential loss if the government ordered the closure of the Lemon & Duke as a result of the coronavirus outbreak and that the plaintiff in those proceedings is entitled to rely on the terms and conditions of the policy on the assumption that the representation and warranty to that effect is correct. The nature of the representation in question is addressed in paras. 57 to 70 above. The FBD defence does not suggest that the representation was confined to outbreaks within 25 miles of the Lemon & Duke. That is consistent with the terms of the FBD email of 2nd March, 2020. It is clear from the exchanges which took place between Mr. Anderson of the Lemon & Duke plaintiff and Mr. Shanahan of FBD that Mr. Shanahan was not prepared to place the business with FBD in the absence of an assurance that cover would be available in respect of the coronavirus. That assurance was given in the terms of the email of 2nd March (which is described in para. 57 above) which stated that the policy was covering coronavirus but that the pub *"must be forcibly shut down".* The representation said nothing about outbreaks being confined to a 25 mile radius. In those circumstances, it seems to me to follow, in light of the terms of the email and the approach taken by FBD in its defence, that the policy in its case must now be read on the basis that the Lemon & Duke plaintiff is entitled to rely on the representation on its own terms. In

circumstances where the representation says nothing about outbreaks within a 25 mile radius, it seems to me to follow that, in the case of the Lemon & Duke plaintiff, the relevant counterfactual is a world in which there is neither an imposed closure nor the existence of Covid-19. Subject to what I say in para. 224 below, the counterfactual in the case of the Lemon & Duke is not confined in any way to outbreaks within any geographic boundary.

224. However, in the case of all four plaintiffs, an issue still remains as to the geographic extent of the counterfactual world. In the case of the Lemon & Duke, is the counterfactual to be based on stripping out the presence of coronavirus in the State or is the existence of the disease anywhere in the world to be stripped out? In the case of the other plaintiffs, are the concurrent causes to be stripped out of the counterfactual confined to those affecting the State or do they extend to the worldwide effects of Covid-19? I note that the counterfactual contemplated by the order of the Divisional Court made in the *FCA* case in October, 2020 is confined to the existence of Covid-19 in the United Kingdom. I can see nothing in the U.K. Supreme Court decision that suggests a different approach. This is not an issue on which any of the parties made any detailed submissions although the relevant terms of the *FCA* order were noted by counsel for FBD in the course of the closing submissions. I believe that further argument is necessary as to whether the elements to be stripped from the counterfactual should be geographically confined to the situation in the State. This could be of some significance to some or all of the plaintiffs. If the relevant elements to be stripped out of the counterfactual world are confined to the State, that could potentially leave the effects of the Covid-19 pandemic on the outside world in place in the relevant counterfactual which could, in turn, have an impact on the business of the

plaintiffs to the extent, for example, that the business of any of the plaintiffs is dependent on tourists from abroad.

Disaggregation

225. If FBD were correct in its case that Scenario 2 (as described in para. 218 above) applied, the only aspect that would be excluded from the counterfactual would be the imposed closure. Under that scenario, an issue would arise as to whether it is possible to separate or, to use the word adopted by counsel for FBD, to *"disaggregate"* the losses suffered by the plaintiffs as a consequence of the imposed closure on the one hand from those losses which they would have suffered in any event as a consequence of the existence of Covid-19 and all of the attendant impacts that disease has had on societal behaviour. In short, FBD made the case that, under the counterfactual applicable in such circumstances, the public house trade would be very severely impacted by the requirement for physical distancing and by a pervasive fear among the population about the risk of contracting Covid-19. In contrast, the plaintiffs have argued that it would simply be impossible to disaggregate the losses in that way and they have referred to the approach taken by the Divisional Court in the *FCA* case.

226. In my view, it is not necessary to reach any conclusion in relation to whether or not it might be possible to carry out a disaggregation exercise in the context of Scenario 2. The basis on which FBD put forward that scenario was that the insured peril constitutes imposed closure. In circumstances where I have held against FBD in relation to that issue, it seems to me that the argument in relation to Scenario 2 falls away. For the reasons previously discussed, the peril in this case is a composite one involving the closure of the insured premises following outbreaks of Covid-19 within a 25 mile radius. For the duration of the imposed closure, each element of that peril

needs to be stripped out of the relevant counterfactual along with any relevant concurrent proximate uninsured causes within the *Miss Jay Jay* principle which are not excluded under the FBD policy.

227. FBD argued that, irrespective of the nature of the peril, at least part of the losses sustained by the plaintiffs are attributable not to the composite peril, but to societal changes in response to the Covid-19 pandemic which predate the eventuation of the peril and FBD made the case that the latter can be disaggregated from the losses flowing from the peril. FBD argued that, in contrast to the *FCA* case where the Divisional Court took the view that disaggregation of this kind was not possible, the court in this case had the benefit of evidence which, in the words of counsel for FBD on Day 3, *"demonstrates that it is perfectly possible to disaggregate the losses"*. In this context, counsel relied heavily on the evidence of Mr. Mark Lewis and, to a lesser extent on Mr. Paul O'Brien. I was informed that Mr. Lewis had devised a model which I understood was based on extensive macro-economic data about business conditions in Ireland. As it transpired, when Mr. Lewis came to give his evidence, there was no macro-economic basis for the model. Instead, the model was, as discussed further below, a very crude one which was based not on any scientific principle or objective data, but on Mr. Lewis's own measurement of losses in other cases on behalf of insurers. I was not persuaded that the approach proposed by Mr. Lewis provides a proper basis to disaggregate losses in the manner suggested by FBD. Moreover, Mr. Lewis, in his report, did not address Scenario 3, other than in the most cursory terms, with the result that his report provides no guidance at all as to how losses could be disaggregated in the context of this scenario. In so far as Scenario 3 is concerned, the report made brief reference to the experience in New Zealand and in

the Scilly Isles but did not assist as to how that very particular experience could be applied to the pub trade in Ireland.

228. The FBD approach to disaggregation seems to proceed on the basis that one can separate the effects on business of the outbreaks of Covid-19 from the effects of the peril itself. But, such a separation seems to me to be unlikely to be achievable in circumstances where outbreaks of the disease are themselves an inherent element of the peril. Although not the subject of any submissions by FBD, I can see that an argument might, in theory, be made that the effects of the closure and outbreaks of Covid-19 in the 25 mile radius should be capable of being separated from the effects arising from events outside that radius. However, any such argument seems to me to lack reality. I do not understand how such a separation could be undertaken in practice and there is nothing in Mr. Lewis's evidence that assists in that regard. Changes in societal behaviour are as likely to be prompted by outbreaks which occur 26 or 30 miles away as those that occur within a radius of 25 miles. To separate the effects of one from the other seems to me to be a hopeless task. While this is a matter that can only finally be determined in the quantum hearing (when findings are made as to the proximate causes of the plaintiffs' respective losses), it seems to me to be likely, having regard to the extent to which the composite peril and societal reaction to the outbreaks are likely to overlap as proximate causes, that, as in *Silversea*, it would, in practice, be impossible to effect a disaggregation of that kind. For that reason, it seems to me that the approach suggested in paras. 212 to 213 and 220 above, will require to be taken.

229. That said, as noted in para. 221 above, there may be cases where there is a specific head or heads of loss sustained by a plaintiff which are found to be proximately and solely caused by an uninsured peril. In such cases, it will, of course,

be possible to disaggregate such losses from those proximately caused by the composite peril in combination with a peril which overlaps with the composite peril and is not excluded by the FBD policy.

