



Neutral Citation Number: [2023] EWHC 1481 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 16/06/2023

**Before :**

**MR JUSTICE JACOBS**

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**Between :**

**Case No: CL-2022-000528**

**LONDON INTERNATIONAL EXHIBITION  
CENTRE PLC**

**Claimant**

**- and -**

- (1) ROYAL & SUN ALLIANCE INSURANCE PLC**  
**(2) ALLIANZ INSURANCE PLC**  
**(3) CNA INSURANCE COMPANY LIMITED**  
**(4) AVIVA INSURANCE LIMITED**  
**(5) ZURICH INSURANCE PLC**  
**(6) CHUBB EUROPEAN GROUP SE**

**Defendants**

**AND**

**Case No: CL-2022-000433**

- (1) HAIRLAB LIMITED**  
**(2) MUSCLEWORKS LIMITED**  
**(3) BODYLINES FITNESS LIMITED**

**Claimants**

**- and -**

**AGEAS INSURANCE LIMITED**

**Defendant**

**AND**

**Case No: CL-2021-000737**

**MAYFAIR BANQUETING LIMITED**

**Claimant**

**- and -**

**AXA INSURANCE UK PLC**

**Defendant**

**AND**

**Case No: CL-2022-000375**

**(1) KAIZEN CUISINE LTD (t/a Kaizen  
Cuisine)**

**(2) MY TIME FINE FAIR LTD (t/a My Time)**

**(3) UMBERTO'S RESTAURANT LTD (t/a  
Umbertos)**

**Claimants**

**- and -**

**HDI GLOBAL SE - UK BRANCH**

**Defendant**

**AND**

**Case No: CL-2022-000593**

**WHY NOT BAR AND LOUNGE LIMITED**

**Claimant**

**- and -**

**(1) ZENITH INSURANCE PLC**

**(2) QIC EUROPE LIMITED**

**Defendants**

**AND**

**Case No. CL-2022-000400**

**(1) PIZZAEXPRESS GROUP LIMITED**

**(2) PIZZAEXPRESS (RESTAURANTS) LIMITED**

**(3) BOOKCASH TRADING LIMITED**

**(4) AGENBITE LIMITED**

**(5) PIZZA EXPRESS (JERSEY) LIMITED**

**Claimants**

- and -

**(1) LIBERTY MUTUAL INSURANCE EUROPE  
SE**

**(2) XL INSURANCE COMPANY SE**

**Defendants**

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**Adam Kramer KC and William Day** (instructed by **Stewarts Law**) for the **LIEC Claimant**  
**Neil Hext KC** (instructed by **Keoghs LLP**) for the **LIEC 1<sup>st</sup> Defendant**  
**Gavin Kealey KC and Keir Howie** (instructed by **Clyde & Co**) for the **LIEC 2<sup>nd</sup> to 6<sup>th</sup>  
Defendants**

**Jeffrey Gruder KC and Mubarak Waseem** (instructed by **Barings Law**) for the **Hairlab and  
Kaizen Claimants**

**Aidan Christie KC and Anna Hoffmann** (instructed by **Keoghs**) for the **Hairlab Defendant**

**Neil Fawcett** (instructed by **Gunner Cooke**) for the **Mayfair Claimant**  
**Michael Davie KC and Martyn Naylor** (instructed by **DAC Beachcroft**) for the **Mayfair  
Defendant**

**Keir Howie** (instructed by **Clyde & Co**) for the **Kaizen Defendant**

**Richard Chapman KC and David Hoffman** (instructed by **Hugh James**) for the **Why Not  
Bar Claimant**

**Aidan Christie KC and Sushma Ananda** (instructed by **DWF Law**) for the **Why Not Bar  
Defendants**

**Tom Weitzman KC and Peter Ratcliffe** (instructed by **Dechert LLP**) for the **Pizza Express  
Claimants**

**David Scorey KC and Sushma Ananda** (instructed by **DAC Beachcroft**) for the **Pizza  
Express Defendants**

Hearing dates: 24<sup>th</sup> – 27<sup>th</sup> April, 2<sup>nd</sup> – 4<sup>th</sup> May 2023

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**Approved Judgment**

This judgment was handed down remotely at 10 am on Friday 16<sup>th</sup> June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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## **MR JUSTICE JACOBS:**

### **A: Introduction and factual background**

#### **A1: The parties and the preliminary issues**

1. This judgment concerns a number of preliminary issues in six expedited test cases heard in succession between 24 April and 4 May 2023. The claims are made in 6 separate actions in respect of business interruption (“BI”) losses allegedly suffered by a number of different policyholders. Following directions given at a case management conference in December 2022, the claim by London International Exhibition Centre PLC against 6 insurers is the lead action. The claimant in that action owns and operates a very large and well-known exhibition and venue space in east London, and this is commonly known as the Excel Centre, and I will use the name “Excel” to refer to that claimant and the lead action. The insurers in that action are the Royal & Sun Alliance Insurance PLC (“RSA”), which led the relevant policy, and a following market comprising 5 other well-known insurers.
2. One of the actions concerns companies within the well-known Pizza Express restaurant group (“PizzaExpress”), which operates a large number of restaurants at different premises within the United Kingdom and elsewhere. Apart from PizzaExpress, all of the other claimants in the various proceedings operate from a single premises, albeit that in Excel’s case the premises are very large. Apart from Excel and PizzaExpress, all the claimants are small or relatively small businesses. In the “Hairlab” proceedings, there is a hairdresser and two gyms: Hairlab Ltd, Muscleworks Ltd and Bodylines Ltd. The “Mayfair” proceedings, brought by Mayfair Banqueting Ltd, concern a London nightclub. The “Kaizen” proceedings are brought by 2 small restaurants and a café: Kaizen Cuisine Ltd (t/a Kaizen Cuisine), My Time Fine Fair Ltd (t/a My Time) and Umberto’s Restaurant Ltd (t/a Umberto’s). The “Why Not Bar” proceedings are brought by Why Not Bar and Lounge Limited, a bar and nightclub. There are various different insurer defendants to those proceedings as is apparent from the heading to this judgment.
3. The policyholders in each test case claim to have suffered significant BI losses as a result of the Covid-19 pandemic. Each policyholder had a form of ‘at the premises’ or “ATP” disease cover in their BI insurance policy. (In this judgment, I shall capitalise the word “premises” when quoting a capitalised policy term or where the context otherwise requires). In Excel, the lead action, the relevant policy wording (“the RSA Infectious Disease Extension”) is as follows:

“The word Damage is extended to include closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of ... any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified.”
4. The clause therefore concerns “closure of the Premises” resulting from an outbreak or occurrence of notifiable diseases “at the Premises”. The equivalent clauses in the other policies are as follows:

### ***Hairlab***

The Company will indemnify the Insured in respect of loss resulting from the interruption or interference with the Business in consequence of ... any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises.

### ***Mayfair***

Section B (Loss of Profits) is extended to include losses arising from the closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee or by defective sanitation vermin or pests at the Premises as specified in the schedule or by murder or suicide occurring at the Premises.

### ***Kaizen***

The liability of the Insurer includes loss as insured by this Section resulting from interruption or interference with the Business in consequence of ... closure or restrictions placed on the Premises on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a Notifiable Human Disease occurring at the Premises.

### ***Why Not Bar***

The insurance is extended to include business interruption loss as insured in this Section in consequence of ... closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises.

### ***PizzaExpress***

Incident for the purposes of all cover provided by Section 2 includes ... any occurrence of a Notifiable Human Disease at the Premises ... that causes restrictions on the use of the Premises on the order or advice of a statutory, local or other competent authority.

5. Although there are differences in the policy wordings in the 6 test cases, a common feature is that they refer to occurrences (or some other events) “at the Premises” and to notifiable diseases. Under the relevant legal framework in the various nations of the United Kingdom, Covid-19 became a notifiable disease (i.e. that needed to be reported to the relevant authorities) on dates in February and March 2020. Some policies contain a definition of a “notifiable disease”: see section B below, and Appendix 1 hereto, where the material clauses of the policies are set out.
6. Each test case has differently formulated preliminary issues. The precise formulation of the issues in each action is set out in Section H of this judgment. The central (albeit not exclusive) question across the test cases is the same. That is whether ‘at the

premises’ or “ATP” disease cover entails the same approach to proximate causation as the disease covers considered by the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649 on appeal from the decision of the Divisional Court (Flaux LJ and Butcher J) [2020] EWHC 2448 (Comm) (“the *FCA test case*”). Put shortly: does the decision of the Supreme Court on causation in the *FCA test case* apply to ‘at the premises’ or ATP disease cover?

7. The policyholders in these actions uniformly say that the answer to that question is ‘yes’. All of the insurers say that the answer is ‘no’, albeit not entirely for uniform reasons. The policies considered by the Supreme Court in the *FCA test case* (whose material terms are set out in Appendix 2 hereto) provided cover in respect of occurrences which were not confined to the premises of the policyholder, but extended to a radius around the premises or to events in the vicinity of the premises. A central question is whether this makes a material difference to the causation analysis. This issue is addressed in Section D below.
8. Although I understand that a large proportion of outstanding BI insurance claims from the pandemic may be concerned with “at the premises” disease cover, no previous case in England and Wales has directly addressed this issue. A number of “at the premises” claims brought by policyholders following the *FCA test case* have been settled by insurers. In contrast, those BI claims that have reached judgment have been concerned with either ‘radius’ disease cover or some other insured peril, such as prevention of access.
9. In addition to the central issue concerning “at the premises” cover, a number of other issues require decision. The principal issues are:
  - (1) Whether occurrences of Covid-19 before it was made a notifiable disease (in England on 5 March 2020) are covered. This is an issue in *Excel, Hairlab, Kaizen and Why Not Bar*. (Section E below).
  - (2) Whether the Chief Medical Officer of England, and the equivalent officers in the other nations of the United Kingdom, come within the expression “Medical Officer for Health of the Public Authority” which is contained in the policies in the *Kaizen and Why Not Bar* proceedings. (Section F below).
  - (3) The effect of particular language in the *Mayfair* policy which does not refer to an occurrence but rather to “notifiable infectious disease ... suffered by any visitor or employee”. (Section G below).
10. Some other issues raised on the pleadings, and which were then identified in the orders for preliminary issues, fell away during the hearing or were resolved as the hearing progressed. In particular:
  - (1) It became apparent that arguments advanced by insurers as to the need for disease to manifest itself or to be diagnosed and reported to the public authorities, did not raise any question which was separate from the central issue of proximate causation.
  - (2) The parties accepted that various arguments, arising from the fact that there was a sequence of lockdowns in the UK interrupted by periods when restrictions were

at least partially lifted, largely raised issues of fact rather than issues of law which could be determined as preliminary issues. Accordingly, the parties in *Excel*, *Kaizen* and *Why Not Bar* were able to agree the terms of declaratory relief responsive to certain preliminary issues. (See generally Section H below).

11. The hearing of the various cases took place sequentially, with arguments in the lead *Excel* case occupying the most time (2 days). The 7<sup>th</sup> and final day of the hearing provided an opportunity for parties to make submissions on points raised in other cases subsequent to the hearing of their own cases.
12. For the purposes of the preliminary issues, the parties in each action had agreed documents setting out agreed and assumed facts for the purposes of their respective cases. Across the 6 cases, these totalled 186 pages of text. The agreed and assumed facts in the lead *Excel* case were generally adopted in whole or in substantial part, and then supplemented, by the parties in the other cases. The exception was *Mayfair* where a 79-page document was produced without reference to the agreed facts in *Excel*. In large part, however, the *Mayfair* parties' agreed and assumed facts that had previously been agreed in the *FCA test case*.
13. As the oral argument in the various cases developed, there was relatively little reference to the detail contained within the agreed and assumed facts, and it is unnecessary to set out much of that detail in this judgment. The following sections (A2 and A3), which are drawn from the *Excel* agreed and assumed facts, provide sufficient factual background for the purposes of the issues which require resolution. Where necessary, later sections refer to particular agreed facts relevant to certain issues, such as the "Medical Officer for Health of the Public Authority" issue.

## **A2: Factual background: Covid-19 and the UK government's response**

### *Covid 19, its emergence and spread*

14. SARS-CoV-2 is a zoonotic coronavirus which causes the disease Covid-19. Covid-19 is a contagious or infectious disease of humans capable of causing serious illness and death.
15. SARS-CoV-2 is the third zoonotic coronavirus known to have emerged in the last twenty years. The other two zoonotic coronaviruses are Severe Acute Respiratory Syndrome (SARS-CoV-1 also known as SARS), which caused outbreaks in 2002 and 2004, and the Middle East Respiratory Syndrome (MERS-CoV), which was first detected in 2012.
16. SARS-CoV-2 spreads mainly between people who are in close contact with each other (for example, at a conversational distance). The virus can spread from an infected person's mouth or nose in small liquid particles when they cough, sneeze, speak, sing or breathe. Another person can then contract the virus when infectious particles that pass through the air are inhaled at short range (this is often called short-range aerosol or short-range airborne transmission) or if infectious particles come into direct contact with the eyes, nose, or mouth (droplet transmission). The virus can also spread in poorly ventilated and/or crowded indoor settings, where people tend to spend longer periods of time. This is because aerosols can remain suspended in the air or travel farther than conversational distance (this is often called long-range aerosol or long-range airborne

transmission). People may also become infected when touching their eyes, nose or mouth after touching surfaces or objects that have been contaminated by the virus.

17. A proportion of individuals with Covid-19 may be asymptomatic or pre-symptomatically infectious and cause further cases of infection and/or disease. Such an asymptomatic or pre-symptomatic individual may be infectious, although some studies show that asymptomatic cases may be less infectious than symptomatic cases. A proportion of persons with SARS-CoV-2 infection are asymptomatic.
18. The first wave of Covid-19 in the UK was the result of growth of at least many hundreds of independent introductions of SARS-CoV-2 into the UK from other countries and the local transmission of SARS-CoV-2 generated by such importation.
19. The broad consensus amongst epidemiologists is that the rate of initial importations of SARS-CoV-2 into the UK in either late 2019 or early 2020 was low, and then rose rapidly in February and early March 2020 (coinciding with, or later than, the rapidly increasing human-to-human transmission of SARS-CoV-2 in other European countries, including Italy, France and Spain) before then dropping (but not ceasing) with the precipitous fall in air travel after 15 March 2020.
20. Epidemic growth within the UK of SARS-CoV-2 was driven by the combined effect of the early independent introductions into the UK of SARS-CoV-2 between January and March 2020 and local transmission of SARS-CoV-2 generated by such importations, as well as subsequent importations generating further local transmission.
21. The first reported case of infection with SARS-CoV-2 arrived in the UK on 23 January 2020 from Hubei province in China.
22. The UK Government reports daily and cumulative numbers of cases on <https://coronavirus.data.gov.uk/details/cases> for people with a positive Covid-19 virus test (either lab-reported or rapid lateral flow test) on or up to the specimen date or reporting date. Details about the reported data and how it is collected are published at <https://coronavirus.data.gov.uk/details/about-data>.
23. COVID-19 cases are identified by taking specimens from people and testing them for the presence of parts of the SARS-CoV-2 virus. Case data includes all positive lab confirmed virus test results plus, in England, positive rapid lateral flow tests that do not have negative confirmatory lab-based PCR tests taken within 72 hours. The data is collected from both Pillar 1 (i.e. virus testing in Public Health England (“PHE”)/United Kingdom Health Security Agency (“UKHSA”) labs and NHS hospitals for those with a clinical need, and health and care workers), and Pillar 2 (i.e. virus testing for the wider population) testing.
24. Data available at <https://coronavirus.data.gov.uk/details/cases> only reflects cases with a positive Covid-19 test (“confirmed” cases). Initially, there was limited capacity in Pillar 1 testing and there was no public testing (Pillar 2) available. In particular, as to Pillar 1 testing, according to estimates in an announcement from the Department of Health and Social Care (“DHSC”) on 18 March 2020, and a bar chart in a DHSC presentation at a press conference on 23 April 2020, the testing capacity had increased to 5,000 per day during the week commencing 9 March 2020 and had exceeded 10,000 per day by 23 March 2020.

25. Prior to the closure of the Excel Centre in March 2020 (as assumed by the parties in assumed facts summarised at the end of this section A2 below), the total number of actual cases of Covid-19 would have been higher than government data on the reported number of cases. A DHSC presentation at a press conference on 30 March 2020 indicated that:

“Cases are reported when lab tests are completed. This may be a few days after initial testing. Testing capacity is increasing, which is resulting in a greater number of observed cases. (Confidence: testing capacity constraints mean there are likely many more cases than currently recorded here)”.

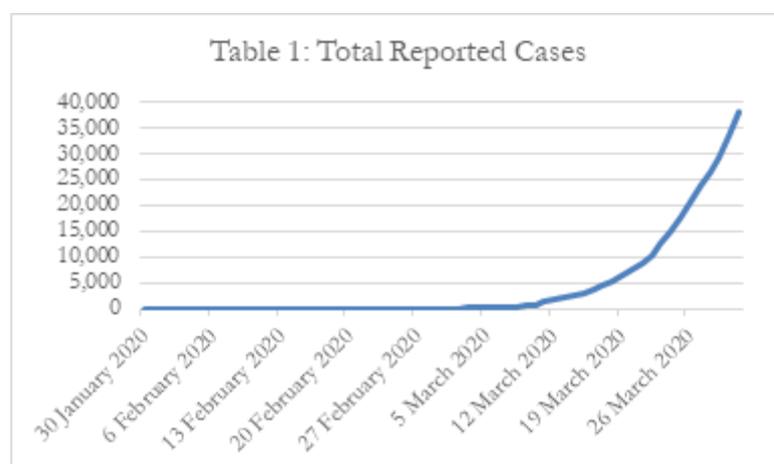
26. To obtain a more accurate picture of actual case data it is necessary to rely on sampling studies and modelled estimates of daily case data. Sampling studies by the Office for National Statistics and the REACT study conducted by Imperial College London did not begin until April 2020. However, at least three models were developed to estimate true numbers of infections per day in England/the UK in the earlier stages of the pandemic:

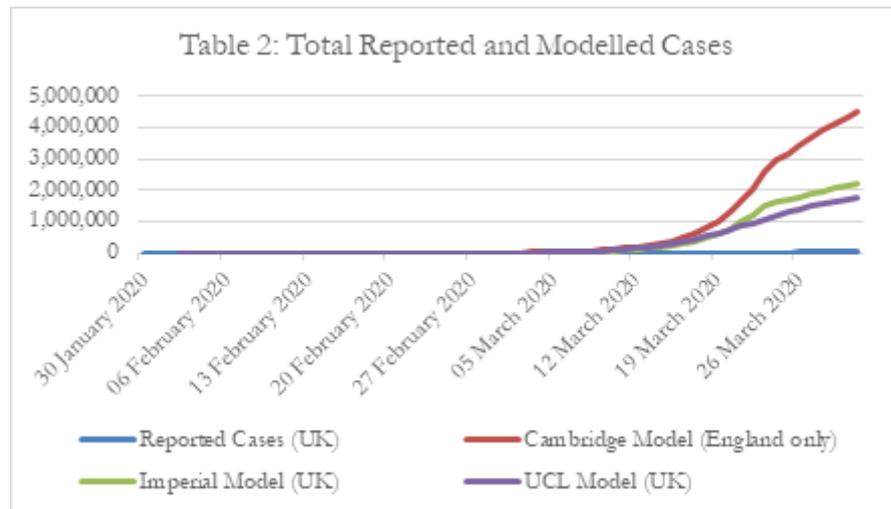
(1) First, the MRC Biostatistics Unit at the University of Cambridge developed a transmission model and fitted it to a range of data sources.