230. In the case of the Lemon & Duke bar, the position is more straightforward. For the reasons outlined above, it seems to me that the effect of the representation made in its case is that both the imposed closure and the existence of the disease must be stripped out of the counterfactual such that the scope for disaggregation is significantly, if not wholly, curtailed. In this context, I am of the view that if the disease *per se* is stripped out of the relevant counterfactual, it must follow that public concern regarding the risk of infection must also fall away. Those concerns only arise where Covid-19 is present. If, however, Covid-19 is stripped out of the counterfactual world, those concerns disappear.

231. However, as noted above, it is necessary, in my view, to hear further submissions from the parties, in all four cases, as to whether the stripping out of the effects of Covid-19 should be confined to its effects in the State or whether the worldwide effects can be stripped out. If the worldwide effects are not stripped out, this could potentially have some impact on the extent of recovery under the policy to the extent that, for instance, an identifiable part of the profits of any of the plaintiffs is attributable solely to the foreign tourist trade. That is an issue that would require to be explored at the quantum hearing and I make no ruling on it now other than to identify it as an issue that might require debate at that hearing.

Trends and circumstances

232. Paragraph (A) of s. 3 of the policy provides an indemnity in respect of loss of gross profit during the indemnity period (which is a defined term) calculated by comparing the gross profit earned during that period with the gross profit earned

during the corresponding period in the previous year *"adjusted for the trend and other circumstances affecting the business".* There is a definition of gross profit for this purpose in s.3. In addition, s.3 states that the rate of gross profit is that earned on the *"takings"* during the financial year immediately before the date of the damage. There is, in turn, a definition of "*annual takings"* which are defined as the takings during the twelve months immediately before the date of the damage *"adjusted for the trend of or other circumstances affecting the business".*

233. Neither the term *"trend"* nor *"other circumstances affecting the business"* are defined in the FBD policy. This is to be contrasted with the FBD Business Complete policy where a definition is provided of the term *"trends of the business".* There, the definition encompasses:

> *"Trends and variations in the broad business environment which:*
>
> - *Affect the business, either before or after the damage; or*
> - *Would have affected the business if the damage had not happened".*

234. The dispute between the parties relates to whether the fall off in sales suffered by the plaintiffs in the days preceding the government imposed closure on 15th March, 2020 constitute a trend or circumstance that should be carried forward into the period of closure. In other words, the question is whether those losses should be assumed to continue throughout that period. Each of the plaintiffs accepted, in the course of the hearing, that, to the extent that they suffered a fall-off in sales in the days immediately prior to 15th March, 2020, that must be taken into account in calculating the takings during the twelve months immediately before the date of damage. In the words of counsel for the plaintiffs, the plaintiffs are *"stuck with that as being built into the comparator".* Each of the plaintiffs made a similar concession. They did so in circumstances where they accepted that the insured peril here did not eventuate until

15th March, 2020 when the imposed closure was announced following the previous outbreaks of Covid-19. The plaintiffs maintained, however, that once the insured peril eventuated, it would, thereafter, be contrary to principle, if any element of the insured peril was to be taken into account in adjusting the amount of the payment to be made by FBD under s.3 of the policy.

235. In contrast, FBD maintained that, under the "*trends and circumstances"* provisions of s.3 of the policy, any trends and circumstances affecting the business prior to the occurrence of the insured peril on 15th March, 2020 are to be taken into account in adjusting the amount to be paid, even if they are ultimately part of the composite insured peril. In making that case, FBD relies on the Divisional Court judgment in the *FCA* case and also on a decision of the Hong Kong courts in *New World Harbourview Hotel v. ACE Insurance* [2011] Lloyd's Rep IR 230 upheld on appeal [2012] Lloyd's Rep IR 537.

236. I do not believe that the approach advocated by FBD is correct. It seems to me that, in applying the trends and circumstances provisions of s.3 of the FBD policy, one must exclude the effects of the insured peril from the calculation. In the absence of clear language to the contrary, it would be contrary to the nature of an insurance policy as a contract of indemnity, to allow the effects of the insured peril to reduce the payment to be made to an insured who has the benefit of cover for that peril. As the FBD submissions acknowledged, the purpose of the trends and circumstances clause is to ensure, in so far as reasonably practicable, that the adjusted figures reflect the financial results which, but for the occurrence of the peril, would have been achieved during the subsistence of the peril. For the reasons previously discussed in paras. 227 to 229 above, this approach seems to me to be applicable whether the losses were

proximately caused by the events within the relevant 25 mile radius or by a combination of the events within and beyond that radius.

237. I do not see anything in the decision of the Hong Kong courts in the *New World Harbourview Hotel* case which supports a contrary conclusion. That case was concerned with the impact on a hotel business as a consequence of the outbreak of SARS in Hong Kong in 2003. The relevant policy of insurance provided cover in respect of business interruption resulting from a notifiable disease. SARS did not become a notifiable disease in Hong Kong until 27th March, 2003. Prior to that date, SARS was present in Hong Kong and there was already a reduction in the business of the hotel as a consequence of customers staying at home. There were a number of issues which required to be resolved in the proceedings including the date when cover was triggered for the purposes of the policy. The court came to the conclusion that, since the peril insured under the policy was business interruption resulting from a notifiable disease, cover was not triggered until 27th March, 2003. The question then arose (which was described in the judgment as issue 4) as to whether the calculation of *"Standard Revenue"* under the policy included or excluded the effect which SARS had on the revenue of each plaintiff before 27th March, 2003. The definition of Standard Revenue in clause 13.4 of the policy was broken down into two paragraphs. The first paragraph dealt with the calculation of the revenue in the relevant twelve-month comparator period preceding the date of damage. The second paragraph dealt with the application of trends. Clause 13.4 was in the following terms:

> ***"STANDARD REVENUE** means the Revenue realized during the twelve months immediately preceding the date of the Damage ….*
>
> *Adjustments shall be made to the Standard Revenue as necessary to determine the trend of the Insured business, in consideration of variations of the relative*

economy or other circumstances affecting the Insured Business either prior to, or after the date of Damage, or which would have affected the Insured Business had Damage not occurred so that the figures as adjusted shall represent as nearly as may be reasonably practicable the results which, but for such Damage, would have been realized during the relative period after the occurrence of Damage".

238. Reyes J. explained, in para. 75 of his judgment, that the first paragraph of clause 13.4 requires consideration of the financial earnings of a business during the twelve months immediately preceding the date of damage. A similar requirement arises under s. 3 of the FBD policy. Reyes J said that this twelve-month period is to serve as a comparator against which the revenue lost by the business for the duration of the occurrence of the insured peril can be measured. At para. 76 of his judgment, he explained that the second paragraph requires another sort of adjustment which he explained as follows:

"An adjustment has to be made to Standard Revenue so that it will 'represent as nearly as may be reasonably practicable the results which, but for such Damage [that is, the damage arising from the insured peril], would have been realized during the relative period after the occurrence of the Damage'. In other words, one assumes that everything but the insured peril occurred. Given that hypothesis, one has to calculate what revenue a relevant business would have earned."

239. In its closing written submissions, FBD has made the case that para. 76 of the judgment makes clear that the court was of opinion that the downward trend which predated 27th March, 2020 was to be carried through the period of the counterfactual. I do not read that paragraph in that way. On the contrary, it is quite clear that the

court was of opinion that the insured peril must be excluded from the adjustments to be made pursuant to the second paragraph of clause 13.4 (i.e. the paragraph dealing with trends and circumstances). Thereafter, the court, unsurprisingly, made clear that the calculation of standard revenue (which was defined in the first paragraph of clause 13.4) would include the negative effect of SARS on the plaintiff's business prior to 27th March, 2003. As noted above, the plaintiffs in these proceedings all accepted in the course of the hearing that this adjustment must likewise be made under the FBD policy in respect of the fall-off in business in the days immediately prior to 15th March, 2020. However, there is, in my view, nothing in the judgment of Reyes J to suggest that this would be carried forward in terms of any adjustments to be made pursuant to the trends and circumstances provision contained in the second paragraph of clause 13.4. Moreover, to have done so, would have been inconsistent with the very clear statement made in para. 76 of the judgment that, in applying the trends and circumstances clause in that case, one assumes that everything but the insured peril has occurred. It would, accordingly, have been entirely wrong to exclude the effects of SARS in the period after 27th March, 2003 because, to do so, would involve the insured peril being used to reduce the indemnity available under the policy. As the terms of clause 13.4 in that case made clear, its purpose was to arrive at a figure that will represent, as closely as is reasonably practicable, the results which, but for the insured peril, the business would have realised during the subsistence of that peril. Although the trends provision in s. 3 of the FBD policy is not expressed as clearly as clause 13.4 of the policy at issue in the *New World* case, the underlying purpose of the provision is the same.

240. In my view, a consideration of the balance of the judgment of Reyes J. on this issue bears out my understanding as to its effect. In para. 77-80, he said:

"77. I have held that SARS did not become 'notifiable' until 27 March 2003. By that date SARS was … present in Hong Kong. Assume … that as at 27 March 2003 the Plaintiffs were already losing revenue as a result of the occurrence of SARS here in February 2003. In that case, the calculation of 'Standard Revenue' … would encompass the twelve months immediately preceding 27 March 2003.

78. Mr. Chua complains that, on such reckoning, 'Standard Revenue' would include the negative effects of SARS on the Plaintiffs' revenues prior to 27 March 2003 when people were already either avoiding travel to Hong Kong or just staying at home. 'Standard Revenue' would not reflect the Plaintiffs' revenue in the normal course of events before SARS came on the scene. 'Standard Revenue' would be something less.

79. While I understand Mr. Chua's concern, it seems to me that the consequence which he notes is simply the result of applying the clear terms of the definition in clause 13.4. The result is not absurd or unreasonable. It is what the parties bargained for and agreed. The parties had to draw the line somewhere for the purposes of comparing what a business earned before and after the advent of an infectious disease and of measuring the business' consequent loss due to the disease's occurrence. … As we have seen, cover was not triggered until 27 March 2003. Standard Revenue must accordingly be assessed by reference to a business' prior revenue up to at least that date.

80. The answer to question 4 is thus 'include'."

241. It is quite clear from those paragraphs, that Reyes J. was dealing with the first paragraph of clause 13.4 which required a comparison to be made with the preceding 12 month period. He very firmly rejected the plea made by the insured in that case

that the effects of SARS prior to 27th March, 2003 should not be used to reduce the standard revenue (i.e. the revenue realised during the comparator period of twelve months immediately preceding 27th March, 2003). Thus, he held that the calculation of standard revenue should include the effect which SARS had on the revenue of the plaintiffs before 27th March, 2003 when SARS became a notifiable disease and therefore cover was triggered. In my view, there is nothing in those paragraphs to suggest that the same loss was to be factored into the trends and circumstances addressed in the second paragraph of clause 13.4. Moreover, to have done so would, in my view, have been inconsistent with the previous statement made by him in para. 76 of his judgment that, in making the adjustments required under the second paragraph of clause 13.4, one excludes damage arising from the insured peril. For completeness, it should be noted that the decision of Reyes J. was subsequently upheld by the Court of Final Appeal of Hong Kong but the judgment of that court does not consider this aspect of the judgment of Reyes J.

242. FBD has also sought to rely on the judgment of the Divisional Court in the *FCA* case. FBD relied, in particular, on the approach taken by the Divisional Court in relation to the trends clause in the RSA 3 policy (which provided business interruption insurance in respect of occurrences of a notifiable disease within a 25 mile radius of the premises). FBD also relied on the approach taken by the Divisional Court in relation to the Arch policy (which provided business interruption insurance cover in respect of prevention of access to the insured premises *"due to the actions ... of a government ... authority due to an emergency which is likely to endanger life..."*). The *FCA* judgment addresses the trends clause in respect of RSA 3 at paras. 121-122. What is said in para. 121 of the judgment appears to me to be entirely consistent with the approach taken in the *New World* case. There the court said:

> "*121. There are two important related preliminary points about the 'trends clause' ... which are equally applicable to all the trends clauses ... which we are considering. First, it is in the quantification machinery for a claim, so that it is not part of the delineation of cover, but part of the machinery for calculating the business interruption loss on the basis that there is a qualifying insured peril. Where the policyholder has therefore prima facie established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred. Second, subject to the particular wording providing for something different, the object of the quantification machinery (including any trends clause ...) in the policy wording is to put the insured in the same position as it would have been in if the insured peril had not occurred."*

243. As counsel for the owner of Sean's Bar put it, the logic set out in this paragraph is compelling at least in so far as the period after the triggering of the peril is concerned. There is nothing in this paragraph to suggest that any losses flowing from any element of a composite peril are to be incorporated in any adjustments to be made in respect of business trends. This is entirely consistent with the object of the trends clause which is to put the insured in the same position as it would have been in had the insured peril not arisen.

244. FBD, however, rely on the next paragraph of the judgment namely para. 122 where the court continued in the following terms:

"122. Therefore, in applying this clause, … the insured peril would need to be recognised as the interruption … with the business following the occurrence of a Notifiable Disease within 25 miles. Given that the 'trends clause' is intended simply to put the insured in the same position as it would have been had the insured peril not occurred, … what this means is that one strips out of the counterfactual that which we have found to be covered under the insuring clause. This means that one takes out of the counterfactual the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto. The relevant Indemnity Period, however, only starts with the first occurrence of a Notifiable Disease within the 25 mile radius, …. Accordingly, to the extent that there was business interruption or interference related to COVID-19 before that date the insured could not claim for it."

245. It is clear from para. 122 of the judgment, that the Divisional Court was of the view that an insured could not claim in respect of losses prior to the date of inception of the indemnity period following the occurrence of the insured peril. To that extent, this paragraph is consistent with my understanding of the *New World* case. I would not have read this paragraph as suggesting that the losses arising from Covid-19 prior to the first occurrence of the insured peril would be treated as a continuing *"trend"* for the purposes of the trends clause. To do so would appear to be inconsistent with what the court has previously said in para. 121 of its judgment. However, it appears from the terms of the order subsequently made by the Divisional Court on 2nd October, 2020 that my understanding of para. 122 is incorrect. I set out the terms of the order below. Before turning to the order, I should, first, identify one further aspect of the judgment dealing with the Arch policy (which provided cover in respect of prevention of access). In paras. 348 to 351, the Divisional Court addressed the *New*

World case and the argument made by counsel for the FCA that the effect of the pandemic on the policy holders' turnover should be extracted. Counsel for the FCA had submitted that *"if an insuring clause was contemplating insurance against a notifiable disease, it must encompass the emergence of a disease which, once the authorities get round to it, will be made notifiable"* (i.e. an argument in very similar terms to that made by Mr. Chua on behalf of the insured in the *New World* case as recorded in para. 78 of the judgment of Reyes J). The Divisional Court rejected that argument in para. 351 as follows:

> *"351. Ingenious though this argument is, we consider that it is fallacious. Upon analysis, if it were correct, once an insured peril occurred, here the prevention of access due to government actions … due to the pandemic, the policyholder would in fact recover for its losses both before and after the occurrence of that insured peril, …. In any event, in the case of the Arch policy wording, whatever the merits of the argument it is precluded by the express words of the trends provision. Any downturn in turnover before the date… when businesses closed pursuant to government … was a trend or circumstance which affected the business …."*

246. While the first part of that paragraph might suggest that the court was confining itself to a ruling that the policy holder could not recover in respect of losses which arise before the occurrence of an insured peril, the second part of the paragraph clearly envisages that any such losses could be carried forward as a trend. That has been confirmed by the terms of the order subsequently made by the Divisional Court on 2nd October, 2020 in which the relevant declaration appears in para. 11.4. In so far as relevant, that paragraph is in the following terms:

"11.4 As to the proper application of the trends clauses declared applicable …:

(a) … ;

(b) … ;

(c) If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate (subject to (b) above) for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause …) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative. Further, the downturn will only apply to the extent that as a matter of fact the downturn would have continued during the indemnity period if the insured peril had not been triggered; and

(d) Any such continuation must be at no more than the level at which it had previously occurred".

247. In para. 11.4 (c) of the order, the Divisional Court appears to have been concerned to moderate the effect of its declaration insofar as it made clear that any measurable downturn in the turnover of a business due to Covid-19 which occurred before the insured peril was triggered, will only apply to the extent that, as a matter of fact, the downturn would have continued during the indemnity period if the insured peril had not been triggered. That qualification appears to provide some measure of protection for an insured.

248. With great respect to the Divisional Court, I would not approach the matter in the same way. It seems to me that one must start from the principle (which I believe

to be accepted by FBD) that, in the absence of clear language to the contrary, an insured is entitled to recover under a policy of insurance in respect of any losses which are proximately caused by an insured peril and which would not have arisen in the absence of that peril. On that basis, it seems to me to be contrary to principle that an insured's right of indemnity under the policy should be reduced by a trend based on losses which have been caused by that peril. Similarly, in the case of a composite peril, it seems to me to be equally contrary to principle that an insured's claim should be reduced to take account of a trend proximately caused by any element of that composite peril once that composite peril has eventuated. Subject to the evidence available at the quantum hearing, the same seems to me to hold true in respect of the scenarios described in paras. 226- 228 above.

249. Of course, as the plaintiffs have accepted, account has to be taken of any downturn in business caused by Covid-19 prior to 15th March, 2020. Everyone accepted at the hearing that the insured peril did not eventuate before that date. That has the consequence that the revenue for the relevant comparator period of twelve months prior to 15th March, 2020 must take account of the reduction in business which occurred in the days leading up to 15th March. Because the peril had not eventuated before 15th March, 2020, no one could say that those losses had arisen as a consequence of the insured peril. However, it is altogether a different matter to suggest that those losses must necessarily be carried forward as a trend for the duration of the insured peril. That would mean that losses which have, since 15th March, 2020, arisen as a consequence of an element of the insured peril would be taken into account in adjusting the indemnity owed even though those losses flow from the insured peril itself. In my view, that would completely undermine the fundamental principle that a policy of insurance is a contract of indemnity. In my

view, such an approach would require explicit provision to that effect in the relevant policy of insurance. In this context, as discussed in an earlier section of this judgment, the policy must be read as a whole. The *"trends and circumstances"* provisions of the policy must be read in light of the clear promise made by the terms of Extension (1) (d) to provide business interruption cover in respect of business interruption arising as a result of a closure of the premises by government authority following outbreaks of a contagious or infectious disease within 25 miles of the premises. If the trends and circumstances provision of the policy was intended to cut down on the indemnity available in respect of such an explicit peril (rather than to estimate, as far as reasonably practicable, the results which, were it not for the insured peril, the business would have realised during the indemnity period) clear words to that effect would, in my view, be required. Those words are entirely absent in this case and I must therefore conclude that the trends and circumstances provisions of s.3 of the policy cannot be used to cut down the indemnity in that way.

250. I should record, at this point, that the approach taken by the Divisional Court has now been overtaken in the decision of the U.K. Supreme Court which overturned the first instance decision on this issue. In its January 2021 submissions, FBD has argued that the decision of the latter should not be followed and FBD has highlighted that the latter gave no consideration to the decision in the *New World* case. I am not persuaded by FBD's arguments. I have already held that FBD's case seems to me to be contrary to the approach taken in *New World* and I remain of that view.

The evidence of Mr. O'Brien and Mr. Lewis

251. I am conscious that there may well be an appeal by one or more of the parties in this case. In those circumstances, it may be of assistance if I set out my views in brief terms in relation to the evidence which was called by FBD in relation to the

issue of disaggregation. It does not seem to me that the evidence given by Mr. O'Brien of Mazars or Mr. Lewis (both called on behalf of FBD in order to address the principle of disaggregation) is of any assistance in relation to this issue in the context of Scenario 3. Mr. O'Brien, in his evidence, did not address Scenario 3.

252. Mr. O'Brien, in his evidence on Day 7 also suggested that the losses which arose prior to 15th March, 2020 give rise to a definite trend. For the reasons discussed above, it seems to me that it would be wrong in principle to apply those to the *"trends and other circumstances"* provisions of s.3 of the policy. It should also be noted that Mr. O'Brien acknowledged that other factors were in play during that period including the *"close the pubs"* campaign on social media.

253. Insofar as the evidence of Mr. Lewis is concerned, there were a number of significant issues raised in the course of his cross examination which, in my view, call the utility of his evidence into question. These include:

(a) The cross-examination of Mr. Lewis on Day 7 uncovered that the exercise he carried out was based on an assumption (which I believe to be unjustified and to be contrary to principle) that the losses sustained by the plaintiffs in the days immediately preceding the imposed closure on 15th March, 2020 would continue to apply uniformly throughout the period of the counterfactual;

(b) Mr. Lewis also admitted under cross-examination that, for the purposes of his analysis, he had selected the last weekend in July 2020 because it showed a larger decline in business;

(c) While Mr. Lewis, in his report, provided a macroeconomic analysis in ss.5.1 to 5.9, this analysis did not feed through to a subsequent calculation. As a consequence, the macroeconomic analysis carried out by him could

not be said to establish the consequences that would be likely to ensue in any individual case;

(d) The plaintiffs are, in my view, also correct to criticise Mr. Lewis as being selective as to the data he put forward. Thus, for example, in para. 5.4 of his report, he took certain Google footfall data but he failed to take account of other footfall data which would be likely to show greater levels of footfall including supermarket, pharmacy, parks and residential. He appears to have deliberately chosen three metrics of data which show decreases in footfall. One of these three metrics was public transport. Notwithstanding the existence of government advice that public transport should be confined to essential workers, he relied on the fall off in numbers of passengers as evidence of a fall-off more generally in relation to fear of the virus. Mr. Lewis was clearly not aware of the detail of the approach taken by Dublin Bus, for example, in relation to government advice;

(e) In addition, Mr. Lewis chose not to obtain the most up to date evidence of bookings through the OpenTable facility and his explanation for not doing so was unconvincing;

(f) It transpired that the model used by Mr. Lewis was not based on any scientific data but purely on those insurance claims in which, on behalf of insurers, Mr. Lewis had been involved in measuring losses. In all 501 cases (of which 149 were public houses) Mr. Lewis was retained by an insurer. Furthermore, no evidence was given by him to explain that the model had any scientific basis. According to the model, the losses due to the existence of Covid-19 would be expected to be 30% of the sum insured

> pro-rated for the length of the imposed closure period. That model seems to me to be far removed from the consideration that would be required to be given to the individual circumstances of each case.