(2) Second, Imperial College London developed a renewal equation model fitted to data describing numbers of deaths.

(3) Third, University College London published a dashboard using a non-standard epidemiological model.

27. The parties in *Excel* agreed that they could refer to the reported cases and estimated true cases from the above sources. In his written opening submissions, Mr Kramer KC referred to the following tables containing detail, drawn from the sources referred to above, of the rise in reported and modelled cases.





28. The UK Government Scientific Advisory Group for Emergencies (“SAGE”) was provided with various reports and models for the spread of SARS-CoV-2 in February and March 2020.

*UK Government response to Covid 19*

29. On 31 January 2020, the UK announced its first recorded Covid-19 cases.
30. On 2 February 2020, the DHSC launched a UK-wide public information campaign with the aim of reducing transmission of Covid-19.
31. On 10 February 2020, the Health Protection (Coronavirus) Regulations 2020 (“the 10 February Regulations”) were introduced by the Secretary of State for Health and Social Care, pursuant to powers under the Public Health (Control of Disease) Act 1984 (“the 1984 Act”). (For the statutory context of the 1984 Act, see section A3 below). In broad terms, the 10 February Regulations provided for the detention and screening of persons reasonably suspected to have been infected or contaminated with Covid-19. These regulations were subsequently repealed on 25 March 2020 by the Coronavirus Act 2020.
32. On 22 February 2020, Covid-19 was made a notifiable disease in Scotland by an amendment to the Public Health etc (Scotland) Act 2008. This happened when the Public Health etc (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2020 came into force.
33. On 5 March 2020 at 6:15 pm, Covid-19 was made a notifiable disease in England by amendment to the Health Protection (Notification) Regulations 2010.
34. On 6 March 2020, Covid-19 was made a notifiable disease in Wales by amendment to the Health Protection (Notification) (Wales) Regulations 2010.
35. As at 9 March 2020, there were a total number of 649 reported UK cases of Covid-19.
36. On 10 March 2020, at the fourteenth SAGE meeting about Covid-19, it was discussed that “the UK likely has thousands of cases – as many as 5,000 to 10,000”, but with

further data to be collected and input into models. In contrast, the total number of reported cases at this date was only 914.

37. On 12 March 2020, there were a total number of 1,801 reported UK cases of Covid-19. The same day, the government made a decision to retreat to testing for Covid-19 principally within hospitals.
38. On 13 March 2020, SAGE met again and revised its previous modelling of the spread of the disease:

“Owing to a 5-7 day lag in data provision for modelling, SAGE now believes there are more cases in the UK than SAGE previously expected at this point, and we may therefore be further ahead on the epidemic curve”.
39. On 16 March 2020, the Prime Minister instructed the country to “stop non-essential contact with others and stop all unnecessary travel” and to avoid “pubs, clubs, theatres and other such social venues”, adding that the Government would “no longer be supporting mass gatherings”. The minutes of the SAGE meeting from this date recorded that it was “possible that there are 5,000-10,000 new cases per day in the UK”, far above the daily rate cases being diagnosed and reported.
40. On 20 March 2020, the Prime Minister reiterated his previous advice and announced the closure of social venues. At the same time, the Chancellor of the Exchequer announced major financial support including the Coronavirus Jobs Retention Scheme.
41. On 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (“the 21 March Regulations”) were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. The 21 March Regulations provided for the closure of certain businesses.
42. On 23 March 2020, the Prime Minister announced the first UK-wide lockdown, giving the public “a very simple instruction – you must stay at home”, with people “only ... allowed to leave their home for ... very limited purposes”, such as shopping for necessities. The Prime Minister confirmed that the government would close all premises and stop all gatherings and social events (“the 23 March Instructions”).
43. On 25 March 2020, the Coronavirus Act 2020 received royal assent. This Act applies across the UK, although different provisions have come into force in different nations at different times. In broad terms, the Coronavirus Act 2020 provides for emergency arrangements in relation to health workers, food supply, inquests and other matters.
44. On 26 March 2020 the Health Protection (Coronavirus, Restrictions) (England) Regulations (“the 26 March Regulations”) were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. The 26 March Regulations revoked most of the 21 March Regulations and introduced a more expansive regime for business closures, as explained below.
45. For the purposes of the Excel proceedings, the parties assumed that the Excel Centre was, or would have been, closed by virtue of one or more of the following:
  - (1) the 20 March Instructions;

- (2) the Licence (as described below);
  - (3) the 21 March Regulations;
  - (4) the 23 March Instructions; and/or
  - (5) the 26 March Regulations.
46. The “Licence” referred to the fact that, after 20 March 2020, the Excel Centre was repurposed under a licence with the NHS Commissioning Board dated 24 April 2020, although retrospectively effective from 24 March 2020, granted by Excel as a field or ‘Nightingale’ hospital to provide the NHS with 4,000 additional hospital beds in London to deal with the high number of people then anticipated to be hospitalised with COVID-19 infections.

### **A3: The statutory context**

47. The Public Health (Control of Disease) Act 1984 (“the 1984 Act” as defined above), as originally enacted, was a statute consolidating Victorian and other legislation, that defined notifiable disease as being cholera, plague, relapsing fever, smallpox and typhus (Section 10). It gave powers to local authorities in relation to the designation and control of notifiable diseases. This included the power to:
- (1) designate further diseases as notifiable in their own area (Section 16);
  - (2) make an order for the prohibition of certain work on premises where a notifiable disease existed (Section 28); and
  - (3) to cause a premises to be cleaned or disinfected to prevent the spread of an infectious disease (Section 31).
48. These provisions have all since been repealed in the circumstances set out below.
49. By Section 1 of the 1984 Act, “local authorities” are defined (in England) as meaning district councils, county councils, London borough councils, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under Treasurer of the Middle Temple.
50. Section 13 of the 1984 Act (as originally enacted) further provided that the Secretary of State may make regulations for the control of diseases, including relating to the notification of disease or to notifiable diseases.
51. The WHO International Health Regulations 2005 (“the 2005 WHO Regulations”) came into force on 15 June 2007. The 2005 WHO Regulations were introduced as it was recognised that the previous WHO International Health Regulations 1969, which were focused on cholera, plague and yellow fever, were unable to deal with new threats such as SARS. They also pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks, rather than focusing on action at international borders. The UK was required as a matter of international law to comply with and implement its provisions.

52. The 1984 Act was amended by further legislation including in 1995, 1996, 2000, 2002, most notably in 2008 (in part to fulfil UK obligations under the 2005 WHO Regulations), and also in 2012.
53. As amended by the Health and Social Care Act 2008 (“the 2008 Act”) (as well as certain regulations made under that Act), Sections 10, 16, 28, and 31 of the 1984 Act were repealed.
54. Under the 2008 Act, powers were conferred on the Secretary of State in relation to infection and contamination, including by introducing Sections 45B to 45F and Sections 45P to 45R to the 1984 Act. These powers include as follows.
55. Section 13 (as amended) confers a power on the Minister to make regulations (1) “(a) with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases, (b) for preventing danger to public health from vessels or aircraft arriving at any place, and (c) for preventing the spread of infection by means of any vessel or aircraft leaving any place, so far as may be necessary or expedient for the purpose of carrying out any treaty, convention, arrangement or engagement with any other country” and (2) “Without prejudice to the generality of subsection (1) above, the Secretary of State may by any such regulations apply, with or without modifications, to any disease to which the regulations relate any enactment (including any enactment in this Act) relating to the notification of disease or to notifiable diseases.”
56. Section 45C confers a power on the Minister “by regulations to make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)”, such powers being exercisable “in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and ... so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances”, and may include provision for:
  - (a) Imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health (Section 45C(3)(c));
  - (b) A prohibition or restriction relating to the holding of an event or gathering (Section 45C(4)(b)); and
  - (c) A “special” restriction or requirement, namely one that otherwise could be imposed by a justice of the peace under other provisions of the 1984 Act (as amended) (Section 45C(4)(d) and (6)(a)).
57. Pursuant to Section 45F, such regulations may “(a) confer functions on local authorities and other persons; ... (d) provide for the execution and enforcement of restrictions and requirements imposed by or under the regulations” and, pursuant to Section 45P(2), the power to make regulations “includes power to make different provision for different cases or different areas”.

*Notifiable diseases*

58. The regulations enacted by the above provisions of the 1984 Act includes the Health Protection (Notification) Regulations 2010, which includes a list of notifiable diseases at Schedule 1 and causative agents at Schedule 2. On 5 March 2020, Covid-19 was added to Schedule 1 and SARS-CoV-2 was added to Schedule 2 by the Health Protection (Notification) (Amendment) Regulations 2020. The press release from DHSC stated:

“At 6.15pm on 5 March 2020, a statutory instrument was made into law that adds COVID-19 to the list of notifiable diseases and SARS-COV-2 to the list of notifiable causative agents.

This change was made by adding them to the Health Protection (Notification) Regulations 2010.

This change in law requires GPs to report all cases of COVID-19 to Public Health England.”

*Current Position of Local Authorities*

59. Under the 1984 Act as amended by the 2008 Act (and the regulations enacted thereunder), local authorities no longer have the statutory power to designate diseases as notifiable, make an order for the prohibition of certain work on premises where a notifiable disease existed, or to cause a premises to be cleaned or disinfected to prevent the spread of an infectious disease. However, local authorities:
- (1) have the power to request (but not require) co-operation for health protection purposes (Section 8 of the Health Protection (Local Authority Powers) Regulations 2010); and
  - (2) have the power to make an application for a ‘Part 2A Order’ made by a ‘justice of the peace’ including an order that an infected or contaminated premises be closed and/or disinfected or decontaminated (Sections 45I and 45M).
60. The 10 February Regulations were enacted in exercise of the above powers granted to the Secretary of State under the 1984 Act. Among other things, the 10 February Regulations provided that, in addition to the power of a justice of the peace to make a Part 2A order on the application of a local authority, that power is also exercisable on the application of a) a registered public health consultant; and b) the Secretary of State (Regulation 11).
61. The 21 March Regulations and the 26 March Regulations were also enacted in exercise of the above powers granted to the Secretary of State under the 1984 Act.
62. The 10 February Regulations were repealed by the Coronavirus Act 2020 (Schedule 24). This Act came into force on 25 March 2020 and included provisions for public health officers to impose restrictions on potentially infectious individuals (Schedule 21). The latter provisions of the Coronavirus Act 2020 expired on 10 December 2021 under the Coronavirus Act 2020 (Early Expiry) (No 2) Regulations 2021.

**A4: The UK Government’s response after March 2020**

63. The *Excel* agreed and assumed facts addressed the position up until the assumed closure of the Excel Centre in March 2020, since Excel’s claim arose from the lockdown that occurred at that time. The agreed and assumed facts in other cases addressed the position thereafter, since (as previously mentioned) there were arguments arising from the sequence of lockdowns in the UK, interrupted by periods when restrictions were at least partially lifted, with different types of business being affected in different ways. Since these arguments fell away at the hearing, it is therefore unnecessary to describe the position in detail subsequent to March 2020. The following summary is taken from the agreed and assumed facts in the Kaizen and Mayfair proceedings, and therefore deals principally with the position concerning cafés, and restaurants in England in the period to January 2021. The summary is provided in order to explain the background, but is ultimately not relevant to any of the issues which require resolution.
64. The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI 2020/684) (the “July Regulations”) came into force on 4 July 2020 at 00:01am. Restaurants, pubs and hairdressers could open, but nightclubs remained closed.
65. Following a press conference on 9 September 2020 at which the rule of six was announced, the July Regulations were amended by The Health Protection (Coronavirus, Restrictions) (No 2) (England) (Amendment) (No 4) Regulations (SI 2020/986) on 14 September 2020 at 00:01am. This implemented the rule of six, which prohibited any gathering of more than (i) six people (from any number of households); (ii) one household (which may include more than six people); or (iii) two linked households (which again may include more than six people), unless a valid exemption applied.
66. Following a press conference on 22 September 2020 at which further measures were announced, the July Regulations were further amended by The Health Protection (Coronavirus Restrictions) (No 2) (England) (Amendment) (No 5) Regulations 2020 (SI 2020/1029), which came into force at 05:00 on 24 September 2020. As amended, Regulation 4A of the July Regulations prohibited businesses including restaurants, cafés, pubs and bars from carrying on business between 22:00 and 05:00, save for:
- “selling food or drink for consumption off the premises between the hours of 22:00 and 05:00—
- (a) by making deliveries in response to orders received—
- (i) through a website, or otherwise by on-line communication;
- (ii) by telephone, including orders by text message; or
- (iii) by post; or
- (b) to a purchaser who collects the food or drink in a vehicle, and to whom the food or drink is passed without the purchaser or any other person leaving the vehicle.”
67. Following a press conference on 31 October 2020 at which a further national lockdown was announced, on 5 November 2020, The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 came into force (the “November Regulations”). They imposed a second nationwide lockdown for a period of 28 days

(Regulation 23(1)). Regulation 15 of the November Regulations required any person responsible for carrying on the business of a restaurant, café, pub or bar to close any premises, or part of the premises in which food or drink was provided for consumption on the premises, and cease providing food or drink for consumption on the premises.

68. The November Regulations were repealed and replaced by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374) (the “December Regulations”) which entered into force on 2 December 2020. This introduced a system of tiered restrictions. In “Tier 1” and “Tier 2”, restaurants, cafés, pubs and bars were required to close between 23:00 and 05:00 and were not permitted to accept orders for food or drink for consumption on the premises between 22:00 and 05:00. In “Tier 3” and “Tier 4”, restaurants, cafés, pubs and bars were required to close any premises, or part of the premises, in which food or drink was provided for consumption on the premises, and cease providing food or drink for consumption on the premises.
69. On 5 January 2021, the December Regulations were amended pursuant to The Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 (SI 2021/8) with the effect that from 6 January 2021 a nationwide lockdown was reintroduced for the third time. It was implemented by expanding Tier 4 to include the whole of England.

**A5: The Mayfair agreed and assumed facts**

70. Unlike other parties, the Mayfair parties did not adopt and then supplement the *Excel* formulation of the agreed facts. However, the Mayfair agreed and assumed facts covered much of the same ground. It did not seem to me that there was any significant difference, for the purposes of the issues which I need to resolve in the Mayfair proceedings, between the agreed and assumed facts as summarised in Section A2 and A3 above, and the facts as agreed and assumed by the parties to the Mayfair proceedings.
71. In addition, the Mayfair parties agreed the facts which had previously been agreed in the *FCA test case*, as well as the summary of the agreed facts contained in the judgment of the Divisional Court. Accordingly, I did not think that there could be any material difference between the facts on which the *FCA test case* decision on causation was based, and the facts relevant for the purposes of determining the central causation issue in the Mayfair proceedings. I address below, in section D3, a particular argument advanced by the Mayfair insurers (but not the other insurers) which was referable to certain facts agreed in the *FCA test case*.

**B: The policyholders and the policies**

72. This section describes the various policyholders, the policies and the principal relevant terms, and the assumed facts as to disease at the premises. Appendix 1 contains a more complete list of the terms of the policies to which reference was made in the course of argument. In this section, I use capitalised terms and bold text where they have been so used in the relevant policies. Although the policies were issued by various different insurers, the format was similar: each policy included a policy schedule and, separately, standard policy wording.

**B1: Excel**

73. On 31 May 2019, Excel, via its broker, entered into a contract of insurance with the policy number RSAP2068238200 (“the Excel Policy”). The policy incorporated the RSA’s UK027170G wording for Property Damage Insurance, Business Interruption, Money and Terrorism Insurance. The Excel Policy included the RSA Infectious Diseases Extension with a limit of indemnity of £15 million. RSA took 30% of the risk, and the other insurers each took either 10% or 20%. The Policy Period commenced on 31 May 2019 and expired on 30 May 2020. On around 27 March 2020, the Excel policy was amended to incorporate temporary use of the Premises as a “Nightingale” hospital on behalf of the NHS during the Covid-19 pandemic.

74. The Premises for the purposes of the Excel Policy is the Excel Centre, which is an exhibition centre located in the London Borough of Newham in East London. The Excel Centre hosts large international exhibitions, conferences, concerts, ceremonies, conventions and major corporate and other private events. There were and remain 24 food and drink venues located within the central boulevard of the Excel Centre.

75. For the purposes of the preliminary issues hearing, the parties assumed (as set out in Section A2 above) that the Premises was closed by virtue of one or more of various measures taken in response to the pandemic in March 2020. The parties also assumed that there was at least one person at the Premises who was diagnosed with or was reported as having Covid-19 (i) after 25 January 2020 and before 5 March 2020, and (ii) after 5 March at 6.15 pm and before 20 March 2020.

76. The Excel Policy includes a BI insuring clause as follows:

“If Damage by any of the Covers insured occurs at the Premises, to property used by the Policyholder for the purpose of the Business and causes interruption of, or interference with the Policyholder’s Business at the Premises:

the Company will pay to the Policyholder the amount of loss resulting from the interruption or interference caused by the Damage in accordance with the provisions of the insurance”.

77. The RSA Infectious Disease Extension was included within the policy schedule. Although a number of schedules were issued, the wording of the RSA Infectious Disease Extension remained unchanged. For the purposes of identifying the relevant terms, the parties referred to the version of the schedule in force on 20 March 2020.

The RSA Infectious Disease Extension extends the meaning of “Damage” in the standard wording as follows:

“Infectious Diseases – Extension

The word Damage is extended to include closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of:

- A) any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified
- B) food or drink poisoning
- C) vermin or pests
- D) defective sanitation

Provided that

1) the Maximum Indemnity Period is limited to three months and shall apply from the date from which the closure order is enforced

2) the Company shall not be liable under this Extension for more than the limit stated below in respect of any one loss

Limit £15,000,000

Subject otherwise to the terms Exclusions and Conditions of this Policy”.

- 78. The composite insured peril is therefore occurrence of disease at the Premises resulting in local or governmental authority order or advice which leads to closure of the Premises.
- 79. The Excel Policy also contained an NDDA (non-damage denial of access) clause. This excluded the consequences of “infectious or contagious diseases”, and therefore was not relied upon by Excel as providing the basis of a claim. However, as discussed in Section D3 below, the following market insurers placed reliance upon this provision as providing context for their interpretation of the RSA Infectious Diseases Extension on the causation issue. The NDDA clause, which was within the policy schedule, provided:

**“Denial of Access (Non-Damage) - Extension**

“Cover 10 Any other accident is extended to cover interruption of or interference with the Policyholder's Business in consequence of access to the Premises being hindered or prevented as a result of the actions or advice of a government or local authority due to an emergency arising which is likely to endanger life or property at or in the immediate

vicinity of the Premises provided that there shall be no liability under this Extension for

1) any loss as insured involving an interruption of less than 24 hours continuous duration

2) any period other than the actual period of hindrance or prevention of access to the Premises

3) any consequence of physical Damage

4) **any consequence of labour disputes, infectious or contagious diseases** drought

5) any consequence arising from any cause within the control of the Policyholder

6) any action for which the Policyholder has been given prior notice of more than 4 hours by such Government or Local Authority". Other terms are set out in the Appendix. These largely featured in the parties' arguments concerning occurrences prior to the date when Covid-19 became notifiable (on 5 March 2020 in England).

## **B2: Hairlab, Muscleworks and Bodylines**

80. There are three policyholders in the Hairlab proceedings: Hairlab Limited, Muscleworks Ltd and Bodylines Fitness Ltd.
81. The policy issued to Hairlab ("the Hairlab Policy") (No. 9101678W) provided cover for the period 31 January 2020 to 30 January 2021. The business was described as "Hairdressing". The Premises or "Risk Address" was 16 Mayfair House, Town Centre, Basingstoke, RG21 7JT. The Hairlab Policy comprised a Shopkeepers Policy Schedule together with Ageas' standard "Commercial Guard – Shopkeeper's Policy Wording". The Shopkeepers Policy Schedule provided that the limit of indemnity for BI in respect of "Human Infectious diseases (Premises) / Food Poisoning" was £500,000, with a maximum indemnity period of 12 months. The policy wording provided BI cover for "Notifiable Disease, Poisoning, Defective Drains and Murder or Suicide". This wording (set out below) was identical to the wording of the policies of Muscleworks and Bodylines.
82. The policy issued to Muscleworks ("the Muscleworks Policy") (No: LR/5323015V) provided cover for the period 7 August 2019 to 6 August 2020. The policy issued to Bodylines ("the Bodylines Policy") (No: LR/5323016P) also provided cover for the period 7 August 2019 to 6 August 2020.
83. The Premises for the purposes of the Muscleworks Policy is a gym located at 114 Vallance Road, London, E1 5BW. (Mr Gruder told me that, just down the road at 178 Vallance Road, was the address of the notorious gangsters, the Kray twins). The Premises for the purposes of the Bodylines Policy is a gym located at 461 Bethnal Green Road, London, E2 9QH.
84. Both policies comprised a policy schedule and standard Ageas policy wording. The policy wording was "Commercial Guard – Leisure". The Muscleworks and Bodyline

Fitness Policies provided a limit of indemnity of £300,000 in respect of “Notifiable Diseases, Poisoning, Defective Drains and Murder or Suicide”.

85. The relevant clause in the Ageas policy wording for the Hairlab Policy was headed “Notifiable Diseases, Poisoning, Defective Drains and Murder or Suicide”. This provides:

“The **Company** will indemnify the **Insured** in respect of loss resulting from the interruption or interference with the **Business** in consequence of:

- (a)
  - i. any occurrence of a Notifiable Disease (as defined below) at the **Premises** or attributable to food or drink supplied from the **Premises**
  - ii. any discovery of an organism at the **Premises** likely to result in the occurrence of a Notifiable Disease (as defined below)
- (b) the discovery of vermin or pests at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (c) any accidentcausing defects in the drains or other sanitary arrangements in the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (d) any occurrence of murder or suicide at the **Premises**

**Special Provisions**

- (a) Notifiable Disease shall mean illness sustained by any person resulting from:
  - i. food or drink poisoning
  - ii. any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the competent Local Authority has stipulated shall be notified to them.
- (b) For the purpose of this Extension the Definition of Indemnity Period is amended to read:

Indemnity Period shall mean the period during which the results of **Business** shall be affected in consequence of the loss beginning:

- i. in the case of (a) and (d) above, with the occurrence or discovery of the incident

- ii. in the case of (b) and (c) above, with the date from which the restrictions on the **Premises** are applied and ending not later than the Maximum Indemnity Period thereafter.

For the purposes of this Extension the Maximum Indemnity Period is 12 months.

The **Company** shall not be liable under this Extension for any costs incurred in the cleaning, repair, replacement, recall or checking of the Property.

The **Company** shall only be liable for the loss arising at those **Premises** which are directly subject to the occurrence described in (a), (b), (c) or (d).”

86. It is not necessary to set out the equivalent clause (numbered 7) in the Muscleworks and Bodylines Policies, since these are identical.
87. For the purposes of the preliminary issues hearing, the following facts were alleged by the Claimants, denied by the Defendants, but were assumed for the purposes of the Preliminary Issues trial.
88. The Claimants' premises were, or would have been, closed by virtue of one or more of the Regulations set out in Section B above but the relevant government measures relied upon by the *Hairlab* claimants were not specifically directed at and/or taken in specific response to such case(s) of Covid-19 occurring at the Premises.
89. There was at least one occurrence of Covid-19 at each of the *Hairlab* claimants' premises:
  - 89.1 Between 1 February 2020 and 5 March 2020 at 6:15pm;
  - 89.2 Between 5 March 2020 at 6:15pm and 21 March 2020;
  - 89.3 Between 21 March 2020 and 26 March 2020; and/or
  - 89.4 During any such other subdivision of those periods of time as any party may deem to be relevant for the purposes of the preliminary issues trial.
90. Further, there was at least one occurrence of Covid-19 at *Hairlab*'s premises:
  - 90.1 Between 4 July 2020 and 5 November 2020;
  - 90.2 Between 2 December 2020 and 26 December 2020; and/or
  - 90.3 During any such other subdivision of those periods of time as any party may deem to be relevant for the purposes of the preliminary issues trial.
91. In each of the periods referred to above, there was at least one case of Covid-19 at the Claimants' premises that was not diagnosed and/or not reported or otherwise known to the government and/or any local authority which might have been authorised to take measures in relation to the Claimants' premises. Where cases were reported and/or

known to the relevant authorities, including the government, the relevant governmental measures relied upon by the claimant were not specifically directed at and/or taken in specific response to such case(s) of Covid-19 occurring at the Premises.

### **B3: Mayfair**

92. The policy issued to Mayfair Banqueting Ltd (“the Mayfair Policy”) (GIB193762/03/19) provided cover from 8 August 2019 to 24 March 2020. The Premises referred to in the policy schedule was 3-5 Mill Street, London, W1S 2AU. The business was described as “Late Night Bars”. It was an agreed fact that the Premises had, prior to 23 March 2020, operated as a nightclub.
93. The relevant infectious disease cover was contained in an endorsement, which was part of the policy schedule.

#### **“Murder, suicide and infectious diseases extension 2006**

Section B (loss of Profits) is extended to included losses arising from the closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee or by defective sanitation vermin or pests at the Premises as specified in the schedule or by murder or suicide occurring at the Premises.

Notwithstanding the above losses arising from either avian flu or legionnaires diseases are limited to £ 50,000 any one occurrence and in the aggregate”

94. It was an assumed fact that there was at least one visitor or employee who suffered Covid-19 at the Premises prior to 24 March 2020. Mayfair’s factual case relies, amongst other things, on evidence relating to two employees, Maurice Marshall and Myrna Obillo, who suffered from Covid-19 at the premises on 8 March 2020. Maurice Marshall was hospitalised on 12 March 2020 due to Covid-19, and Myrna Obillo was also subsequently hospitalised and then died due to Covid-19 on 2 April 2020.

### **B4: Kaizen**

95. There are three claimants in the Kaizen proceedings all of whom operate cafés and/or restaurants.
96. The policy issued to Kaizen Cuisine Ltd (“the Kaizen Policy”) (SJL2/5510944) provided cover for the period 18 October 2019 to 17 October 2020. This provided BI cover for gross profit of £500,000 with a 12-month indemnity period. The Business Address in the Schedule was 70 Parchment Street, Winchester, Hampshire, SO23 8AT. The Business was a restaurant: Kaizen is a Japanese restaurant.
97. The policy issued to My Time Faire Ltd (“the My Time Policy”) (BON2/4862185) provided cover for the period 18 February 2020 to 17 February 2021. This provided BI cover for gross profit of £500,000 with a 12-month indemnity period. The Business

Address in the Schedule was 375 Green Lanes, London, N13 4JG. The Business was a sandwich shop.

98. The policy issued to Umberto's Restaurant Ltd ("the Umberto's Policy") (HOL1/5750061) provided cover for the period 23 January 2020 to 22 January 2021. This provided BI cover for gross profit of £500,000 with a 24-month indemnity period. The Business Address was 195 High Street, Hornchurch, Essex, RM11 3XT. The Business was a restaurant: Umberto's is an Italian restaurant.
99. The policy wording was an HDI "Small Commercial/ SME Package Cover" wording. Each of the three policies were subject to this wording. The relevant cover for present purposes is the Extension to Section 2. This provides as follows:

"Extensions to Section 2

...

The liability of the **Insurer** includes loss as insured by this Section resulting from interruption or interference with the **Business** in consequence of

1) Premises Closure or Restrictions

- a) closure or restrictions placed on the **Premises** on the advice of or with the approval of the Medical Officer of Health for Public Authority as a result of a **Notifiable Human Disease** occurring at the **Premises**
- b) closure of the whole or part of the Premises by order of the Public Authority consequent upon injury or illness sustained by any person caused by or traceable to foreign or injurious matter in food or drink sold from the **Premises** by the **Insured**
- c) closure of the whole or part of the Premises by order of the Public Authority consequent upon vermin and pests at the **Premises**
- d) closure of the whole or part of the **Premises** by the order of the Public Authority consequent upon closure of the whole or part of the Premises by order of the Public Authority consequent upon defects in the drains and other sanitation at the **Premises**
- e) closure of the whole or part of the Premises by order of the Public Authority consequent upon murder or suicide occurring at the **Premises**

Subject to an aggregate maximum of £50,000 in any one Period of Insurance

The Insurer shall not be liable under this extension for costs incurred in cleaning repair replacement recall or checking of property"

100. The policy wording contained a definition of Notifiable Human Disease:
- “Notifiable Human Disease** – An illness sustained by any person caused by
- a) food or drink poisoning
- b) any human infectious or contagious disease
- An outbreak of which the competent public authority has stipulated shall be notified to them”
101. The following facts were assumed for the purposes of the preliminary issues trial.
102. There was at least one person at each of the Claimants’ premises who was (insofar as may be relevant) diagnosed and/or reported as having Covid-19:
- 102.1 Between 1 February 2020 and 5 March 2020 at 6:15pm;
- 102.2 Between 5 March 2020 at 6:15pm and 20 March 2020;
- 102.3 Between 4 July 2020 and 9 September 2020;
- 102.4 Between 14 September 2020 and 31 October 2020; and
- 102.5 During any such other subdivision of those periods of time as any party may deem to be relevant for the purposes of the preliminary issues trial.
103. There was at least one person at each of My Time and Umberto’s premises who had a case of Covid-19 and who was reported as having Covid-19:
- 103.1 Between 2 December 2020 and 15 December 2020; and
- 103.2 During any such other subdivision of those periods of time as any party may deem to be relevant for the purposes of the preliminary issues trial.
104. Alternatively to the previous two paragraphs, during each of the periods referred to in those paragraphs, there was at least one person on each of the premises who had a case of Covid-19 but where this was not reported or otherwise made known to the Government and/or was not taken into account in decision-making.

#### **B5: Why Not Bar and Lounge Limited**

105. The policy issued to Why Not Bar and Lounge Limited (“the Why Not Bar Policy”) (UK CCC 6495577) provided cover for the period 2 November 2019 to 1 November 2020. The BI cover under Section 2 of the Policy was subject to a maximum indemnity period of 24 months and a maximum sum insured of £500,000 (on a gross revenue basis). The insured Premises were located at 2 Pier Street, Aberystwyth, SY23 2LJ. The policy schedule described the business as a late-night bar/ licenced entertainment venue. It was an assumed fact that, prior to Covid-19, Why Not Bar and Lounge Ltd.

carried on business from the Premises as both a nightclub using the name Why Not Bar and as a restaurant using the name SY23.

106. The Why Not Bar Policy wording was contained in a Markerstudy Insurance Services Limited “Policy Booklet, Commercial Combined”. Extension 6 to the BI section of the wording was as follows:

“Extensions

The insurance is extended to include business interruption loss as insured in the Section in consequence of

...

6

- A) closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises.
- B) closure or restrictions placed on the Premises due to Injury or illness sustained by any customer or Employee arising from or traceable to foreign or injurious matter in food or drink sold from the Premises.
- C) closing of the whole or part of the Premises by order of the Public Authority for the area in which the Premises are situate consequent upon defects in the drains and other sanitary arrangements at the Premises.
- D) closure or restrictions placed on the Premises due to murder or suicide occurring at the Premises.
- E) loss destruction or damage caused by any of the Covers to property in the vicinity of the Premises which prevents or hinders the use of the Premises or access thereto whether the Premises or Your property therein shall be damaged or not but excluding Damage which prevents or hinders the supply of electricity gas water or telecommunications services.”

107. The following facts were assumed for the purposes of the preliminary issue hearing.
108. There were at least two persons who attended at the Premises between 5 March 2020 and before the 20 March 2020 closure of the Premises (see Particulars of Claim, para 8 and Reply, paras 6.2 to 6.5) who:
- (1) were medically diagnosed as having been infected with Covid-19 at the time of the attendance, and/or
  - (2) displayed symptoms of Covid-19 at the time of the attendance.

109. In relation to the assumed manifestations of Covid-19 identified in the previous paragraph above, it is to be further assumed that either:

(1) They were not reported or otherwise known to the UK Government or the Welsh Government; or

(2) They were reported or otherwise known to the UK Government or the Welsh Government but the relevant government measures relied upon by the Claimant and identified in the Reply, paras 3.7.1 to 3.7.7, were not specifically directed at and/or taken in specific response to such case(s) of Covid-19 manifesting at the Premises.

110. In relation to those assumed manifestations of Covid-19, it is to be further assumed that at least one such manifestation was no longer infectious at the time that the relevant closure or restriction was placed on the Premises (and it is to be assumed in the alternative that at least one such manifestation was still infectious).

### **B6: PizzaExpress**

111. The Claimants in these proceedings are various companies in the well-known PizzaExpress Group, which among other things, operate restaurants in England, Wales, Scotland, Northern Ireland, the Republic of Ireland and Jersey.

112. The policy issued to PizzaExpress (“the PizzaExpress Policy”) (No 1000218618-04) provided cover for the period 1 July 2019 to 30 June 2020. The schedule to the PizzaExpress Policy described the Business as, amongst other things: “Operation of restaurants. Dough and pizza base makers and suppliers”. Unlike all the other Claimants in the preliminary issue proceedings, PizzaExpress operated from multiple premises. The policy wording was Aon Trio Property and Business Interruption Policy. This contained a wide definition of Premises: “any premises owned, leased, used or occupied by the Insured within the Territorial Limit, as declared to and accepted by Insurers”. The limits of the PizzaExpress Policy have been the subject of a separate preliminary issue: see [2023] EWHC 1269 (Comm).

113. The relevant cover for infectious diseases is contained in Endorsement 1 to the PizzaExpress Policy:

“Pages 27 & 28 of the Trio Property and Business Interruption Policy Extended Incident is amended as follows –

#### **2 Extended Incident**

**Incident** for the purpose of all cover provided by Section 2 includes:

##### **a. Notifiable Human Disease and Other Health Risks**

- i. any occurrence of a **Notifiable Human Disease** at the **Premises** or a **Notifiable Human Disease** attributable to food or drink supplied from the **Premises**,
- ii. any discovery of an organism or causative agent at the **Premises** likely to result in the occurrence of a **Notifiable Human Disease**,

that causes restrictions on the use of the **Premises** on the order or advice of a statutory, local or other competent authority,

- iii. the discovery of an infestation of vermin or pests at the **Premises** that cannot be controlled in the ordinary course of the business,
- iv. any accident causing defects in the drains or other sanitary arrangements at the **Premises** that cannot be controlled in the ordinary course of the business, including accidental leakage or escape of sewage or effluent
- v. any occurrence or alleged occurrence (of which the Police are informed and investigating) of death, murder, suicide, assault, rape, abduction, physical abuse or sexual abuse at the **Premises**.

Cover provided by this Extension includes the costs and expenses incurred following any Incident described above, in

- a. cleaning and decontamination of property used by the **Insured** for the purpose of the Business (other than stock in trade),
- b. removal and disposal of contaminated property owned or leased by the Insured or for which the **Insured** is responsible,
- c. repair or replacement of property owned or leased by the **Insured** or for which the **Insured** is responsible, provided that such costs do not increase the **Insurer's** liability beyond the amount which would have been recoverable under items a. and b. above.

Definitions for the purposes of this Extension

Notifiable Human Disease means human disease, suspected human disease or contamination which must be notified to the local authority, excluding any occurrence, whether directly or indirectly, of

- a. any mutation of Avian Flu that manifests itself as a human infectious or human contagious disease
- b. Severe Acute Respiratory Syndrome (SARS).

Premises means any location included within the Premises definition applying to Section 2, but excluding any location outside Great Britain, Northern Ireland, Republic of Ireland, Channel Islands and the Isle of Man.”

114. For the purposes of the preliminary issue, the parties assumed the following facts. At each of the Premises in respect of which the Claimants claim under Extension 2(a)(i) of the Policy, between the date when Covid-19 became a Notifiable Human Disease in the relevant territory and the date when the order or advice identified at earlier paragraphs of the agreed facts restricting the use of the relevant Premises took effect:

- i) At least one person visited the Premises who was infected with Covid-19 at the time of the visit (whether or not the infection was symptomatic at the time of the visit).
- ii) That case of Covid-19 was never diagnosed by a medical professional or by medical testing; and/or
- iii) That case was not reported or otherwise known to the relevant authorities prior to their making of the order or the giving of the advice.

It was also further assumed that the government orders and/or advice relied upon by the Claimants and identified at earlier paragraphs of the agreed facts were not specifically directed at and/or taken in specific response to any proven cases(s) of COVID-19 at the Premises.