254. Notwithstanding the obvious frailties in Mr. Lewis's evidence, counsel for FBD stressed that no countervailing evidence had been given by any experts on behalf of the plaintiff. The response of the plaintiffs was that the evidence of Mr. O'Brien and Mr. Lewis was addressed to issues of quantum and that these are matters for the next phase of these proceedings. That seems to me to be correct. The evidence was expressly called to address the principle of disaggregation. I was informed by counsel for FBD that the *"detail"* of the evidence was a matter for the quantum hearing. Counsel for FBD nonetheless argued that, in the absence of any countervailing evidence, the evidence of Mr. Lewis and Mr. O'Brien should be accepted. At this point, I do not believe that it is necessary to make any ruling in relation to Mr. O'Brien's evidence. It seems to me that that his evidence is a matter to be considered in the next phase of these proceedings when an assessment will be made as to the losses which are properly recoverable under the policies. As previously noted, Mr. O'Briens's evidence is, in any event, of no immediate assistance in relation to the Scenario 3 counterfactual. In the case of Mr. Lewis, I believe I should make clear that, in my view, his evidence does not assist in relation to any of the issues before the court at this stage. As I indicated to counsel for FBD, I am of the view that the court is not bound to accept the evidence of an expert witness. I referred counsel in this context to the decision of the Supreme Court in *Aro Road v. Insurance Corporation of Ireland* [1986] I.R. 403 where McCarthy J. had held that the trial judge was in error in deferring to the view of an expert witness notwithstanding that the trial judge in those proceedings had come to a contrary view herself. In response, counsel for FBD

referred me to the decision of Murphy J. in *Murnaghan Brothers Ltd v. Ó Maoldomhnaigh (Inspector of Taxes)* [1991] 1 I.R. 455 about the value of expert evidence in relation to accounting matters. In that case, the Circuit Court had rejected evidence of an accountant that a particular asset had been acquired as trading stock within the meaning of s.62(2) of the Income Tax Act, 1967. Murphy J. held that, while the Circuit Court was correct to say that the court must not abdicate its role of in determining matters of law or fact, the value of expert evidence in relation to accounting matters is well recognised. Murphy J. took the view that it had not been shown that the accountant erred as a matter of law in his approach to making up the accounts of the tax payer company or that he had otherwise failed to apply appropriate accounting principles. Furthermore, in that case, his evidence was not challenged in relation to the practice of the accountancy profession in making up accounts. In those particular circumstances, Murphy J. came to the conclusion that there were insufficient grounds for rejecting the accounts as prepared by the accountant in question. In my view, that case is wholly different to the present one. In that case, the relevant expert was giving evidence in relation to a matter which was clearly within his expertise as an accountant. The accountant's evidence was in relation to the practice of the accountancy profession. The position here is different. The evidence of Mr. Lewis was put forward on the basis that it would show, contrary to the view taken by the Divisional Court in the *FCA* case, that disaggregation (in the sense explained earlier in this judgment) was, in principle, possible. Mr. Lewis was not giving evidence as to classic accounting practice or what would be accepted by accountants in practice. He was therefore in quite a different position to the expert the subject of the ruling in the *Murnaghan Brothers* case. Furthermore, Mr. Lewis accepted that he did not hold any of the usual accounting qualifications such as ACA,

ACCA or CIMA. Most importantly of all, it seems to me that the plaintiffs, in the course of cross-examination of Mr. Lewis have raised issues which have exposed frailties in his evidence. Thus, for all of these reasons, it seems to me that I am entitled to conclude that I am not bound to accept his evidence in this case.

The indemnity period

255. The next issue which requires to be addressed relates to the contention made by the plaintiffs that they are entitled to be indemnified under the policy even in the period after the closure imposed on 15th March, 2020 came to an end. They make this case on the basis of the definition of the *"Indemnity Period"* in s.3 of the FBD policy. That definition is in the following terms:

> *"The period beginning with the occurrence of the loss or damage and ending not later than the twelve months thereafter during which the results of the business shall be effected (sic) in consequence of the loss or damage".*

256. The purpose of the indemnity period is to deal with the ongoing effects on the business of the insured after a loss covered by the policy. Fire is a classic example. If a pub is damaged by fire, the effects of that fire on the business are likely to continue after the last flame has been quenched. It may take some time before the damage caused by the fire is repaired so as to allow the pub to reopen.

257. The point made by the plaintiffs is that, in the FBD policy, the indemnity period is described by reference to the period of the effects of the loss or damage. Subject to an agreed outer limit, the indemnity period is stated to continue for the period *"during which the results of the business"* are affected *"in consequence of the loss or damage".* Counsel for the plaintiffs stressed that the indemnity period is not described by reference to the period of continuance of the peril or even the effects of

the peril. In support of this case, counsel referred to the Features & Benefits document where the indemnity period is described in the following terms:

> *"Consequential loss is subject to an indemnity period. This is the length of time we will provide payment for business interruption after a loss. The indemnity period starts on the date of the loss (fire/flood) and ends when the business is back to a pre-loss turnover position. In effect, you set the indemnity period based on your estimate of the time you believe that your turnover will be reduced after a loss (worst case scenario). Payment is not provided for any period outside the indemnity period. The normal indemnity period is twelve months but this can be increased to 18, 24 months (or more) in certain circumstances".*

258. Counsel for the plaintiffs are correct in so far as they contend that the definition of the indemnity period plainly envisages that, subject to the relevant outer limit (12 months in most cases), it will continue for as long as the business is affected by the damage. As outlined in para. 256 above, the purpose of the clause is to deal with the ongoing effects on the business after a loss covered by the policy. However, the plaintiffs go further. In the course of the hearing, counsel for the plaintiffs confirmed that their case involves an interpretation that gives the plaintiffs a right to claim losses for whatever loss of business they have suffered in the period after the pubs reopened where they continue to suffer loss of business as a consequence of the continued impact of the disease. This contention on the part of the plaintiffs has the potential to have very extensive consequences. For example, take the case of a public house serving food which could have reopened but chose not to reopen on the basis that the disease continues to affect the business such as to call into question whether it is worthwhile reopening. If the plaintiffs are right that public house would be covered

for as long as the effects of the disease continued notwithstanding the cessation of the closure order.

259. Counsel for FBD suggested that the interpretation advocated by the plaintiffs would involve a significant departure from the well-established principle that a contract of insurance is a contract of indemnity intended to put the insured in the position it would have been in but for the occurrence of the insured peril. Counsel argued that the interpretation advanced by the plaintiffs would effectively provide the plaintiffs with disease cover even though the peril insured against is not disease cover. On FBD's case, the peril insured against was simply imposed closure. For the reasons discussed earlier in this judgment, I have held against FBD in relation to that issue. However, similar considerations arise in the case of the composite peril which I have concluded is insured under extension (1) (d) of s.3 of the policy. The interpretation advanced by the plaintiffs would involve the plaintiffs recovering losses which arise not as a consequence of the insured peril (i.e. the composite peril of imposed closure and outbreaks of disease within 25 miles) but as a consequence of the existence of the disease after the closure has come to an end.