## C: Legal background

### *The FCA test case in summary*

115. The legal background to the present case comprises, principally, the decision of the Supreme Court in the *FCA test case*. The circumstances leading to the decisions of the Divisional Court and Supreme Court, and their effect, has been summarised by Cockerill J in *Corbin & King Ltd and others v Axa Insurance UK Plc* [2022] EWHC 409 (Comm), paras [47] – [144] (“*Corbin & King*”), and it is not necessary to repeat what Cockerill J has said.
116. The Divisional Court and the Supreme Court were concerned with issues of construction arising in the context of clauses which broadly divided into three categories, referred to as “disease”, “hybrid” and “NDDA” clauses.
117. Disease clauses are the simplest type of clause, where the relevant linkage is between a notifiable disease and interruption of business at the premises. An example in the *FCA test case* was the RSA 3 wording, and in the present case is the clause in *Hairlab*:
- “The Company will indemnify the Insured in respect of loss resulting from the interruption or interference with the Business in consequence of any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises”.
118. Hybrid clauses add an additional layer, in that they refer to the occurrence of a notifiable disease and to restrictions imposed on the premises. An example in the present case is the *Excel* clause which refers to:
- “...closure of the Premises...on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of ... any human contagious or infectious disease ... an outbreak of which is required by law or stipulated by the governmental authority to be notified.”
119. Another example in the present case is the clause in *Why Not Bar*, which refers to:
- “... closure or restrictions placed on the Premises on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a notifiable human disease manifesting itself at the Premises”.
120. Denial of Access (Non Damage) or NDDA clauses cover prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction. The *Corbin & King* case concerns a clause of this nature. Whilst some of the policies in the present case do contain NDDA clauses, the present preliminary issues do not directly concern them.
121. A central issue in the *FCA test case* was whether losses suffered by reason of restrictions imposed in response to the national pandemic were covered. The Divisional Court decided that because BI losses were caused by restrictions introduced in response to the pandemic in the UK as a whole rather than in any particular localised area,

coverage could only be available if, on their proper construction, disease clauses provided cover against the effects of the pandemic in the whole of the UK. It decided that all disease clauses apart from QBE 2 and QBE 3 did provide cover. It held that the QBE 2 and QBE 3 clauses only provided cover in respect of disease within a radius of 1 or 25 miles of the premises, and those clauses did not indemnify a policyholder against BI losses consequent upon regulations introduced to deal with the national pandemic. The “but for” test for causation defeated the claims under those policies.

122. In contrast, the majority of the Supreme Court (Lord Reed PSC and Lords Hamblen and Leggatt JJSC) decided that all disease clauses did indeed only provide cover limited to the effects of infectious diseases within a radius of 1 or 25 miles of the relevant premises. Consequently, an analysis of causation was essential. On the basis of its consideration of causation, as a matter of construction of the policies in question, infectious diseases occurring within the relevant radius were a concurrent cause of the closures and restrictions, and the consequent BI losses, along with all the other infectious diseases elsewhere in the UK. The minority of the Supreme Court (Lord Hodge DPSC and Lord Briggs JSC) agreed with the causation analysis of the majority, but would also have upheld coverage on a wider basis similar to the reasoning of the Divisional Court.

*The decision of the Divisional Court*

123. The Divisional Court considered that the clauses which provided coverage were those which, on their proper construction, insured against the effects of the national pandemic as a whole, so long as there was, at least, one occurrence of a case of Covid-19 in the relevant radius. Thus, in para [101], in relation to RSA 3, the Divisional Court described RSA’s argument that:

“... if there is a local outbreak of a disease occurring more widely, then it is only the effects of the disease occurring locally, and only insofar as they can be distinguished, which are covered. RSA submits that this is the purpose and effect of the 25-mile radius provision ...”

124. In paragraphs [102] and [103], the Divisional Court rejected that argument, identifying two matters which were “fundamental”.

125. First, in [102], the Divisional Court said that the relevant RSA clause was not expressly or implicitly confined to cases where the interruption had resulted only from the instance(s) of notifiable disease within the 25-mile radius. Instead, the clause should be read as meaning that there is cover:

“... for the business interruption consequences of a Notifiable Disease which has occurred, ie of which there has been at least one instance, within the specified radius, from the time of that occurrence. The wording of the clause, in other words, indicates that the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease”.

126. Secondly, in paragraphs [103] – [104], the Divisional Court referred to the “implications of the fact that the cover relates to occurrences of a Notifiable Disease”. The court referred to the legislative scheme for notifying diseases, and to the broad

range of diseases which were notifiable as well as the coverage under RSA 3 (which is replicated in the cases which I am considering) for diseases to be added to the list:

“[103] The relevant scheme for notification, as mentioned above, is contained in the 1984 Act and the 2010 Regulations. Under the 2010 Regulations, registered medical practitioners have a duty to notify proper officers of the relevant local authority, amongst other things, of grounds for suspecting that a patient has a notifiable disease. Under the same Regulations, the relevant local authority must disclose the fact of a notification of a notifiable disease to, amongst others, PHE [Public Health England], and to the proper officer of the local authority in whose area the patient usually resides, if different. At the time of the conclusion of the contracts of insurance in question, there were some 31 diseases specified in schedule 1 to the 2010 Regulations as notifiable, including cholera, plague, typhus, yellow fever and SARS. Under RSA 3, furthermore, the cover in Extension vii is not limited to Notifiable Diseases which have been included on schedule 1 at the outset of the insurance, but extends to others which may be added thereto, as Covid-19 has been.”

127. The Divisional Court then continued:

“[104] While there is clearly a spectrum of diseases within the category of Notifiable Diseases, it includes diseases which are capable of widespread dissemination, such as SARS (Severe Acute Respiratory Syndrome), which is a viral respiratory illness caused by the SARS-associated coronavirus for which there is no vaccine. It is in the nature of human infectious and contagious diseases that they may spread in highly complicated, often difficult to predict, and what might be described as “fluid”, patterns. Furthermore, the list of diseases includes some which might attract a response from authorities which are not merely local authorities, and which is not a purely local response. The requirement under the Regulations of notifications to PHE, and to other local authorities facilitates such wider responses. Moreover, in terms of Extension vii, the fact that it is envisaged that the occurrence of a notifiable disease up to 25 miles away might be followed by interruption of business at the insured’s premises demonstrates, in our view, that the parties must have contemplated that there might be relevant actions of public authorities which affect a wide area. They must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak, and would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.”

128. As will become apparent, these aspects of the reasoning of the Divisional Court were later echoed in the Supreme Court’s reasoning on the causation issue, notwithstanding that the majority of the Supreme Court disagreed with the Divisional Court’s approach to the identification of the insured peril.

129. In relation to those clauses which provided coverage, the Divisional Court also applied a causation analysis which led to the same conclusion, albeit that it regarded this as “less satisfactory”:

“[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. As Mr Edelman QC submitted, there is material in the agreed facts which provides a sufficient basis for this analysis. He 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. As Mr Edelman QC pointed out, the Secretary of State for Health and Social Care, Mr Hancock, on 28 April 2020 stated that thought had been given to imposing measures first on London and the Midlands, but it had been decided that “we are really in this together”, and that “the shape of the curve ... has been very similar across the whole country”. Given this, it appears to us that it is not unrealistic to say that all the cases were equal causes of the imposition of national measures.”

*The Supreme Court - overview*

130. The majority of the Supreme Court rejected the reasoning of the Divisional Court that there could only be coverage where the relevant clause provided coverage against the consequences of the national pandemic. The Supreme Court decided that the coverage provided by all the disease clauses, and not just QBE 2 and QBE 3, provided localised cover for BI caused by any Covid-19 cases within the relevant radius, whether 1 mile or 25 miles. Thus, in para [95], the court concluded that the disease clauses covered:

“only relevant effects of cases of Covid-19 that occur at or within a specified radius of the insured premises. They do not cover effects of cases of Covid-19 that occur outside that geographical area”.

Accordingly, the majority rejected the Divisional Court’s construction of certain clauses (such as RSA 3 and QBE 1) as providing coverage in respect of the effects of the national pandemic so long as there was at least one case in the relevant radius.

131. Once the Supreme Court held that all the disease clauses under consideration only provided cover in respect of BI losses caused by those cases of Covid-19 which occurred within the specified radius (1 or 25 miles) and no other cases, the analysis of causation became critical:

“[161] On what we consider to be the correct interpretation of the disease clauses, however, questions of causation are of crucial

importance. We have concluded that the clauses cover only the effects of cases of Covid-19 occurring within the specified radius of the insured premises. On this basis, the question of what connection must be shown between any such cases of disease and the business interruption loss for which an insurance claim is made becomes critical.”

132. In its analysis of causation, the majority of the Supreme Court held that each case of Covid-19 was a concurrent cause of the restrictions and, therefore, even if there was only one case of Covid-19 in the relevant radius before the restrictions were introduced, there was coverage:

“[176] Thus, in the present case it obviously could not be said that any individual case of illness resulting from COVID-19, on its own, caused the UK Government to introduce restrictions which led directly to business interruption. However, as the court below found, the Government measures were taken in response to information about all the cases of COVID-19 in the country as a whole. We agree with the court below that it is realistic to analyse this situation as one in which "all the cases were equal causes of the imposition of national measures" (para 112).”

133. The Supreme Court’s decision on causation, in relation to disease clauses, was summarised in its conclusion at para [212] as follows:

“[212] We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "following" or some other formula such as "arising from" or "as a result of". It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case.”

134. At paragraph [213], the Supreme Court applied that analysis to hybrid clauses which contained, as one element, an occurrence of an infectious disease within a specified distance of the insured premises.

135. At paragraph [250], the Supreme Court said, under the heading of “Other wordings”:

“[250] It is unnecessary to address other hybrid and prevention of access clauses in relation to which, as noted earlier, this issue does not affect the outcome of the proceedings. In principle, however, a similar analysis

must apply to those clauses as to the clauses which we have specifically addressed.”

*The Supreme Court – the detailed causation reasoning*

136. The central issue of causation is whether the Supreme Court’s decision, in the context of the “radius” clauses that it was considering, is applicable to “at the premises” wordings. It is therefore necessary to examine the reasons that led the Supreme Court to its decision to apply its concurrent causation approach to the issues on the disease and hybrid radius clauses as well as (so the policyholders argued) those clauses referred to in paragraph [250]. (In this section, paragraph numbers in square brackets are, unless the context otherwise requires, references to the Supreme Court judgment).
137. In Section V, the Supreme Court considered disease clauses, of which an exemplar was the RSA 3 policy wording. In paragraph [54], the Supreme Court identified the two central issues: (i) the scope of the peril insured against, and (ii) the causal link between the insured peril and the interruption to the business required in order to entitle the policyholder to be indemnified. The Supreme Court said that the second issue had to be approached in the light of the answer given to the first.
138. On the first issue, the scope of the peril insured against, the majority of the Supreme Court disagreed with the approach of the Divisional Court, which (on a fair reading of its judgment) had concluded that the insured peril was the disease across the country: [64]. The relevant peril, covered by the insurance, was the case or cases of illness resulting from Covid-19 that occur within the 25-mile radius specified in clauses which provided for such a radius, that is to say by a particular person at a particular time and place: see [71].
139. The Supreme Court then discussed the two matters which the Divisional Court had regarded as “fundamental”. The court agreed that it was important that the relevant clause did not confine cover to business interruption resulting only from cases of notifiable disease within the 25-mile radius, as opposed to cases elsewhere. This was “an important point when considering questions of causation”: [72]. In relation to the second “fundamental” matter, the Supreme Court said:
- “[73] Similarly, we think the court below was right to attach significance in interpreting the policy wording to the potential for a notifiable disease to affect a wide area and for an occurrence of such a disease within 25 miles of the insured premises to form part of a wider outbreak. But again, the significance of those matters, in our view, is in relation to questions of causation. They cannot justify extending the geographical scope of the cover beyond the area clearly specified in the policy. As discussed, that goes beyond interpretation and involves rewriting the clause.”
140. In relation to the peril insured against, the majority then applied a similar analysis to other disease clauses. At [86], in a point developed later in the judgment, the Supreme Court referred to the QBE 1 clause as containing a “geographical limit” to which the insured peril was subject.
141. The Supreme Court’s discussion of causation is contained in Section VII of the judgment in paragraphs [160] – [250]. The court described the principles concerning

proximate causation, in particular in the context of marine insurance cases. At paragraphs [171] – [176], the court considered various authorities, including insurance cases, concerning concurrent causes. In paragraphs [175] – [176], the court referred to causes which operate in combination to bring about a loss. As set out in paragraph [176], quoted above, the court said that a concurrent cause analysis could be applied to multiple causes which act in combination to bring about a loss. The court then proceeded to consider and reject the insurers’ arguments to the contrary.

142. At paragraphs [177] – [190], the court considered the insurers’ principal argument, namely that the claims all failed because it could not be said that “but for any individual case of illness resulting from Covid-19, the Government measures would not have been taken”. The court agreed at paragraph [181] that in the vast majority of cases prior event X would not be regarded as the cause of subsequent event Y, if Y would have occurred anyway. However, that analysis did not always apply, for reasons which the court explained in some detail. At paragraph [190] – [191], the court said that:

“[190] ... Whether an event which is one of very many that combine to cause loss should be regarded as a cause of the loss is not a question to which any general answer can be given. It must always depend on the context in which the question is asked. Where the context is a claim under an insurance policy, judgements of fault or responsibility are not relevant. All that matters is what risks the insurers have agreed to cover. We have already indicated that this is a question of contractual interpretation which must accordingly be answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation.

[191] For these reasons there is nothing in principle or in the concept of causation which precludes an insured peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause - indeed as a proximate cause - of the loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself. It seems incontrovertible that in the examples we have given there is a causal connection between the event and the loss. Whether that causal connection is sufficient to trigger the insurer's obligation to indemnify the policyholder depends on what has been agreed between them.”

143. At paragraphs [192] – [197], the Supreme Court rejected the insurers’ “but for” argument. It described the two competing arguments, namely the FCA’s concurrent cause analysis (which had been accepted by the Divisional Court in relation to some policy wordings) and the insurers’ argument for a “but for” test or alternatively “if that contention is rejected, that a single case of disease or a relatively small number of cases of disease occurring within the specified radius is not sufficient to satisfy the causal requirement required by the policy”. It was common ground that the central reasoning of the Supreme Court was contained in the following paragraphs, to which frequent reference was made at the hearing before me:

“[194] In deciding between these competing interpretations, we consider that the matters of background knowledge to which the court below attached weight in interpreting the policy wordings are important.

The parties to the insurance contracts may be presumed to have known that some infectious diseases - including, potentially, a new disease (like SARS) - can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision.

[195] We do not consider it reasonable to attribute to the parties an intention that in such circumstances the question whether business interruption losses were caused by cases of a notifiable disease occurring within the radius is to be answered by asking whether or to what extent, but for those cases of disease, business interruption loss would have been suffered as a result of cases of disease occurring outside the radius. Not only would this potentially give rise to intractable counterfactual questions but, more fundamentally, it seems to us contrary to the commercial intent of the clause to treat uninsured cases of a notifiable disease occurring outside the territorial scope of the cover as depriving the policyholder of an indemnity in respect of interruption also caused by cases of disease which the policy is expressed to cover. We agree with the FCA's central argument in relation to the radius provisions that the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius.

[196] This conclusion is reinforced by the other matter to which the court below attached particular importance in interpreting the disease clauses. This is the fact that the relevant wordings do not confine cover to a situation where the interruption of the business has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere. As leading counsel for the FCA, Mr Edelman, pointed out, to apply a "but for" test in a situation where cases of disease inside and outside the radius are concurrent causes of business interruption loss would give the insurer similar protection to that which it would have had if loss caused by any occurrence of a notifiable disease outside the specified radius had been expressly excluded from cover. If the insurers had wished to impose such an exclusion, it was incumbent on them to include it in the terms of the policy.

[197] We accordingly reject the insurers' contention that the occurrence of one or more cases of COVID-19 within the specified radius cannot be a cause of business interruption loss if the loss would not have been

suffered butfor those cases because the same interruption of the business would have occurred anyway as a result of other cases of COVID-19 elsewhere in the country.”

144. At paragraphs [198] – [205], the Supreme Court considered the insurers’ alternative argument: i.e. that a single case of disease or a relatively small number of cases of disease occurring within the specified radius was not sufficient to satisfy the causal requirement required by the policy. The insurers argued that the correct approach was to aggregate all the cases of disease falling within the scope of the policy, and “to ask whether those cases, taken together, had an equal or similar causal impact when compared with the aggregate impact of all the cases of disease not covered by the policy”. The Supreme Court rejected this approach as well. The Supreme Court noted that each case of illness sustained as a result of Covid-19 was a separate peril and thus potentially a separate cause of loss [199]. At paragraph [200], however, the Supreme Court said:

“[200] This does not mean that cases of disease cannot combine to cause loss that would not have resulted from any individual case of disease had it occurred alone. That is what would normally be expected to happen and precisely what has happened in the present case, albeit on a far greater scale than might have been anticipated. We would accept that the language of the policies is not inconsistent with an interpretation whereby, when cases of disease combine to cause loss, an insured occurrence of disease is not to be regarded as a proximate cause unless the other insured cases of disease with which it has combined, taken together, are of similar causal potency as any uninsured cases of disease (also viewed together). We do not consider, however, that this interpretation is one that makes commercial sense of the disease clauses” (My emphasis, and I will return to the significance of the underlined words).

145. At paragraph [202], the Supreme Court referred to unworkable aspects of the proposed test in many situations. In paragraph [203], the Supreme Court referred to the “still more fundamental objection to this approach”, namely that it:

“sets up cases of disease occurring outside the territorial scope of the cover in competition with the occurrences of disease within its scope in determining whether the policy will respond”.

146. In paragraphs [204] – [205], the court referred to the benefits of a clear or hard-edged rule which was relatively easy to apply, and in that context referred to the radius provisions as providing a “territorial limit”:

“[204] ... it is entirely reasonable for insurers to set a territorial limit to the scope of business interruption cover which is arbitrary in the sense that there is no particular logic for selecting a radius of 25 miles, rather than 24 or 26, to define it and though the consequence of selecting a specific distance will inevitably be that there will be no cover for business interruption in some cases when on very slightly different facts there would have been cover.”

147. These themes were then reiterated at the start of the following section (paragraphs [206] – [212]) where the Supreme Court summarised its conclusions:

“[206] By contrast, an interpretation that recognises the causal requirements of the policy wordings as being satisfied in circumstances where each case of disease informs a decision to impose restrictions and treats each such case as a separate and equally effective cause of the restrictions irrespective of its geographical location and the locations of other such cases avoids such irrational effects and the need for arbitrary judgments and is also clear and simple to apply. This accords with the presumed intention of the parties to an insurance product sold principally to SMEs and often with relatively low financial limits. (For example, under MSA 1 the maximum payable for any one loss is £100,000.) It also accords with the desire for certainty manifest in the definition of cover by reference to a specific radius of 25 miles (or one mile) of the insured premises.