260. Counsel for the plaintiffs acknowledged that the definition of *"indemnity period"* was very likely tied into the type of consequential loss available under s.3 of the policy in respect of business interruption arising from a loss within s.1 or s.2 of the policy. This is consistent with the reference to *"fire/flood"* in the text relating to the indemnity period in the Features & Benefits document. It is certainly easy to see how the indemnity period would be applied in the case of business interruption arising from the destruction of the premises by fire.

261. In light of the existence of the extensions in s.3 of the policy, it is necessary to seek to understand how the definition of the indemnity period should be construed

where the occurrence of the loss or damage constitutes business interruption as a result of imposed closure following outbreaks of a contagious or infectious disease within 25 miles of the premises.

262. In my view, the plaintiffs are mistaken in relation to this aspect of their case in so far as they contend that they are entitled, post the period of closure, to recover for ongoing losses in respect of the continuing effects of Covid-19. Essentially, what they say is that they are entitled to be compensated, post the period of imposed closure, for the losses that arise from changes in societal behaviour arising from the continuing presence of Covid-19 in the community. That seems to me to go beyond the scope of the indemnity available under the policy. The definition of the indemnity period must be read in the context of the policy as a whole and in the specific context of s.3 of the policy in particular. To my mind, the plaintiffs have overlooked the critically important language in the opening words of the extensions where it is stated in clear terms that FBD *"will also **indemnify** the Insured in respect of (A), (B) or (C) above as a result of the business being affected by …"* (emphasis added). The indemnity therefore exists in respect of the loss of gross profit, measured in accordance with para. (A), as a result of the business being affected by imposed closure of the premises by order of a local or government authority following (*inter alia)* outbreaks of contagious or infectious diseases on the premises or within 25 miles of it. That is the nature of the indemnity which is given. It is not given in respect of the business being affected by disease *per se.* Subject to what I have previously said in relation to concurrent causes and the *Miss Jay Jay* principle, it is only the effects on the business as a result of the imposed closure following the outbreak of disease within the relevant radius that is covered. Both elements of that composite peril must exist before the obligation to indemnify arises.

263. In addition, the definition of the indemnity period must be read together with the words which immediately precede para. (A) of s.3 of the policy where it is stated that *"the company shall **indemnify** the Insured in respect of … the loss of gross profit during the indemnity period…"* (emphasis added). Again, it is clear that what FBD has committed to do is to indemnify the insured in relation to the loss of gross profit during that period. This is entirely consistent with the principle that a policy of insurance is a contract of indemnity.

264. It is next necessary to see how the definition of the indemnity period should be construed in the context of the insuring provisions set out in section 3. As counsel for the plaintiffs fairly acknowledged, the reference in the definition to the occurrence of the loss or damage was probably drafted in the context of business interruption claims arising from a loss covered by either s. 1 or s. 2 of the policy. While the definition speaks of the occurrence of the loss or damage rather than the occurrence of the insured peril, those words must, in my view, be construed as referring to the occurrence of the loss or damage caused by the relevant insured peril. That is how they would be read in the context of a fire claim or a flood claim. In my view, they must also be read in that light in the context of a claim based on extension (1) (d). Thus, for the purposes of these proceedings, the indemnity period begins on 15th March, 2020 when the business was first interrupted by the imposed closure of the premises following the relevant outbreaks of disease. The indemnity period, according to its terms, will then continue thereafter during the time when the results of the business are affected *"in consequence of the loss or damage"*. The latter reference to *"loss or damage"* seems to me to plainly refer back to the loss or damage mentioned at the outset of the definition – namely the loss or damage as a result of the business being affected by the relevant insured peril (in this case the imposed closure

following the relevant outbreaks of disease). It does not seem to me that there is any basis to conclude that the words *"loss or damage"* can be construed in the abstract as unconnected with the relevant peril. For that reason, I do not believe that the loss or damage can properly be construed as referring to loss or damage, arising after the closure comes to an end, caused solely by the continued existence of the disease (which would be the only element of the composite peril in existence once the imposed closure comes to an end). That would be to provide cover to the insured which manifestly goes beyond the specific terms of extension (1) (d). Had any of the plaintiffs wished to seek cover for outbreaks of disease *per se*, they could have sought such cover on the market.

265. Nonetheless, I accept that the language of the definition of *"indemnity period"* would permit a policy holder to continue to maintain a claim, even after the period of imposed closure comes to an end, if the policy holder can demonstrate that the results of the business continue to be adversely affected by the eventuation of the insured peril during the period of imposed closure. That seems to me to follow from the language used in the definition. That is, however, quite different from the case made by the plaintiffs as outlined in para. 258 above and is not to be equated with a claim for losses stemming from the effects on the business (post the period of imposed closure) arising from the ongoing effects of the presence of Covid-19 in the community after the cessation of the closure period. In my view, after the cessation of the closure period, the losses caused by the ongoing effects of the disease are caused solely by an uninsured peril and, thus, there is no scope for the application of the *Miss Jay Jay* principle.

266. In the January 2021 submissions, a new case is made by the Leopardstown Inn and Sinnotts plaintiffs based on the U.K. Supreme Court judgment. It is argued that

the parties to the FBD policy must have realised that the outbreaks of infectious disease contemplated by extension 1 (d) which are serious enough to require the imposed closure of pubs as much as 25 miles away are likely to persist for a lengthy period, even after reopening and that they cannot reasonably have intended that, as soon as the premises reopened, the effects of the peril would cease. I am not persuaded by that argument. It seems to me that this plainly goes beyond the terms of the indemnity available under the policy. Once the closure ceases, the composite peril comes to an end and while, I accept that the plaintiffs are entitled to claim for the continuing effects of that composite peril for as long as the effects of that peril persist, I can see no basis to suggest that, once the closure comes to an end, the intention of the policy is to indemnify the plaintiff in respect of the effects of the post closure effects of the disease. To my mind, that would involve a re-writing of the policy.

267. For the reasons outlined above, I reject the claim made by the plaintiffs that they are entitled, by reference to the definition of the indemnity period, to maintain a claim for the continuing effects of the Covid-19 pandemic on their business even after any period of imposed closure comes to an end.

The claim for aggravated damages by the Lemon & Duke plaintiff

268. The Lemon & Duke plaintiff claims aggravated damages arising from the conduct of FBD in its defence of these proceedings. As explained by Finlay C.J. in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 at p. 317, aggravated damages are compensatory damages increased by reason of circumstances which may properly form an aggravating feature in the measurement of compensatory damages. Finlay C.J. explained that the aggravating feature in question *"must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who*

has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant".

269. It should be noted that, although a claim to exemplary or aggravated damages was made in the plenary summons and statement of claim (without any elaboration) no suggestion was made by counsel for the Lemon & Duke plaintiff, in opening its case to the court, that such a claim was, in fact, being pursued. The issue was not raised until written closing submissions were delivered on behalf of the Lemon & Duke plaintiff on 19th October, 2020 immediately prior to the commencement of the closing oral arguments on Day 8 of the trial on 20th October. In the course of his closing argument on Day 8 of the trial, counsel for the Lemon & Duke plaintiff submitted that it was not until the evidence was led in the trial that a basis for pursuing the claim emerged. Nonetheless, the case that is now made relies not just on the evidence which emerged at the trial but on a number of matters which predated the hearing including the purported withdrawal on 15th April, 2020 by FBD of the representation made by it in the email of 2nd March, 2020. In that context, I should record that counsel confirmed that no suggestion is made that the legal advisors to FBD bear any responsibility for the conduct which it is alleged forms the basis for the aggravated damages claim.

270. In making the case for an award of aggravated damages, the Lemon & Duke plaintiff relies on the following:

(a) The terms of the email of 2nd March, 2020 sent by Mr. Shanahan to Mr. Anderson;

(b) What was described as the uncontradicted evidence of Mr. Anderson as to what he was told by Mr. Shanahan;

(c) What was described as the evidence of Mr. Shanahan to the effect that the case now made by FBD was not something he believed as of 2nd March, 2020. I do not, however, believe that the passage in the transcript relied upon in support of this contention is sufficiently clear to enable this case to be made. I therefore do not propose to consider this factor;

(d) The evidence from Ms. Tobin of FBD to the effect that there was *"no hint"* of the matters that she would like to have seen in the email of 2nd March, 2020. In the course of her cross-examination, Ms. Tobin stated that she would have preferred to have seen a reference in the email to the terms and conditions of the policy. She also said that the email was not entirely accurate in that she believed that it should have stated that the policy could be triggered by an imposed closure following a localised outbreak of the virus.

(e) The evidence of Ms. Tobin in which it was suggested that she had accepted that, based on the representation made to Mr. Anderson, he was entitled to believe as he did about the FBD policy. I do not believe that this factor is relevant. I believe that counsel for FBD was correct, in the FBD closing submissions, to stress that the question that was put to Ms. Tobin was put in a very generalised way such that she simply gave a very general answer to a very general question. In my view, if this factor was intended to be relied upon, it would have required to be addressed with Ms. Tobin in much greater precision in the course of her cross-examination;

(f) Reliance was also placed on the letter of 15th April, 2020 withdrawing the representation which it is alleged clearly understood the nature of the

representation made. However, for the reasons discussed at an earlier point in this judgment, I do not believe that the reference to the nature of the representation in that letter can be read in the manner suggested by the plaintiff. Accordingly, I do not believe that any reliance can be placed on the letter of 15th April to that effect. However, the Lemon & Duke also relies on the letter, more generally, insofar as it purported to withdraw the representation, as unconscionable conduct on the part of FBD sufficient to come within the scope of aggravating features as explained by Finlay C.J. in *Conway;*

(g) The Lemon & Duke plaintiff further relies on the statutory obligation imposed on insurers to act honestly, fairly and professionally. This is an obligation which arises under the Consumer Protection Code published by the Central Bank. There was no debate as to whether that code applies to the circumstances of this case but, for the purposes of this issue, I will assume (without so deciding) that it does apply. In the context of the code, reliance is placed on the evidence of Ms. Tobin to the effect that the obligation requires FBD to ensure that it does not put in the way of customers seeking to recover under FBD policies of insurance *"arguments in which it has no reasonable belief".*

271. In response, counsel for FBD, in very measured closing submissions addressed each element of the claim made on behalf of the Lemon & Duke plaintiff. Counsel also referred to the very recent decision of the Court of Appeal in *O'Mahony v. Promontoria* (*GEM) DAC* [2020] IECA 30 in which extensive guidance is given in relation to the circumstances in which damages can be awarded of a punitive or like nature.

272. I do not, however, believe that it is necessary to address the arguments of counsel in detail. While I fully understand the deep concern, upset and disappointment expressed by Mr. Anderson on behalf of the Lemon & Duke plaintiff in response to the approach taken by FBD in declining the claim and subsequently in purporting to withdraw the representation of 2nd March, 2020, I do not believe that there is any sufficient basis on which to award aggravated damages in this case. My reasons for reaching that conclusion can be briefly stated as follows:

(a) The starting point must be that in commercial contract cases, a contract breaker is not generally liable for additional damages arising from his or her conduct. As Whelan J. observed in *O'Mahony v. Promontoria (GEM) DAC*, at p. 61, the Supreme Court in *Murray v. Budds* [2017] IESC 4 at para. 38 have approved the following observation by Bingham LJ (as he then was) in *Watts v. Morrow* [1991] 1 W.L.R. 1421 at p. 1445 where he said:

> *"A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not… founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*
>
> *But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. …"*

(b) Whatever might be the case in the context of a domestic insurance policy, I do not believe that there is any basis to suggest that a commercial contract of

insurance falls into the exceptional category mentioned by Bingham LJ. That is not to say that a defendant in a commercial case may never be the subject of an award of aggravated damages. It appears to be clear from the decision of the Supreme Court in *Conway*, that aggravated damages can be awarded where there is a significant aggravating feature in the conduct of a party to proceedings which can be characterised as sufficiently cavalier or outrageous that the hurt or insult caused by such conduct to the plaintiff should be marked by an award of aggravated damages.

(c) In my view, the conduct of FBD here does not approach the standard which would justify the award of aggravated damages. Insofar as the representation itself is concerned, there was a genuine dispute between the parties as to the effect of the representation. In my view, FBD was clearly entitled to pursue the issue as to the interpretation of the representation. It is true that, in the course of her cross-examination, Ms. Tobin gave some evidence that was not consistent with the case made by FBD in its opening submissions as to whether the policy was capable of responding in a pandemic situation. However, that does not demonstrate that FBD had no reasonable belief in the case that had previously advanced. Notwithstanding her very senior role within FBD and notwithstanding her very obvious expertise and depth of knowledge, the views expressed by Ms. Tobin are, as all of the case law shows, not relevant to the questions of contractual interpretation which arose in this case and which were of considerable complexity and novelty. In circumstances where the issue as to the correct interpretation of the contract was an entirely objective matter, it seems to me that FBD was entitled to pursue any legal arguments which it was advised to pursue as to how the

contract should be interpreted. In these circumstances, I do not believe that there is any basis to conclude that FBD has put forward an argument in which it could be said to have no reasonable belief. It follows that the alleged breach of its statutory obligation has not been made out;

(d) Nonetheless, I was troubled by the terms and purported effect of the letter of 15th April, 2020. The letter, which was clearly written with the benefit of legal advice (and was transmitted under cover of a letter from FBD's solicitors) took the very unusual step of purporting to withdraw a representation after it had been acted upon. The legal basis on which this was purported to be done has never been explained. The letter itself does not set out the legal basis for doing so. It simply draws attention to the terms of the policy and makes the case that the losses sustained by the Lemon & Duke plaintiff are not covered under the policy. However, although I am troubled by this behaviour on the part of FBD, I do not believe that it is necessary to consider whether this action is sufficiently reprehensible to warrant consideration as a basis for an award of damages. I have formed that view in circumstances where FBD, very soon thereafter, took a number of steps which are relevant in any consideration of its conduct. In the first place, it proposed mediation. This was done in a letter of 18th May, 2020. A mediation subsequently occurred on 28th May but was unsuccessful. In addition, FBD, very soon afterwards, by letter dated 5th June, 2020 from its solicitors wrote acknowledging the representation and unreservedly apologised for the making of what it suggested was an incorrect representation. In that letter, FBD stated that, while it did not accept that the Lemon & Duke plaintiff had suffered any loss as a result of the representation, FBD was prepared to make a payment of

€52,000 constituting a refund of the premium paid of €27,000 and an additional payment of €25,000 "*in order to ensure a fair outcome for your client in respect of the incorrect representation".* Importantly, FBD, in the same letter, confirmed that the policy of insurance would continue until expiration and that the Lemon & Duke plaintiff would have the benefit of the cover provided by that policy. On 10th June, 2020, a payment of €52,000 was paid to the Lemon & Duke plaintiff. On the same day a defence was delivered in which, as noted above, the representation was admitted and it was also admitted that, in entering into the policy, the Lemon & Duke plaintiff had relied upon it. As further noted above, it was expressly accepted that the defendant represented that the policy would cover consequential loss if the government ordered the closure of the Lemon & Duke public house as a result of the coronavirus outbreak and that the plaintiff is entitled to rely on the terms and conditions of the policy on the assumption that the representation and warranty is correct. That acceptance is consistent with my own conclusion as to the true effect of the representation. In all of these circumstances, I believe that the steps taken by FBD in the aftermath of the purported withdrawal of the representation make it impossible to conclude that the behaviour of FBD in its conduct of the defence of the Lemon & Duke case was sufficient to expose it to an award of aggravated damages.