[207] ... On the interpretation that we think makes best sense, only the effects of any case occurring within the radius are covered but those effects include the effects on the business of restrictions imposed in response to multiple cases of disease any one or more of which occurs within the radius.”

148. In paragraph [211], the Supreme Court also reiterated the point, which the Divisional Court had correctly treated as fundamental; i.e. that the radius provisions do not limit cover to a situation where the interruption of the business was caused only by cases of disease occurring within the area, as distinct from other cases outside the area. The Supreme Court’s overall conclusion on disease clauses was set out in paragraph [212], quoted above.
149. The Supreme Court then turned its attention to NDDA and hybrid clauses. In summary, it held that its concurrent cause analysis of disease clauses applied to hybrid clauses [213]. As is apparent from the discussion introduced in paragraphs [214] – [217], and then developed in paragraphs [218] – [249], there was an additional causation line of argument that required resolution in relation to hybrid and NDDA clauses. Such clauses included elements in a causal sequence which went beyond disease clauses, and there were arguments as to how proximate causation worked in that context and in particular as to the relevant counterfactual.
150. For the most part, the parties’ arguments in the hearing before me did not focus on paragraphs [214] – [249] of Supreme Court’s judgment, recognising that the more significant reasoning for present purposes is that which culminates in the conclusions at [212] – [213]. It is therefore sufficient to say that, in paragraphs [214] – [249], the Supreme Court also applied a very similar concurrent cause (rather than a “but for”) analysis to the questions that it was addressing in those paragraphs. For example, in paragraph [240], the Supreme Court said that where the causal chain specified in the Hiscox 4 wording referred to an occurrence within a mile of the insured premises, the “disease is very likely to have occurred elsewhere”. The originating cause of that disease was the global Covid-19 pandemic. The policy did not exclude loss arising from the global pandemic, and other concurrent effects of the pandemic on an insured

business did not reduce the indemnity under the relevant clause. A similar concurrent cause analysis was contained, for example, in paragraphs [247] and [249].

151. Finally, in Section VII of the judgment, the Supreme Court briefly addressed “other wordings” in paragraph [250], quoted above.
152. The next section of the judgment addressed the “trends clauses”. Although some reference was made to this section in the argument of Mr Kramer for Excel, I did not think that this added significantly to the debate, which in my view is to be resolved by considering the Supreme Court’s conclusions in the paragraphs prior to and including [250].
153. In addition to the majority judgment discussed above, there was a brief minority judgment in which Lord Briggs and Lord Hodge expressed their agreement on all issues apart from one major and one minor point. The major point was that, on the question of the scope of the peril, Lord Briggs and Lord Hodge accepted the approach of the Divisional Court as additional reasons (i.e. additional to causation) why the insurers’ appeals failed. In the course of those reasons, the minority reiterated points made by the majority, for example:

“[316] ... As the majority show, there were a number of well-known notifiable diseases (such as cholera, plague, typhus, yellow fever and SARS) to which the relevant clauses clearly applied, all of which were capable of spreading rapidly and widely, so as potentially to cause a threat to health on a national scale, and to threaten a national reaction by the responsible authorities, leading to business disruption on a national scale.”

154. In consequence of its judgment, which dismissed the insurers’ appeals and allowed aspects of the appeals by the policyholders [313], the Supreme Court made a number of declarations. I shall refer to some of these in particular contexts later in this judgment.

#### *Subsequent decisions*

155. There have been a number of decisions subsequent to the Supreme Court’s decision in the test case. The principal decisions to which reference was made in the parties’ arguments are:
  - 1) *The China Taiping* arbitration award of Lord Mance, described in paragraphs [115] – [124] of *Corbin & King*;
  - 2) The decision of Cockerill J in *Corbin & King*;
  - 3) Three decisions of Butcher J in cases raising, to some extent, similar issues: *Greggs PLC v Zurich Insurance PLC* [2022] EWHC 2545 (Comm); *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm); *Various Eateries Trading Ltd v Allianz Insurance PLC* [2022] EWHC 2549 (Comm). These decisions were principally relevant in relation to certain causation issues, raised by the preliminary issues, which the parties ultimately agreed raised questions of fact rather than law.

156. 156 I was also referred to a well-reasoned Financial Ombudsman Service (“FOS”) decision of Mr Sam Thomas in a complaint relating to AllianzInsurance plc. This decision is consistent with the arguments of the policyholders on two of the issues with which I am concerned. It was submitted that whilst this decision had no status as precedent, its reasoning was persuasive and should be adopted. An analogy was drawn between this decision and a good journal article or textbook. I think that this is a fair analogy, and that in fact the same applies to the arbitration award of Lord Mance. Both the FOS decision and the Lord Mance arbitration award have the benefit of having been reached after substantial adversarial arguments, so that the decision-maker could see both sides of the case.

**D: The causation issue**

**D1: The parties' arguments**

157. In summary, the policyholders submitted that the causation reasoning of the Supreme Court was applicable to the “at the premises” wordings in the present case, and that there was no principled basis for distinguishing between the present wordings and the “radius” cover which was addressed in the *FCA test case*.
158. The insurers were not wholly united in their approach. Some insurers submitted that a “but for” test of causation should be applied in the present context. The proponents of this argument were Mr Scorey KC for the PizzaExpress insurers, and Mr Christie KC for the insurers in *Hairlab* and *Why Not Bar*. The essence of the argument sufficiently appears from Mr Scorey’s submissions summarised below.

*The “but for” causation argument*

159. Mr Scorey submitted that there are important differences between radius clauses (whether covering 1 mile or 25 miles) and ATP clauses. Most obviously, the former cover a potentially wide geographical area involving disparate properties and people; in contrast, ATP clauses are focussed myopically upon the specific premises in question. These differences lead inevitably to the conclusion that: (i) the scope and nature of cover intended to be provided by radius clauses is inherently very different from that intended to be provided by ATP clauses; and (ii) the exceptional principle of concurrent causation which was applied in the *FCA test case* in relation to radius clauses can have no application to ATP clauses, either as a matter of principle, or as a result of the language of such clauses. He identified a number of differences between ATP clauses and radius clauses.
160. First, ATP clauses cover restrictions which are in response to cases of disease actually occurring at the premises and not elsewhere. Under an ATP clause, cases of disease at a neighbouring property are irrelevant if the premises covered is not infected. By contrast, radius clauses are concerned with the consequences of disease occurring away from the premises, including some considerable distance away where there is a 25 mile radius. ATP clauses therefore cover the most limited, circumscribed and localised of risks.
161. Secondly, in the context of ATP cover, all elements of the insured peril (i.e. disease, restrictions imposed and interruption) concern the insured premises alone. The place from which the policyholder carries on business is likely to be the key source or site of the disease, and the risk that is sought to be averted is that the insured premises continues to produce that disease or that it spreads away from the premises and to others. The restrictions envisaged by the clause, and which are likely to give rise to the contemplated business interruption, are therefore directed specifically at the premises to stop the production or spread of the disease. The clause does not, naturally or at all, contemplate measures taken on a national or wide area basis, responding to disease everywhere without any specific regard to, and irrespective of, the cases of disease at the premises.
162. Thirdly, and consequently, by agreeing insurance for occurrences of a notifiable disease at the premises, the parties did not necessarily contemplate occurrences of disease away

from the premises and the consequences of widespread disease. ATP cover is necessarily directed at restrictions imposed in response to – and to address – specific incidents of disease at the Premises.

163. Fourthly, by contrast radius clauses expressly contemplate non-local occurrences of disease away from any specific premises. This disease has nothing to do with the premises itself, save for location within the defined geographical radius. Nevertheless, it impacts the policyholder's business, most likely as a result of relevant authority action taken over a wide area. The risk posed by such distant disease lies in the nature of notifiable infectious diseases and their propensity to spread rapidly, widely and unpredictably through close human-to-human contact. The restrictions envisaged by a radius clause and the likely basis for the business interruption are not, therefore, premises-specific or insured-specific restrictions, but instead are general restrictions in the form of public health orders aimed at stopping or reducing the spread of disease in the wider community both within and without the relevant radius.
164. Fifthly, radius clauses necessarily contemplate occurrences of disease not just within the specified radius but also out of it; i.e. a wide area disease outbreak. They also contemplate authority action over a large geographical area responding generally to such a widespread outbreak.
165. Sixthly, in the context of a wide area infectious disease outbreak / epidemic, one would anticipate ATP clauses and radius clauses to address the risk presented at different stages of the outbreak / epidemic. The premises-specific risk contemplated by an ATP clause is most likely to manifest itself during the early stages of the outbreak, with premises-specific measures being implemented to prevent the spread of disease beyond the sites of infection and into the wider public. If those measures fail, and the disease spreads across a widespread area attracting generalised and unspecific government action, ATP clauses will no longer be relevant. Instead, it is a radius clause which will be triggered and will provide relevant cover.
166. Thus, the nature of the cover provided by ATP clauses is fundamentally and qualitatively different from that provided by radius clauses. In particular, the fortuity contemplated by ATP clauses is business interruption caused by restrictions imposed on the premises in response to and directly targeting specific incidents of disease at a precise location. A radius clause provides cover for more indirect causation. An ATP clause envisages a direct, conventional, causal connection, requiring proof of 'but for' causation, between occurrences of disease at the premises, authority action, and business interruption and loss.
167. There were a number of situations where this could be proved. A straightforward case was an individual occurrence of disease, for example food poisoning or Legionnaire's disease, at only the specific insured premises, leading to a closure of the premises by the authorities. An outbreak of disease in a localised area, with occurrences of the disease at more than one premises, could lead to closure of each location where there had been an occurrence of disease, in response to those occurrences. Even on a national scale, there could be coverage: if the authorities instructed particular premises to close and/or clean, where occurrences of disease have been reported at such premises. The coverage in respect of notifiable diseases was therefore in respect of occurrences at the Premises itself, and business interruption resulting from restrictions specifically targeted at those occurrences.

*The alternative argument: direct, distinct, palpable and discernible causation*

168. The “but for” causation argument was not, ultimately at least,<sup>1</sup> adopted by insurers other than those represented by Mr Scorey and Mr Christie. Instead, those insurers relied upon much of the reasoning advanced by Mr Scorey in the context of “but for” causation: in his oral submissions, Mr Kealey KC referred specifically to the principal sections of Mr Scorey’s written argument. However, the end-point of the argument was different: it did not lead to “but for” causation, but rather to the requirement that causation had to be (as Mr Kealey put it) direct, distinct, palpable and discernible. Although these adjectives have different shades of meaning, I shall refer to the “distinct” causation test as encompassing all of them. Mr Kealey said that this test involved asking whether the outbreak of the disease at the premises had a meaningful causal significance because of what had happened at the premises.
169. Mr Kealey submitted that the occurrence at the premises had to be an effective cause of the closure in the sense that it was the occurrence being at the premises that caused the authorities to order that closure. The case of disease must therefore cause the authorities to take action and for the premises to be closed. In his oral reply submissions, Mr Kealey made it clear that he was not advocating a “but for” test, and that his submission as to the applicable test accepted the possibility of concurrent causes in certain situations. This was because he accepted that the action of the authorities might be a response not only to the occurrence at the premises, but also a response to occurrences at other premises, and that the parties would have appreciated that. However, it did not follow that (what he described as) the diluted causative link, applied by the Supreme Court, was sufficient to establish causation.
170. The insurers represented by Mr Scorey and Mr Christie adopted the distinct causation test in the event that I rejected their “but for” causation argument. There was some dispute as to whether it was permissible for RSA in the *Excel* case, in the light of certain admissions made concerning the applicability of the Supreme Court test, to advance the distinct causation argument. However, it was ultimately agreed that this issue can if necessary be addressed at a subsequent stage of the proceedings.

**D2: Discussion**

*Approach to construction*

171. The critical question is whether the causation reasoning of the Supreme Court in relation to the various “radius” clauses considered in the test case can properly be applied to “at the premises” clauses. Ultimately, this is a question of construction. The applicable principles of construction were not in dispute. They are summarised in paragraphs [62] – [66] of the judgment of the Divisional Court in the *FCA test case*, referred to in paragraph [47] of the judgment of the Supreme Court:

“[47] The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably

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<sup>1</sup> In their written submissions, the following market in the *Excel* case submitted (in their concluding section summarising their answers to the preliminary issues) that “it is necessary to prove that the order or advice for closure would not have been made in the absence of the occurrence”; arguing in the alternative for the “distinct and specific target” test. The latter ultimately became their primary submission.

have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task”.

172. The Supreme Court elaborated on the approach in paragraph [77] of its judgment:

“...the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis. It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting”. (internal citations omitted)

173. Apart from Excel and PizzaExpress, all of the policyholders in this case are small enterprises. However, it is not necessary to dwell on any differences between small and larger enterprises. There was no suggestion that the policies would have been read differently by the ordinary SME policyholder and the two much larger businesses.

174. Although these are the relevant principles of construction, I agree with the policyholders’ submission that I am not dealing with the question of construction starting with a blank slate, by applying the iterative process of construction (i.e. considering the language of the relevant policies, the commercial consequences of the rival constructions, and the factual matrix) as though the Supreme Court decision did not exist. The Supreme Court has considered the question of causation in the context of the very same Covid-19 pandemic with which I am concerned. It has done so against a factual matrix which is not materially different, in relevant respects, to the matrix against which the present contracts of insurance were concluded. The test case was decided in the light of facts which were agreed, and these have been incorporated into the agreed facts in the present cases.

175. There are also very obvious similarities between the clauses considered by the Supreme Court, and the clauses with which I am concerned. Each of them provides coverage in respect of notifiable infectious diseases, a term which requires reference to the list of notifiable diseases contained in the Health Protection (Notification) Regulations 2010. Each of them refers to the premises of the policyholders. It is true that the *FCA test case* clauses contained this reference in the context of “radius” clauses. However, two of the clauses in the *FCA test case* expressly applied to occurrences which were both “at the premises” and within the relevant radius, and there was no suggestion by the Supreme Court that a different causation test applied to these two aspects of the clause. Indeed, as discussed below, a clause which simply covers occurrences within a radius will encompass, even if it does not say so expressly, occurrences at the premises: in other words, the radius will start at the centre of the premises rather than at their perimeter.

176. Against this background, the question is whether the logic and rationale of the Supreme Court’s decision in relation to radius clauses should be applied to the “at the premises” wordings. I start with some initial points.

*Initial points*

177. First, the mere fact that a radius clause and an “at the premises” clause are differently worded does not, of course, mean that the reasoning of the Supreme Court is inapplicable. Equally, I accept the insurers’ point that the reasoning of the Supreme Court cannot be transposed unthinkingly from a radius clause to an “at the premises” clause. As the insurers repeatedly emphasised, the applicable causation test is ultimately a question of the construction of the relevant contract.
178. Secondly, it is also clear from the nature of the issue under consideration, as well as from the analysis of the Supreme Court, that the construction issue that arises in relation to causation cannot be approached, as one approaches some issues of contract interpretation, on the basis of one’s first impressions of the wording of the relevant clause. The insurers placed considerable emphasis on the use of the words “at the premises”, and other language which referred expressly to the premises. They argued that, as a matter of language, the clause was concerned with matters which were premises-specific. The insurers were not covering anything that occurred outside the premises.
179. In my view, however, this argument deflected attention from the real issue under consideration. The policyholders did not suggest that the cover provided was for anything other than occurrences at the premises. They could not do so, in the light of the decision of the Supreme Court as to the nature of the peril insured against: the Supreme Court rejected the analysis of the Divisional Court which, in relation to some policies, had identified the relevant peril as being the pandemic as a whole. Thus, the policyholders fairly accepted that the cover, in an “at the premises” wording, was highly localised: i.e. it applied only to occurrences at the premises. In that respect they submitted, and I agree, that it was a more highly localised form of coverage than a 1-mile radius clause, albeit that such a clause could itself also be described as localised and certainly far more localised than a 25-mile radius clause.
180. The important question, however, does not concern the highly localised nature of the peril insured against. Rather, it concerns the approach to causation in circumstances where the impact on the policyholder’s business is the result of the combination of a large number of individual events, one of which is the occurrence at the premises which is (assuming that it can be proved) in principle a covered occurrence. I do not consider that any amount of emphasising the words “at the premises”, or similar wording, provides an answer to the question of how to approach causation in circumstances where the loss is the result of a combination of multiple events. It was that issue that the Supreme Court addressed in the context of radius clauses, and the answer was that a “concurrent cause” approach to causation was applicable; so that the covered event or events within the radius were, in combination with a very large number of uncovered events of a similar nature outside the radius, all effective causes of the policyholder’s loss, thereby grounding an ability to recover under the policy.
181. Thus, it did not avail the insurers in the *FCA test case* to argue that the only focus of the coverage in a radius clause is the radius, and nowhere else. As described in Section C above, the insurers there advanced two arguments, both rejected by the Supreme Court, whose substance was that cover was confined to the impact of covered occurrences within the radius. The first argument was the “but for” analysis: the insurers contended that the policyholder’s losses would have been suffered even if there had

been no occurrence within the radius, because Covid-19 was so widespread and the lockdown would have happened anyway. This was an argument which focused on the occurrences within the radius, and asserted their causal irrelevance. The second argument, referred to by the Supreme Court as the “weighing approach”, was similarly based upon the contention that the only covered occurrences were those within the radius, and that the correct approach was to weigh the relative impact of those occurrences within the radius by comparison with those outside.