273. In light of the considerations discussed in para. 272 above, I have come to the conclusion that this is not a case where an award of aggravated damages should be made in favour of the Lemon & Duke plaintiff.

The new claim advanced by the Lemon & Duke plaintiff in its January 2021 submissions

274. In its January 2021 submissions filed after the U.K. Supreme Court judgment, the Lemon & Duke plaintiff made an entirely new argument, based on an aspect of that judgment, to the effect that the word *"closure"* in extension 1 (d) should be interpreted to include a partial closure such as occurs, for example, where, under the relevant government imposed restrictions in place, outside dining only is permitted or where take-way food trade only is permitted. Since this issue was never raised in the course of the hearing, I do not believe that I can entertain it at this point. If this plaintiff wishes to pursue the argument, it should be the subject of an appropriate application to the court on notice to the other parties. In making that observation, I am not to be taken to accept that the issue can be raised at this point. I simply wish to ensure that the views of all affected parties can be obtained before ruling on whether it can be pursued.

Conclusion

275. For the reasons discussed earlier in this judgment. I hold against FBD in relation to the interpretation of extension (1) (d) of the policy. In my view, the relevant insured peril is not confined to the imposed closure of the insured premises. The relevant peril is the imposed closure following outbreaks of infectious or contagious disease (in this case Covid-19) on or within 25 miles of the premises. I am also of the view that cover is not lost where the closure is prompted by nationwide outbreaks of disease provided that there is an outbreak within the 25 mile radius and that outbreak is one of the causes of the closure.

276. For this purpose, I hold against FBD in relation to the meaning of the word *"following".* I do not accept that it requires that the closure should be proximately

caused by the outbreaks within 25 miles. On the other hand, I also hold against the argument made by the owner of Sean's Bar that *"following"* should be given a purely temporal meaning. In my view, the word *"following"* does have a causative meaning although I believe that it envisages a lesser standard than proximate cause. However, even if I am wrong in that conclusion, it seems to me that the outbreaks which occurred within 25 miles of each of the plaintiffs' premises (which are admitted by FBD) were, in any event, a proximate cause of the imposed closure of public houses announced by the government on 15th March, 2020. The fact that outbreaks outside that 25 mile radius were also proximate causes of the government decision does not alter that conclusion.

277. The question of whether the plaintiffs' claimed losses were proximately caused by the composite peril described in extension 1 (d) can only finally be determined at the quantum hearing. However, I have attempted to provide guidance on this issue in paras. 201 to 202 above. In so far as *"but for"* causation is concerned, I have set out my views in paras. 205 to 213 above. For the reasons discussed in those paras., I have formed the view that, to the extent that there are overlapping proximate causes of the plaintiffs' losses, one of which is the composite peril described in extension 1 (d) and the other is the alteration of societal behaviour in response to Covid-19, it would be fair and reasonable to modify the *"but for"* test in the manner suggested by *Hart & Honore* in the passage quoted in para. 210 above.

278. My finding as to the nature of the insured peril has significant consequences for the counterfactual to be applied in assessing the plaintiffs' losses. The counterfactual proposed by FBD is not applicable. In the case of each of the plaintiffs (other than the Lemon & Duke plaintiff) I have formed the view that the correct counterfactual is a world in which there is no imposed closure and no outbreaks

within 25 miles of the plaintiffs' premises. However, as explained above, that counterfactual will also exclude any overlapping proximate cause of the plaintiffs' losses.

279. For the reasons explained in para. 250 above, the position of the Lemon & Duke plaintiff is different. It has the benefit of a policy subject to the specific representation made to it by FBD on 2nd March, 2020 that cover would be available if the premises were the subject of an imposed closure by reason of coronavirus. That representation made no reference to outbreaks being confined within a radial distance of 25 miles from its premises. In those circumstances, it appears to me that the correct counterfactual in its case is a world in which there is no imposed closure and no outbreaks of Covid-19. However, in the case of all of the plaintiffs, I believe that further submissions are necessary in order to determine whether the only elements to be stripped out from the counterfactual are those referable to the territory of the State.

280. Insofar as the concept of disaggregation is concerned, a final conclusion on that issue can only be reached at the quantum hearing. However, I reject the approach advocated by FBD. I nonetheless accept that there may be cases where specific heads of loss sustained by the plaintiffs are found to be proximately and solely caused by an uninsured peril. Where losses are proximately caused by a combination of the composite peril embodied in extension 1 (d) and societal reaction to Covid 19, I have expressed the view that the approach taken in *Miss Jay Jay* and *Silversea* is appropriate.

281. With regard to the trends and circumstances clause in the FBD policy, I reject the case made by FBD that losses sustained by the plaintiffs in the days immediately prior to the imposed closure in March 2020 can be considered to constitute a trend which is to be applied for the duration of the insured peril. However, as the plaintiffs

themselves have acknowledged, these losses can be taken into account in relation to the comparator period applicable under s.3 of the policy.

282. I reject the claim made by the plaintiffs that they are entitled, by reference to the definition of the indemnity period in the FBD policy, to maintain a claim against FBD for the continuing effects of the Covid-19 pandemic on their business even after any period of imposed closure comes to an end. However, to the extent that the plaintiffs can show that their business continues to be affected by the composite peril embodied in extension 1 (d) after the period of imposed closure comes to an end, they are entitled to be indemnified for those losses until the losses cease or the indemnity period comes to an end (whichever is the earlier).

283. I also reject the claim made by the Lemon & Duke plaintiff for aggravated damages. In light of the conclusions which I have reached in relation to the representation made to it I do not believe that it is necessary to address its claim for misrepresentation as against FBD any further. However, if the plaintiff in the Lemon & Duke proceedings believes that there is any aspect of its claim for misrepresentation which still requires to be addressed, I will hear submissions in relation to that issue. Furthermore, if the Lemon & Duke plaintiff wishes to pursue the issue as to the meaning of the word *"closure"* as outlined in para. 274 above, an application should be made to that effect in the presence of all parties.

284. I will list this matter remotely for mention on Wednesday 17th February, 2021 at 10.30 a.m. with a view to giving the parties, in the meantime, an opportunity to consider this judgment and to agree the next steps. I will direct the parties (who should confer together for this purpose) to give consideration, in the intervening period, to the terms of the orders to be made on foot of this judgment and to identify

the appropriate steps necessary to bring this phase of the proceedings in the High Court to a conclusion.