182. Both of these arguments were rejected by the Supreme Court, notwithstanding that the coverage was clearly confined (on the approach of the majority of the Supreme Court) to an occurrence within the radius. If, therefore, a policyholder with a radius clause could establish the existence of an occurrence within the relevant radius of its policy, there could be recovery for the consequences of the closure of its premises resulting from the pandemic as a whole. This was because the occurrence within the radius was an insured peril, and that occurrence was sufficiently causative of the loss, applying the concurrent cause analysis. Although the policy did only extend to occurrences within the radius, it was no answer, applying a but for test, for the insurer to say that the consequences of the pandemic would have occurred irrespective of the occurrence within the radius, because the vast number of other cases of Covid-19 would have caused the policyholder’s loss anyway. Nor was it an answer that the relative impact of cases outside the radius was much greater than the impact of cases within the radius.
183. In my view, the argument based on the policy wording, and in particular which emphasises the reference to “premises” in the words “at the premises” or elsewhere, in the clauses with which I am concerned, is no different in substance to the arguments based upon the coverage being for occurrences within the radius in the *FCA test case*. Those arguments failed, notwithstanding the very clear wordings which referred to the radius, and nothing elsewhere, and notwithstanding that the peril insured under a “radius” cover was confined to occurrences within the radius.
184. Against this background, the insurers need to show, as they sought to argue, that cover which is confined to occurrences “at the premises” is indeed something fundamentally different to cover which extends to occurrences within a given radius, however small that radius might be, with the consequence that a completely different causation test should be applied to the former as compared to the latter. The insurers submitted that there were fundamental differences, or as one insurer submitted, “at the premises” clauses and radius clauses are “chalk and cheese”. This argument requires consideration of the reasons which led to the Supreme Court, in the context of radius clauses, to reach the conclusion that a concurrent effective cause was sufficient for coverage, and thence to the question of whether their reasoning can be read across into “at the premises” wordings. I address this below.
185. Thirdly, there are some features of radius cover which featured in the argument, and which were ultimately not substantially in dispute.
186. As the argument in the case developed, it was accepted by the parties that a clause which covered occurrences within a given radius would apply equally to occurrences which were at the premises themselves as well as occurrences beyond their perimeter but within the radius. In other words, the radius would spread outwards from the centre of the premises, and therefore apply to occurrences within it, rather than starting at the perimeter of the premises so as only to be applicable to occurrences outside. I have no

doubt that this is the correct approach, and that therefore clauses which refer to occurrences “at the premises” and also within a given radius of the premises, involve an element of duplication or surplusage. However, surplusage is very familiar in commercial contracts, and an argument of construction based on surplusage is often regarded as weak.

187. In this sense, therefore, there is a clear geographical link between a radius clause and an “at the premises” clause. The radius of the former starts at the centre of the premises themselves, and therefore provides cover in respect of occurrences therein, but also the perils insured extend to those which are outside thereby making it potentially easier for the policyholder to establish the existence of a covered peril. The latter also starts at the centre of the premises, but stops at their perimeter.
188. Some of the clauses referred to by the Supreme Court in its judgment also contain another, and close, geographical link to the premises. The widest area covered by those clauses was a 25-mile radius, and therefore included a very large area some distance from the premises. Declaration 8 made by the Supreme Court identified this area as 1963.5 square miles. However, other clauses covered occurrences within a 1-mile radius. This is obviously a closer geographical connection: it covers an area of 3.4 square miles around the premises, nearly 600 times smaller than the area of a 25-mile radius. On one view, an area of 3.4 square miles can be considered to be quite a large area, particularly if it is in a city, as the insurers pointed out in their submissions. But it is also possible to consider it to be a smallish localised area, as indeed the Hiscox insurers submitted to the Supreme Court in the *FCA test case*.
189. Ultimately, as many of the insurers accepted in their submissions, the answer to the causation question in relation to the (alleged) difference between radius and ATP cover cannot depend on the size of the radius specified in a radius clause. Indeed, by the end of the hearing, the submissions made by a number of insurers expressly acknowledged that the size of the radius, in the sense of the width of the circle which spreads out from the central point (the premises) did not matter. Thus, there did not come a point where, under a radius clause, the causation test switched from the concurrent effective cause test established by the Supreme Court and became something else, for example the “but for” or “distinct cause” test. It was thus accepted that even if the radius was smaller than 1 mile – for example the 250 metre radius provided for in some policies that Mr Gruder KC made available at the hearing – the Supreme Court test was applicable.
190. Furthermore, I consider that the Supreme Court’s judgment shows that the radius can be shrunk very considerably, so as to be smaller than even a 250 metre radius. My present view is that in paragraph [250] of its judgment, the Supreme Court was saying that, in the context of NDDA (Non-Damage Denial of Access) clauses, its causation approach applied to clauses which covered occurrences which occurred “in the vicinity of the premises”. “Vicinity” is a concept with a degree of elasticity, and the absence of a clearly defined boundary provides room for argument, unavailable in a clear radius clause, as to where the vicinity ends. However, the Divisional Court in the *FCA test case* considered that “vicinity” in ordinary usage connoted neighbourhood, the area surrounding or in the neighbourhood of the premises in question: see paragraphs [436], [444] and [466]. This is obviously a very close geographical connection, and in many contexts (particularly urban contexts) will be far less than 1 mile.

191. There was some debate before me as to whether paragraph [250] of the Supreme Court judgment in the *FCA test case* should be read as applying the Supreme Court's concurrent causation test to "vicinity" clauses, and this debate may resurface in a different context in preliminary issues which I am to hear later this year. In *Corbin & King*, Cockerill J considered paragraph [250] and decided that the Supreme Court's reasoning on causation did indeed apply to NDDA clauses which included vicinity wording. I have not been persuaded, at least on the arguments advanced at the present hearing, that her decision was wrong, and therefore I see no reason not to follow it. Paragraph [250] comes at the end of the causation section of the Supreme Court's judgment, and it is natural to read this as applying to all that has gone before. Mr Scorey accepted that it was a reference back to paragraph [122] of the judgment, but submitted that it was simply addressing the second part of the causation analysis (i.e. the arguments principally concerning the "counterfactual" which were considered in paragraphs [218] – [249]). However, as Mr Gruder pointed out, this would be strange. The second part of the analysis would not arise for consideration unless the concurrent causation test, rather than the insurers' 'but for' test had been applied.
192. In fact, for present purposes, the question of whether paragraph [250] applies to the whole of the Supreme Court's reasoning is not critical, since many insurers (correctly in my view) accepted that the size of the radius did not matter, and that in a radius clause there did not come a point where the Supreme Court's reasoning was inapplicable. In so far as some insurers did not expressly accept this, no principled argument was advanced which identified the point at which the size of a radius would become so small that the Supreme Court's reasoning would not apply, and indeed it is difficult to see how any such point could be identified.

*The Supreme Court reasoning*

193. Paragraphs [194] – [196] contain the heart of the Supreme Court's reasons which led to its rejection of the "but for" test. Some of these reasons are reiterated, with additional points made, in its rejection of the "weighing approach". All of these reasons ultimately led to the court's conclusion (see e.g. [206] and [212]) that a concurrent cause analysis should be applied to each case of Covid-19 "irrespective of its geographical location and the locations of other such cases."
194. These paragraphs refer to a number of factors which played a part in the court's reasoning. It seems to me that, save in one possible respect, the reasons which led to the Supreme Court's conclusions are equally applicable to the "at the premises" wordings with which I am concerned, and that the court's analysis can (to use Lord Mance's expression in the *Taiping* award) readily be transposed to such clauses.
195. First, there is the nature of the notifiable diseases covered. Many of the diseases on the list of notifiable diseases, existing at the time that the insurances were placed (i.e. in around 2019 or early 2020), were highly contagious and infectious. The Divisional Court had referred in paragraph [104] to the spectrum of diseases covered by the 2010 Regulations, including cholera, plague, typhus, yellow fever and SARS. It said that the spectrum included diseases "capable of widespread dissemination", and referred specifically to SARS for which there was no vaccine. The Divisional Court also referred to the fact that the list of diseases was not closed and that others could be added. The Divisional Court said that it was:

“in the nature of human infectious and contagious diseases that they may spread in highly complicated, often difficult to predict, and what might be described as “fluid”, patterns”.

196. The Divisional Court also said, again by reference to the list of diseases, that it included:

“some which might attract a response from authorities which are not merely local authorities, and which is not a purely local response”.

197. The Supreme Court was clearly of the same view, albeit that it considered that these were matters that were important in the causation analysis rather than the analysis of the nature of the insured peril: see paragraph [73] where the Supreme Court said that the Divisional Court was right to attach significance to “the potential for a notifiable disease to affect a wide area and for an occurrence of such a disease within 25 miles of the insured premises to form part of a wider outbreak”. The nature of the diseases covered is therefore the first point made in paragraph [194] of the majority judgment: i.e. that the parties would know that some infectious diseases, including potentially new diseases, can spread rapidly, widely and unpredictably, and that it was obvious that an “outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder’s premises”. The same point was made by Lord Briggs and Lord Hodge, who referred in paragraph [316] to a number of well-known notifiable diseases to which the relevant clauses applied, all of which were capable of spreading rapidly and widely “so as potentially to cause a threat to health on a national scale, and to threaten a national reaction by the responsible authorities, leading to business disruption on a national scale”.

198. The essence of the point is also captured in paragraphs [199]-[200] of the Supreme Court judgment, where the court said that although the occurrence of each case of illness is a separate peril, this:

“... does not mean that cases of disease cannot combine to cause loss that would not have resulted from any individual case of disease had it occurred alone. This is what would normally be expected to happen and precisely what has happened in the present case, albeit on a far greater scale than might have been anticipated”.

199. In my view, all of this is equally applicable both to policies providing insurance in respect of occurrences of cases of disease on the list of notifiable diseases within a radius, and occurrences “at the premises”. The diseases covered are the same, and so are their potential to be widespread and to call for a response which is not solely responsive to cases within the radius or the premises. The Supreme Court stated clearly that one would normally expect the cases of disease to combine and cause loss. That is again the case whether one is dealing with cases within a radius or cases “at the premises”.

200. Secondly, the Supreme Court did refer, in paragraph [194] (and indeed also [73]) to the width of the radius, and its significance in terms of the nature of the outbreak. The important point was that if an occurrence of a disease at the edge of a 25-mile radius was to have an effect on the policyholder whose premises were 25 miles away, it was highly likely that the disease was very widespread and that it would be calling for a response over a very wide area, and that such response would be dealing with

occurrences both inside and outside the relevant radius. However, the effect of the insurers' argument was to deny coverage when there was a national pandemic.

201. The insurers argued that there was, here, a fundamental distinction between a radius clause and an "at the premises" clause. With a radius clause, however narrow the radius, there is coverage for occurrences which take place outside the premises in question, and which have an impact on the policyholder's business. By contrast, with an "at the premises" clause, it is only an occurrence "at the premises" which is covered and which must therefore have the relevant impact.
202. I do not accept that this is a fundamental distinction which leads to a different test of causation. There was ultimately no dispute that the applicable radius can be shrunk considerably from the 25 miles being considered by the Supreme Court, without affecting the applicability of the causation test; for example, to 1 mile, 250 metres, to "in the vicinity". Logically, it must follow that it can be shrunk to something close to vanishing point (say even 10 metres around the property). In my view, the Supreme Court's discussion of the position of a 25-mile radius, and its impact on premises so far away, illustrates and highlights the first point referred to by the court, namely the nature of the diseases covered. I do not consider that this can lead to a radically different test of causation. Contrary to the submissions of the insurers, it is not the existence of the radius which means that there may be (as Mr Kealey described it) "non-premises specific wider area authority action": it is the nature of the diseases which are covered. The existence of the radius thus illustrates and reinforces the fact that there may be wide area authority action, but it does not follow that such action is only contemplated where the policy provides for a radius.
203. It is therefore no accident, and is not an omission in the Supreme Court's reasoning, that there is no substantial discussion as to why the same causation approach applies whatever the size of the radius; i.e. whether the radius is 25 miles, 1 mile or the vicinity. It was not necessary for there to be an extended discussion, because the principle was the same and it arose from the nature of the diseases covered. Given that the radius can be shrunk from 25 miles, to 1 mile, to "the vicinity", without making any difference to the causation analysis, there is no reason why it cannot be further shrunk from the vicinity of the premises to the premises itself. In such a case, as Mr Weitzman for PizzaExpress submitted, the "radius" would extend from the centre of the premises to the perimeter of the premises, although I would accept that it would not be usual to speak of a radius in that context.
204. There is in my view a further reason, apparent from the Supreme Court's reasoning, why the radius can be shrunk very considerably without any impact on the causation analysis, and indeed more generally as to why the insurers' submissions should be rejected. This is because, as the Supreme Court explained, the function of the radius clause is simply to define the geographical or territorial area in which the insured peril must occur. The concept of a geographical area covered by the policy, or a territorial scope of cover, or territorial limit is referred to in a number of places in the Supreme Court judgment: see [73], [86], [95], [175], [204], [205], [207], [212]. A policyholder who has purchased coverage for occurrences within a 25 mile radius will obviously find it easier, in most cases, to prove an occurrence than a policyholder whose coverage is only for occurrences at the premises. However, the 25 mile radius is, as is apparent from paragraphs [204] – [206] of the judgment, simply a line that has been drawn, for the purposes of contractual certainty, in order to define the territorial scope of the coverage.

205. The policyholders were therefore correct in their submission that “at the premises” is simply about the geographical or territorial scope of the coverage, and where the parties have chosen to draw the line in that respect. It has no impact on the appropriate approach to causation. Mr Gruder expressed essentially the same point in his submission that the principal difference in wording between a radius clause and the “at the premises” clauses is, on the proper construction of the policies, a matter of the insured peril, not a point that goes to causation. I agree with that submission as well.
206. The possibility that the radius can be shrunk very considerably from 25 miles to 1 mile or to the “vicinity” gives rise to a further difficulty in the insurers’ argument. In all of those situations, the insurers accept that the Supreme Court’s decision means that there is, in effect, coverage for the consequences of the national pandemic applying the concurrent causation test, provided that there is an occurrence within the relevant radius. However, as Mr Kramer pointed out, it is difficult to see why, particularly in the cases of a shrunken radius, the insurers’ “distinct” cause test could not be applied, if it had any validity at all. This is illustrated by the argument on behalf of the Hiscox insurers in the Supreme Court (see page 670 of the report at [2021] AC 649), viz; that notifiable diseases may be highly localised or confined and that a 1-mile limit was to ensure that only local events were covered. Since 1 mile radius clauses could be regarded as providing “localised” cover, the present “distinct” cause argument could have been advanced by the insurers in the Supreme Court case, but it was not.
207. Thirdly, as explained in [196], the Supreme Court’s conclusion in paragraph [195] was reinforced by the fact that the relevant wordings did not confine cover to a situation where the interruption of the business resulted only from cases of disease within the radius. This point had been described by the Divisional Court as fundamental. The Supreme Court clearly took the same view. In paragraph [203], the court referred to the “fundamental objection” (both to the “but for” and the “weighing” approach) that it “sets up cases of disease occurring outside the territorial scope of the cover in competition with the occurrences of disease within its scope”. The Supreme Court referred to this point, again, at paragraph [211].
208. There can in my view be no doubt that this “fundamental” point is equally applicable to “at the premises” clauses. All versions of the insurers’ argument in this case seek to disapply their coverage for occurrences within the territorial scope of the “at the premises” cover, by setting up the cases of disease outside that scope. I see no reason how it could be a fundamental point in relation to radius clauses, but could at the same time be inconsequential or relatively so in the context of “at the premises” clauses.
209. The Supreme Court also attached importance in paragraph [196] to the absence of any exclusion of cover in respect of occurrences outside the territorial scope. Whilst this is essentially the same point as the fact that cover was not confined to interruption resulting only from cases within the territorial scope, it is again a point which applies equally to the “at the premises” wording with which I am concerned.
210. Fourth, the Supreme Court considered that it was appropriate, as a matter of construction, to have an approach that was clear and simple to apply. The court considered (see [195]) that the “but for” test gave rise to “intractable counterfactual questions”. In the present case, the insurers put forward a number of examples where, applying the “distinct” cause test of causation, there would be coverage. As further discussed below, the circumstances in which recovery would and would not arise were

far from clear, and the distinctions drawn seemed artificial. The test proposed is on any view nothing like as simple and clear as the concurrent cause approach adopted by the Supreme Court.

211. Accordingly, I have no hesitation in reaching the conclusion that the Supreme Court's causation approach is equally applicable to the clauses with which I am concerned, and that there is no principled reason why the court should adopt a different causation analysis.
212. In reaching that conclusion, I have considered the large variety of arguments advanced by insurers, and will address the principal points (to the extent that I have not already done so) below.

**D3: The insurers' arguments in support of a different test of causation**

213. *The list of diseases*: Mr Scorey on behalf of the PizzaExpress insurers discussed in detail, in what he described as a biology lesson, each of the notifiable diseases in the 2010 Regulations, submitting that many of them (the paradigm example being Legionnaire's disease) were likely to be confined to individual premises, and that others (for example smallpox) were unlikely to be a significant and widespread problem because of successful vaccination programmes.
214. I did not consider that this argument led anywhere. The Divisional Court and Supreme Court were looking at the same list of notifiable diseases, and reached the obvious conclusion that some (albeit not all) of them were highly contagious and could spread in ways that could not be anticipated. The policy coverage was in respect of all of the diseases, and was not a closed list: it included coverage for new diseases that might emerge, and which could therefore not be the subject of Mr Scorey's biology lesson. The cover was not limited to Legionnaire's disease or similar diseases which were likely to affect one or a handful of premises. The existence of successful vaccination programmes in respect of some diseases might mean that a substantial problem in respect of those diseases was unlikely to occur, but it does not eliminate the risk, and the purpose of insurance is to protect against the unexpected. In any event, it was not suggested that, at the time when the policy was placed, there was an effective vaccine for SARS (which was in fact specifically excluded under the PizzaExpress policy, but not the others). It obviously could not be suggested that effective vaccines existed for the unknown diseases which might be added to the list of notifiable diseases and which were also the subject of coverage.
215. The existence of clear cover against all notifiable diseases, including new – and potentially transmissible and dangerous infectious – diseases that might emerge in the future, also provides an answer to the insurers' argument based on aspects of other perils covered by the policy wordings, for example the cover for vermin and defective sanitation. The insurers argued that this demonstrated the localised nature of the coverage provided by the "at the premises" wording. However, in my view this was really the "Legionnaire's disease" argument in another form. It may be that some aspects of perils insured against were more likely to be very local problems. This does not, however, have the effect of restricting the cover that is provided against all notifiable including new diseases. The clauses considered by the Supreme Court, for example QBE 3, also covered vermin and/or defective sanitation, but this did not affect the Supreme Court's causation analysis. Furthermore, the localised nature of the peril

insured against, in the sense that it requires proof of a relevant occurrence “at the premises”, is not in dispute. But, as the Supreme Court decision makes clear, a narrowly defined insured peril does not, in a context such as the present, result in a restrictive approach to causation in circumstances where there is a combination of insured and uninsured perils.

216. Mr Christie, on behalf of the Hairlab insurers, advanced what seemed to me to be the most extreme version of the insurers’ submission in relation to diseases. He submitted that any reasonable reader of the wording “any occurrence of a Notifiable Disease ... at the Premises” would understand that the clause is concerned with disease which occurs at the premises and not with disease which occurs elsewhere and spreads to the premises. This proposition was also referred to in his “chalk and cheese” distinction between an ATP and a radius clause: the former is dealing with things which happen at the premises and may spread away from them, and a radius clause is concerned with things which happen away from the premises and may spread towards them.
217. This submission, if accepted, would in practical terms eviscerate the cover for contagious infectious diseases completely, since it would seem improbable that any policyholder could ever prove that a disease had not spread to his premises, as opposed to originating there. Indeed, on this analysis, cover would presumably be restricted to the first person (person zero) who suffered the contagious illness and the first premises visited by that person, since it could be said that every other instance of disease in all other premises was a result of the spread to those premises.
218. Another answer to this point, and to various points made by Mr Scorey in relation to the pattern or likely progress of diseases, is the point made by the Divisional Court, namely that infectious diseases spread in highly complicated, often difficult to predict, and what might be described as “fluid”, patterns. It therefore cannot be said, as Mr Scorey submitted, that the place from which the policyholder carries on business is likely to be the key source or site of the disease. It may simply be one of very many places to which the disease has spread.
219. “*But for*” causation. In the *FCA test case*, the “but for” causation argument was advanced, and it was decisively rejected by the Supreme Court, not only in its analysis of disease clauses but also in its later discussion (paragraphs [218] – [249]) of proximate cause in the context of hybrid and prevention of access clauses. For reasons already given, I consider that the Supreme Court’s analysis is equally applicable to “at the premises” clauses.
220. In the present case, a significant number of insurers – the Excel insurers (both RSA as the lead and the following market represented by Mr Kealey), Axa Insurance represented by Mr Davie KC, and HDI Global SE represented by Mr Howie – have all declined to support the “but for” test for which Mr Scorey and Mr Christie argued on behalf of their respective clients. Although not the most significant reason for rejecting the “but for” argument, the fact that these insurers have recognised that a “but for” argument cannot be sustained is something which confirms my view that the Supreme Court’s rejection of “but for” is equally applicable to the “at the premises” cover with which I am concerned.
221. *The “distinct cause” causation test.* It can be said that Mr Kealey’s “distinct cause” test has the advantage, from insurers’ perspective, that it was not – directly at least –

advanced in argument before the Supreme Court. (It also has the disadvantage that it gives rise to the question: if it was applicable, why was it not argued in a test case which was extremely important to the market and which gave rise to expedited hearings?) An initial question is whether and the extent to which, this test differs, as a matter of substance, from the “but for” test, which was rejected by the Supreme Court. In his opening submissions, Mr Kealey argued that it was a different test, but that it would be useful to ask the question posed by the “but for” test and that this would usually provide the same answer as the application of the distinct cause test. It was never clear to me why it would be useful to consider “but for” causation in the context of the different test which was being proposed. As Mr Kealey’s argument developed, particularly in his reply submissions, it became clear that the test proposed was not a “but for” test at all, and that the proponents of this test ultimately accepted concurrent causation. However, it was a modified and restricted application of the Supreme Court’s concurrent cause test.

222. Thus, in paragraphs 53 and 54 of their opening written submissions, the Excel following market insurers drew a distinction between two situations. Where there was a closure of businesses everywhere, because of disease everywhere in the UK and irrespective of whether there happened to be a case of disease at the premises, then a reasonable person would not say that the premises were closed as a result of an outbreak or occurrence of disease at the premises. In that situation, the action by the authorities was not “targeted” at the disease at the premises, and there was no coverage. This was contrasted with the situation described in paragraph 54 of those submissions:

“By contrast, *on particular facts* a closure order might well be said to have been made as a result of disease at the Premises even in circumstances where disease was not confined to the Premises. If a closure order were made of the Premises (and possibly other, probably local, premises) in response to both an outbreak of disease at the Premises and to the presence of disease in the immediate neighbourhood of the Premises, one might conclude that the order might nevertheless be regarded by the reasonable observer as a result of the disease at the Premises. This might be the case if, for instance, disease occurred at other locations on the ExCeL campus, as well as at the Premises, and the authorities ordered the closure of both the campus and the Premises.”

223. In a footnote to that submission, the insurers referred to another example where there would be coverage, albeit removed from the facts of the present case:

“... the same conclusion might follow if (say) there were outbreaks of measles at several of the nurseries in a particular city, and the authorities ordered the temporary closure of all nurseries in the city”.

224. The nurseries example was then elaborated upon in the course of Mr Kealey’s oral opening and closing submissions. He submitted that in a case where an area had 11 nurseries, and measles was discovered at 5 of them, and the local authority then closed all nurseries, the distinct cause test would mean that there was some coverage available. The 5 nurseries, where measles had been discovered, and which had been closed down, would all be able to claim under their policies. The “but for” test would not apply in these circumstances: insurers would not be able to respond to the claims of any of these 5 nurseries by arguing that the closure would have happened anyway, irrespective of

the outbreak of measles at their particular nursery, on the basis that all the nurseries would have been shut. However, the other 6 nurseries would not be in a position to make any claim. Even if it were later proved that there were cases of measles at those nurseries, those cases were not a distinct cause of the closure.

225. In his reply submissions, Mr Kealey submitted that the 6 nurseries might have a claim if it could be shown that, despite there being no established case of measles at the time of the closure, it could be proved that the local authority believed that there were such cases, or perhaps that they believed on the basis of reasonable evidence or reasonable grounds that there were such cases. In such a situation, the closure of all 11 nurseries would have been distinctly caused by the measles, and the response would have been targeted at those nurseries. If, therefore, the authorities were acting in response to the so-called known unknowns – in other words a belief (proved to be correct) in the existence of cases of disease at the other 6 nurseries which has not yet been confirmed by testing or reporting – then there would be coverage. In such a case, all 11 nurseries would have been closed by reason of the occurrence of disease at the premises.
226. I agree with Mr Gruder’s submission that these examples demonstrate the artificiality of the distinctions which the insurers have sought to draw. If one assumes that the public health response is a consequence of all of the cases of infectious disease in the nurseries, then the simple and proper analysis is that all of the cases were concurrent causes of any business interruption loss. The position is no different if the public health response is not confined to nurseries, but extends to closure of premises in a high street, borough or town in the light of cases of infectious disease in those places – just as the restrictions in late March 2020 were imposed in the light of all the cases of Covid-19 which had occurred in the UK, including those that had occurred (if the claimants can prove that they occurred) at the claimants’ premises.
227. For the reasons previously discussed, I do not consider that this “distinct cause” approach can stand with the Supreme Court decision. Its effect is to provide some form of localised cover, in circumstances where the nature of the diseases covered, and the range of responses to those diseases, may well not be localised, depending upon the nature of the disease and the public health response which is necessary. The argument accepts that there are circumstances in which concurrent causation will operate. For example, in both the “immediate neighbourhood” and nurseries illustrations which were advanced as part of these submissions, there were individual occurrences of disease which had combined to bring about a public health response; namely the closure of “possibly other, probably local, premises” in the former example, and the closure of nurseries in the latter. However, even in those situations, the extent of coverage would be uncertain. It is not clear whether all of the “possibly other, probably local, premises” would be entitled to cover, and the ability of all of the 11 nurseries to recover would depend upon evidence, for example, as to whether the local authority believed that the relevant disease was present at all of the nurseries, and possibly upon whether that belief was reasonable. This is the opposite of an approach which is “clear and simple to apply”, as referred to by the Supreme Court in paragraph [206] of its judgment.
228. More fundamentally, because the aim of the “distinct cause” test is to provide restricted cover, the policyholder’s coverage ceases whenever there is a significant problem which causes a public health response, whether on a local or national basis, which extends beyond a handful of premises. Thus, in the nurseries example, the public health response resulted in the actual closure of all 11 nurseries, each of which has suffered a

loss in consequence of a combination of the occurrence of cases of measles. However, even in this very limited example, the 6 nurseries where measles had not actually been discovered at the time of the public health response, are not in a position to claim, at least unless the authorities believed that there were cases there. Once the example is scaled up beyond these small numbers and small-scale responses, however, a claim becomes in practical terms impossible. The insurers submitted that this was rightly so, and that this was simply the result of the policyholders having purchased restrictive “at the premises” cover. However, once it is accepted that a concurrent causation analysis is at least to some extent appropriate, so as to cover the situation where a number of separate occurrences have combined to lead to a public health response and closure of premises, I do not consider that there is anything in the language of the policy which results in the insurers’ proposed restriction of that analysis. If, as the Supreme Court held, the concurrent causation analysis can be “scaled up” in the case of coverage which applies to occurrences within 25 miles, 1 mile, or the vicinity of the premises, then I see no reason why it cannot equally be scaled up in the case of occurrences at the premises themselves.

229. It also seems to me that the “distinct” cause argument has much in common with the alternative “weighing” approach which was rejected by the Supreme Court. Both arguments stem from the recognition that a “but for” approach is unsatisfactory, or at least may so be regarded by a court. The insurers seek therefore to substitute a more palatable test. The “weighing approach”, rejected by the Supreme Court, involved what Mr Kramer described as a “quantitative” approach to the assessment of the impact of the relevant covered occurrences on the public health response. The “distinct cause” approach involves what can be described as a “qualitative” approach to the impact of the relevant covered occurrences on the public health response. In a case of a major problem, and a response which affects a broad range of premises, both approaches result in the impact of the covered occurrences being disregarded because of the impact of uncovered occurrences. In the case of weighing, the quantitative weighing of the uncovered cases would (on the insurers’ rejected argument) preclude recovery in respect of the covered occurrences. In the case of the “distinct” cause argument, the problem for the policyholder arises, similarly, once there is a large number of cases to which the authorities are responding, since it will not be possible to show that the covered occurrence was a distinct reason for the response.
230. *The FCA submissions to the Supreme Court.* The insurers referred to submissions made by the FCA, in the *FCA test case*, in support of their argument that there was a principled distinction between “at the premises” cover and radius cover. I did not derive any assistance from these submissions: what matters, in my view, is the Supreme Court’s analysis, rather than the submissions made by the FCA along the way. Furthermore, the relevant submissions were made in the context of the FCA’s argument relating to the nature of the insured peril: i.e. that radius clauses, on their proper construction, provided coverage against the pandemic as a whole so long as there was one case in the radius. That analysis was decisively rejected by the Supreme Court. A submission by the FCA in support of a flawed argument cannot in my view be given any weight. Indeed, I was referred to the FCA’s current guidance, following *Corbin & King*, which expresses the view that the Supreme Court’s causation approach “could be particularly relevant to ‘disease at the premises’ clauses”.

231. *The US cases.* The insurers referred me to a number of United States authorities. These apply a ‘but for’ test of causation. They are of no persuasive value. They are decided under the laws of the states of a number of US states, and there is no discussion of English law principles. The decision of the Supreme Court in the *FCA test case* was not cited, let alone discussed.
232. In fact, I consider that the decision of the FOS Ombudsman, which accords with the views which I have reached, is of much greater persuasive value than any of the US decisions to which I was referred.
233. *The factual basis of the decision of the Divisional Court and the Supreme Court.* In an argument that was not advanced or adopted by any of the other insurers, Mr Davie on behalf of Axa, the insurers of Mayfair, submitted that the Supreme Court’s decision on causation, in the context of radius cover, was rooted in facts which had no equivalence in the context of ATP cover. Mr Davie had carefully considered the agreed facts in the *FCA test case*, including the underlying materials. He identified certain agreed facts which showed that, prior to the government imposing its first lockdown measures, including business closures, the available underlying data was information about confirmed cases of Covid-19 in patients whose postcode was allocated to a geographic local authority area around the country. The smallest geographical areas identifiable were “Lower Tier Local Authority areas”. Since the Supreme Court was concerned with policies addressing disease in circumstances in geographic areas of 25 miles and 1 mile around insured premises, he submitted that there was “an equivalence between a case of Covid-19 in those geographic areas and the cases of Covid-19 in the local authority geographic area that the government had information about when making its closure decision”. Axa submitted that the evidence as to what caused the government to order closure of businesses does not support the conclusion that the incidence of Covid-19 at particular insured premises, or even that the collective incidences of Covid-19 at business premises generally, caused the government to order closure.
234. In support of this line of argument, Mr Davie referred to certain submissions made by Mr Edelman KC (on behalf of the FCA in the *FCA test case*) on Day 8 of the hearing. Those submissions referred to a map of England showing which Lower Tier Local Authority areas had reported cases of Covid-19 on various dates in March 2020. Mr Edelman then compared that to a map of England showing 25-mile radius areas across the country. Mr Edelman made the submission that “everywhere had it”.
235. Mr Davie was able to point to a passage in the Divisional Court’s decision that shows that the court accepted Mr Edelman’s point: see [112] of the Divisional Court’s judgment, already quoted above, but which it is appropriate to quote again:

“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. As Mr Edelman QC submitted, there is material in the Agreed Facts which provides a sufficient basis for this

analysis. He 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. As Mr Edelman QC pointed out, the Secretary of State for Health and Social Care, Mr Hancock, on 28 April 2020 stated that thought had been given to imposing measures first on London and the Midlands, but it had been decided that “we are really in this together”, and that “the shape of the curve... has been very similar across the whole country”. Given this, it appears to us that it is not unrealistic to say that all the cases were equal causes of the imposition of national measures.”

236. This particular paragraph in the Divisional Court’s judgment was expressly referenced by the Supreme Court in paragraph [176] of its judgment, quoted above. This paragraph concludes:

“However, as the court below found, the Government measures were taken in response to information about all the cases of COVID-19 in the country as a whole. We agree with the court below that it is realistic to analyse this situation as one in which “all the cases were equal causes of the imposition of national measures” (para 112).”

237. Mr Davie’s submission, in the light of these matters, was that there was an equivalence between the sort of wide areas that were the subject of Covid-19 surveillance informing government decisions, on the one hand, and the subject of radial insurance cover (typically 25 mile or 1 mile radial areas), on the other, and that a valid distinction exists between those wide area territories (which were the subject of Covid-19 surveillance) and individual business premises (where the evidence does not disclose there having been Covid-19 surveillance that was available to inform decisions as to whether to make interventions including business closures). Accordingly, the reasoning and conclusions of the Supreme Court in the *FCA test case* in respect of radial cover are distinguishable from ATP cover.
238. This argument is certainly imaginative, but I have no hesitation in rejecting it. It was no part of the reasoning of either the Divisional Court or the Supreme Court that the concurrent cause analysis was appropriate because of an equivalence between the radiuses referred to in the various policies and the known cases in the country, or that it was in some way based on the maps which Mr Edelman had produced in the course of his final submissions. The maps were produced in support of the proposition that the government was reacting to the cases in the country as a whole. This was relevant to the FCA’s case on concurrent causation; because it supported the proposition that all of the cases across the country were to be treated as effective causes. This was the argument that was accepted (albeit as a less satisfactory analysis) by the Divisional Court in paragraph 112 in relation to the RSA 3 wording, and was accepted more generally by the Supreme Court in its decision. That reasoning was not based upon any equivalence between radiuses from any particular premises and the government’s decision to lock down the country. The fallacy of the argument is also shown by the fact that although Mr Davie could point to a map which showed 25-mile radiuses which covered substantially the whole country, in terms of the incidence of known Covid-19 cases, he could not identify any equivalent map showing 1-mile radiuses. Nor,

obviously, could he point to any map showing the cases which were “in the vicinity” of every building in the country.

239. Furthermore, the argument cannot in my view be reconciled with the declarations that the Supreme Court made, in order to give effect to their concurrent causation analysis. Declaration 8 of the Supreme Court’s declarations, which updated the Divisional Court’s declarations, concerned the manner in which policyholders may prove “actual prevalence”, with the burden of proof being on the policyholder “to prove the presence of Covid-19 within the relevant policy area”. These declarations showed that the question of whether there were occurrences within the relevant policy area was a matter to be proved in due course: it was not a matter which had been proved in the evidence before the Supreme Court thereby leading to its decision on concurrent causation.
240. There was some debate, in the context of this argument, as to whether the paragraphs in the judgments of the Divisional Court and the Supreme Court which referred to “all the cases in the country” was a reference purely to known and reported cases, or whether it included the “known / unknown” cases. In view of the conclusions which I have reached, I do not think that anything turns on this in the present context. However, in light of what was said in the underlying SAGE minutes, which formed part of the agreed facts in the *FCA test case*, it cannot realistically be contended that the government’s reaction was purely to the known cases, and was not also a reaction to the very large number of unreported cases which at that stage were known to exist. The agreed facts in the *FCA test case* included agreement that:

“The actual presence of Covid-19 in the UK in March 2020 would have been much higher than was reflected in the number of Reported Cases. However, the extent of the difference between the number of Reported Cases and the actual number of people infected with Covid-19 is not agreed.”

In the light of these matters, it is unrealistic to contend that the reference to “all the cases in the country”, by both the Divisional Court and the Supreme Court, was confined to known reported cases.

241. *The Mayfair wording.* Mr Davie also drew attention to specific features of the Mayfair policy wording, in particular the reference to “visitors and employees”, in support of Axa’s causation argument. These points are addressed in Section G below, but I do not consider that they make any difference to the causation analysis.
242. *The exclusion in the Excel Policy.* On behalf of the following market, Mr Kealey advanced an argument based upon the wording of the NDDA clause in the Excel policy (quoted in Section C above).
243. The following market submitted that the NDDA clause showed that the parties did intend to create cover for the business interruption consequences of authority intervention in response to dangers which might arise otherwise than “at the premises”, and yet nevertheless might present a risk to or at the premises. Importantly, however, the NDDA clause contained an exclusion which specifically concerned infectious or contagious diseases. The parties therefore specifically contemplated the possibility of government reactions to wide-scale emergencies which might impact upon the policyholder’s premises. However, where the reaction was to “infectious or contagious

diseases”, there was an exclusion and the NDDA clause would therefore not provide cover. There was therefore no claim brought by Excel under the NDDA clause. This led to the conclusion that the coverage for infectious diseases which did exist under the relevant clause (the RSA Infectious Diseases Extension) would not write back the entirety of the NDDA cover subject only to proof of occurrence of disease at the premises. The infectious diseases coverage was only for an outbreak or occurrence that had its own distinct causal impact. It did not cover government intervention in response to a more general or widespread emergency which was concurrently caused by all cases of disease forming part of the emergency, as this is what the parties had specifically excluded in the NDDA clause. Excel’s argument therefore sought to recreate the very type of cover for infectious diseases that the parties had specifically excluded in the NDDA clause.

244. I did not consider that there was anything in the NDDA clause which could be relied upon as restricting the coverage in the RSA Infectious Diseases Extension, or the causation analysis. The exclusion of coverage for infectious diseases in the NDDA clause leads only to the conclusion that such coverage must be found, if at all, elsewhere in the policy. There is an express clause (the RSA Infectious Diseases Extension) which provides such coverage, and in certain material respects it is narrower than the coverage that would have existed (absent an exclusion) if the NDDA clause had been applicable. For example, the NDDA clause excludes all contagious and infectious diseases, and the RSA Infectious Diseases Extension does not provide coverage for all such diseases but only those which are notifiable. Also, the NDDA clause would apply to access to the premises being hindered or prevented, whereas the RSA Infectious Diseases Extension provides cover only in respect of closure. There are also different limits in respect of cover: the limit under the NDDA clause is £7.5 million, whereas the limit under the RSA Infectious Diseases Extension is £15 million. All of these matters lead to the conclusion that the coverage in the RSA Infectious Diseases Extension is to be considered and interpreted on its own terms, and that it is not appropriate to attempt to read across, from the NDDA clause, exclusions or limitations which are not expressed therein.
245. In the *Taiping* arbitration award, Lord Mance reached the same conclusion, when considering a very similar argument advanced by Mr Kealey for the insurers. In that case, there was no coverage under the disease clause, because there was a “closed” list of diseases which therefore did not extend to Covid-19. The *Taiping* insurers sought to read that across to the NDDA clause, with the consequence that there was no coverage for Covid-19. The argument was rejected. Lord Mance said at paragraph [28] of his award:
- “Both Extension 1 [the NDDA clause] and Extension 2 [the disease clause] must be allowed to operate according to their respective terms, whether they contain elements which potentially overlap or not. There is no implied exclusion under Extension 1 even in respect of notifiable diseases covered under Extension 2 (which would not assist the Insurer), still less in respect of COVID-19 which was not specified under Extension 1”.
246. In an earlier paragraph of his award, Lord Mance had said that the “Policy could have made clear the interrelationship between Extensions 1 and 2, by excluding from Extension 1 all or any aspect of the perils to which Extension 2 refers, but it does not

do this”. The same is true in the present case. Indeed, there is no room for dispute that there is coverage for infectious diseases under the Infectious Diseases-Extension, and there can therefore be no room for the suggestion that the exclusion in the NDDA clause can be read over in a wholesale way so as to create an exclusion for the cover which the RSA Infectious Diseases Extension clearly provides. I see no reason why the exclusion should then be read across in a more limited fashion, so as to impact upon the appropriate test for causation.

247. It also seems to me that the argument must also fail because (as further discussed below), the RSA Infectious Diseases Extension in the present case expressly refers both to the actions or advice of a governmental authority (in addition to a local authority) and to an “outbreak” as well as the “occurrence” at the premises. The policy therefore expressly contemplates that the national government may be responding to an outbreak, which the Supreme Court appear to have considered to be a wider concept than an occurrence: see [66]. The insurers’ argument, based on the NDDA clause, that there is no coverage under the RSA Infectious Diseases Extension, for the consequences of a wide scale emergency is in any event defeated by this language.

#### **D4: Conclusions**

248. Accordingly, I consider that the Supreme Court analysis applies on the causation argument, and that none of the insurers’ arguments in support of the contrary conclusion are persuasive.
249. This seems to me to be an appropriate result, since any other conclusion would give rise to anomalies which it would be difficult rationally to explain to a reasonable SME policyholder who read the policy. In the course of argument, I gave the example of two restaurants, next door to each other: an Italian restaurant owned by Mario, who has an ATP policy, and a Greek restaurant owned by Costas who has radius wording (say 1 mile or “vicinity”). If Mario had contracted Covid-19 in the period before lockdown, there is no dispute that Costas would be able to rely upon Mario’s illness in order to claim for the business interruption loss flowing from the closure of his restaurant. This is because, applying the Supreme Court’s reasoning, Mario’s illness would be a concurrent cause (with many other causes) of the closure of Costas’s restaurant and therefore of his loss. However, on the insurers’ case, a completely different analysis would apply when Mario sought to claim for the closure of his own restaurant and the consequent losses. For although Mario’s illness would be treated as one of many concurrent causes of the closure of Costas’s restaurant, it would not be treated as a concurrent cause of the closure of his own restaurant. I find it difficult to see how the reasonable SME reader of Costas’s policy would (on the Supreme Court’s analysis) reach the conclusion that Mario’s illness was a concurrent cause of Costas’s loss, but that the reasonable reader of Mario’s policy would reach a completely different conclusion in relation to Mario’s loss. There was in my view considerable force in Mr Gruder’s submission (referring to hairdressers and gym owners) that:

“if we come back to the position at the conclusion of the policy, if somebody had explained the position in simple words to a hairdresser or to the owner of the gym – if your disease at your premises in conjunction with the same disease at other premises, either in the same town or in the same borough or in the same county or in the same country, if they all together caused restrictions which caused all these businesses to close

down, in my submission a business owner would say: well, why shouldn't we all recover. We are all in it together, we're all the cause, we're all the cause together".

250. My conclusion also resolves another issue raised by certain of the preliminary issues. The preliminary issues indicated that insurers were contending that the "at the premises" wordings required, in substance, each occurrence to have been reported to the relevant authorities and for the authorities to have acted on the basis of the knowledge so acquired. As the argument developed, however, it became clear that this was not a point which was separate from the causation argument, whether advanced on a "but for" or "distinct cause" test. The requirement for reporting and knowledge was therefore part and parcel of those causation arguments. Since I reject those arguments, and consider the Supreme Court concurrent cause test to be applicable, there is no separate point which requires resolution. In so far as a separate point was advanced, I reject it as being inconsistent with the Supreme Court decision and unsupported by any relevant wording in the clauses which I am considering.
251. Finally, in the *Excel* proceedings, Mr Kramer placed reliance upon the specific reference in the relevant policy wording to "closure ... on the order or advice of any local or governmental authority as a result of an outbreak or occurrence ...". The reference to "governmental authority" was, here, clearly a reference to a national government response, and not simply a local authority response. The reference to "outbreak" was wider than occurrence. Both points led to the conclusion that there would be coverage for a wide-scale response at a national level, and therefore provided reasons why the insurers' contrary argument should be rejected. I consider that there was force in these submissions, and that (in the case of *Excel*) they are further reasons for rejecting the insurers' argument. However, those policyholders who do not have equivalent wording are in no worse position: the Supreme Court's concurrent causation analysis applies whether or not these or equivalent words are present.

**E: Occurrences prior to Covid-19 becoming notifiable**

252. *The issue and the factual background* An issue in Excel, Hairlab, Kaizen and Why Not Bar is whether cases of Covid-19 which occurred before it was made a notifiable disease are capable of falling within the cover. The policyholders contend that they are, and the insurers contend otherwise. The relevant statutory background is set out in Section A3 above, and the important features for the purposes of the present argument are as follows.
253. Notifiable diseases in England are now dealt with under the Health Protection (Notification) Regulations SI 2010/659. These regulations contain at Schedule 1 a list of disease that are notifiable diseases. In England, Covid-19 was added to the list at 6.15 pm on 5 March 2020.
254. The position in Wales, relevant to Why Not Bar whose premises are in Aberystwyth, is slightly different. In Wales, Covid-19 became a notifiable disease on 6 March 2020 by the Health Protection (Notification) (Wales) (Amendment) Regulations 2020 for the purposes of the Health Protection (Notification) (Wales) Regulations 2010. Scotland was the earliest of the nations to make Covid-19 notifiable. There, Covid-19 was made notifiable on 22 February 2020.
255. The effect of making Covid-19 notifiable in England was that, from 6.15 pm on 5 March 2020, a registered medical practitioner was obliged to notify the proper officer where he or she had “reasonable grounds for suspecting that a patient ... whom [he or she] is attending has Covid-19”. The relevant regulation in this regard is Regulation 2 (1) of the 2010 Regulations. The position was similar in Wales and Scotland.

*The parties’ arguments*

256. The policyholders’ arguments in the four cases, where this issue was raised, had many similarities. All policyholders emphasised that what really mattered was whether Covid-19 was notifiable at the time when their premises were closed and therefore that their losses began. However, the policyholders with “hybrid” clauses potentially had, or at least considered that they had, a more powerful argument in this regard than those (in Hairlab) with pure “disease” clauses. This will be apparent from the summary of the argument below. The case could therefore be put somewhat differently by Mr Day on behalf of the Excel policyholders than by Mr Gruder on behalf of the Hairlab policyholders.
257. On behalf of Excel, Mr Day submitted that whilst the disease had to be made notifiable for there to be a claim, the coverage clause in the Excel Policy does not specify when the disease has to be stipulated by governmental authority to be notified. On the true construction of the policy, the outbreak or occurrence of the disease was required to be notifiable at the time that the composite peril was complete. In the context of a hybrid clause, where an element of the composite peril was closure of the premises on the order or advice of any governmental authority, this meant that the insured peril was only complete after the order or advice to close the premises.
258. Excel submitted that this approach was supported by the language of the clause. Mr Day emphasised the word “is” in “is required by law or stipulated by the governmental authority to be notified”. In context, this meant notified at the time of the closure. This

approach made more commercial sense in the context of a novel disease that becomes notifiable, and which might rapidly reach epidemic proportions. Whether the government had made the disease notifiable at the particular date at which the disease occurred is irrelevant to the risk being insured and entirely arbitrary. The parties cannot sensibly be taken to have agreed that cover contingent on the vagaries and precise sequence of public authority response to the disease. This turned out to be different (in terms of the date of notifiability) in Scotland, England and Wales. It was entirely foreseeable that there could be a gap between a novel disease emerging, spreading and then becoming notifiable.

259. In his oral submissions, Mr Day contrasted the hybrid cover in Excel with pure disease cover, where the peril occurs when the disease occurs, albeit that there will not be any loss until the business interruption begins. He referred to a provision of the Excel Policy dealing with terrorist cover (see Appendix 1), and which referred to a certificate being obtained from the government. This would necessarily occur after the terrorist incident itself, and therefore there was no logical reason why notifiability should not similarly follow the occurrence or outbreak of the illness, particularly when one was dealing with a novel disease.
260. In the Hairlab proceedings, Mr Gruder submitted that the purpose of the “Notifiable Disease” definition in the Hairlab policy (“any human infectious or contagious disease ... an outbreak of which the competent Local Authority has stipulated shall be notified to them”) was to identify those infectious or contagious diseases in respect of which there was business interruption cover if an occurrence at the premises caused loss. The policies in Hairlab did not state that cover would only be provided in respect of a particular disease as from the date it was made notifiable under the 2010 Regulations. A reasonable small business owner reading the policy would have considered that the definition of “Notifiable Disease” was a shorthand way of listing out the diseases whose presence at the premises would attract business interruption cover if loss was suffered. He or she would not have thought that, if a policy incepted on 1 January 2020 for one year, it would make any difference whether business interruption loss was caused by the presence of Covid-19 at the premises on 4 March (prior to the disease being made notifiable) or 6 March. In the *FCA test case*, the Supreme Court had held that the government measures were taken in response to information about all the Covid-19 cases in the country as a whole. The government had not drawn any distinction between post and pre-5 March cases.
261. Mr Gruder therefore submitted that in policies with a pure disease clause, the question of whether the disease was notifiable or not was a purely theoretical question until the business interruption loss was suffered. That loss was suffered when, towards the end of March, the lockdown and restrictions were imposed. The loss, when it arose, was caused by a disease which was in fact notifiable. In the context of the Hairlab cases, he did not need to suggest that loss suffered before the disease became notifiable was recoverable, but it may be that claimants in other cases may wish to argue that.
262. He also relied upon charterparty cases, where the nomination of a port from a range is then treated as if it had originally been written into the charterparty. Here, once Covid-19 was added to the list of notifiable diseases, it was as if it was written into the policy as from the date of its inception. In his argument for Excel, Mr Day adopted this argument.

263. Mr Gruder’s primary argument, therefore, was that there was coverage provided that (i) the disease occurred prior to the closure of the premises in question and the consequent loss, and (ii) the disease was made notifiable prior to closure. As an alternative argument, however, he submitted that there would be a covered occurrence if an individual with Covid-19 had been at the relevant premises prior to 5 March, but was still suffering with Covid-19 at the time that it became a notifiable disease at 6.15 pm that evening. In that regard, he relied upon the requirement for a medical practitioner to notify the relevant local authority where the practitioner had reasonable grounds for suspecting that a patient – whom the practitioner “is attending” – had the notifiable disease. Accordingly, a doctor who had attended a severely ill patient on (for example) 3 March, would be obliged to report that case once it became notifiable 2 days later. The doctor’s obligation was not confined to reporting cases of Covid-19 which only came to his or her knowledge after 6.15 pm on 5 March. The government advice as at 16 March 2020 was that people with symptoms of Covid-19 should stay at home for 14 days. Against that background, a doctor would have reasonable grounds for suspecting that a patient, who had developed symptoms up to 14 days before 5 March 2020, still had a notifiable disease at the time that it became notifiable. As from 6.15 pm on 5 March 2020, a doctor would have to reflect on all the patients that he had treated in the previous 14 days or even earlier, and to report those cases which had exhibited symptoms typical of Covid-19 on the basis that those patients might still have Covid-19 on 5 March 2020.
264. On behalf of the Excel insurers, the oral argument on this issue was presented by Mr Hext KC for RSA. The central point in his written and oral submissions was that the requirement that the outbreak is “required by law or stipulated by the governmental authority to be notified” was descriptive of the disease covered by the RSA Infectious Diseases Extension. Further aspects of his argument, which I accept, are incorporated into the discussion below.
265. In a brief but effective argument on behalf of the Hairlab insurers, Mr Christie’s main point was similar. The peril is any consequence of a notifiable disease. It is not any disease: it is a notifiable disease which has to occur before the insured peril is triggered. There must therefore be an occurrence of a disease which is actually notifiable at the time it occurs.

### *Discussion*

266. I shall start by considering the position in the lead case, Excel. It is correct that, as Excel submitted, the “hybrid” clause in that case involves an insured peril with a number of elements. As the Supreme Court said in paragraph [216] of the *FCA test case* in the context of the Hiscox clause in that case:

“ ... the peril covered by the clause is itself a composite one comprising elements that are required to occur in a causal sequence in order to give rise to a right of indemnity. Setting out the elements of the insured peril in their correct causal sequence, they are: (A) an occurrence of a notifiable disease, which causes (B) restrictions imposed by a public authority, which cause (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of financial loss”.

267. I accept Mr Hext's argument that, in relation to the present policy, the elements in their correct causal sequence are: (A) an occurrence of notifiable disease at the premises, which causes (B) the closure of the premises on the order or advice of a governmental authority which causes (C) interruption of or interference with the policyholder's business at the premises.
268. I also accept his submission that all of these elements are required in order for there to be a right to recover and, importantly, that the first element is only satisfied if the occurrence is an occurrence of a notifiable disease. Since Covid-19 only became a notifiable disease at 6.15 pm on 5 March, any occurrence of Covid-19 prior to that date and time would not have been an occurrence of notifiable disease and would not have satisfied the first requirement.
269. I therefore do not consider that the Excel policy can reasonably be read so that the words "an outbreak of which is required by law or stipulated by the governmental authority to be notified" relate back to, or can be read as qualifying, the words "closure of the Premises or part thereof" at the beginning of the clause. These words are, as Mr Hext submitted, naturally to be read as being descriptive of the outbreak or occurrence at the premises of any human or contagious disease. Accordingly, it is not any disease that must be the subject of the outbreak: it must be a disease, an outbreak of which is required by law or stipulated by the authority to be notified. Prior to 6.15 pm on 5 March 2020, any occurrences or outbreaks at Excel's premises did not have this character and therefore did not meet that description.
270. I do not accept that it is a valid criticism of the insurers' approach that the word "is", rather than "was", is used in the relevant part of the clause. This is a natural and appropriate word to use in the context of the phrase being descriptive of the earlier reference to outbreak or occurrence of disease. The present tense thus looks to the nature of the disease at the time that it occurs.
271. Contrary to Mr Day's argument, I do not consider that any assistance is to be derived from the policy provisions concerning terrorism. The terrorism clause is indeed looking at a requirement of certification which follows the act of terrorism. That is a natural enough sequence in the context of an act of terrorism. But it says nothing about the approach to the interpretation of the RSA Infectious Diseases Extension at issue here.
272. Nor do I consider that the charterparty cases concerning the nomination of a port assist in construing the relevant clause in the Excel Policy. It is of course true that the policy covers new diseases which may, subsequent to the issue of the policies in issue here, become notifiable. That is why the policies provide coverage (subject to the various arguments that I am considering) for the consequences of Covid-19. In a loose sense, therefore, Covid-19 becomes written into the policy as a covered disease. However, on the clear language of the relevant clause, this only happens at the time that it becomes notifiable, since it is only at that time that the infectious disease acquires the character which is required under the clause. The policyholders' argument, based on the charterparty cases, would also (if correct) logically lead to the conclusion that the closure and loss could happen prior to the disease becoming notifiable, provided that it became notifiable at some unspecified point in the future. However, Excel made it clear that they were not contending that there would be coverage where the closure had predated notifiability. Since this would be the logical conclusion of the argument, it would suggest that (as I consider to be the case) the argument is wrong.

273. Accordingly, the disease must be notifiable at the time of occurrence or outbreak. There is, in my view, nothing uncommercial or arbitrary in this approach. The policy needed to identify the nature or character of the diseases that would qualify for coverage. An approach that asks whether the disease was notifiable at the time of the relevant occurrence is straightforward to apply and perfectly sensible. This may mean that some occurrences will, depending upon when they occur, fall outside coverage. However, that is simply the ordinary consequence of the application of the words of the policy. The consequence is no more arbitrary than coverage under a 1-mile radius clause applying to occurrences within the radius, whereas occurrences just outside are uncovered.
274. The Supreme Court's conclusion that the government measures were taken in response to information about all the Covid-19 cases in the country as a whole does not affect this analysis. A policyholder must still show that there was an occurrence in respect of which cover was provided. A policyholder with a 1-mile radius clause must therefore establish an occurrence within the radius, and it is no assistance that there may have been other cases, causative of the government action, outside the radius. Similarly, all policyholders in the present case must establish an occurrence at the premises covered by their policies, and in all cases that must be an occurrence of a notifiable disease.
275. These conclusions are equally applicable to the policies in Hairlab. The relevant provision requires the "occurrence of a Notifiable Disease (as defined below)...". The words "Notifiable Disease" are here used in close proximity to "occurrence", and clearly apply to the occurrence and nothing else. In other words, Excel's argument (which I have rejected), that they can relate to the "closure" referred to earlier in the Excel clause, is not available here. The definition of Notifiable Disease is "any human infectious or contagious disease ... an outbreak of which the competent Local Authority has stipulated shall be notified to them". This too is descriptive of the disease, and accordingly there is no coverage unless the disease has that character at the time of the occurrence.
276. Hairlab's alternative argument takes the matter no further. It may well be the case that a doctor was required, after 6.15 pm on 5 March 2020, to notify cases of Covid-19 in patients who had symptoms prior to that time and had a continuing illness. However, Hairlab's policy requires an "occurrence of a Notifiable Disease ... at the Premises". Even if an individual was suffering from Covid-19 on (say) 4 March when he or she was at the relevant premises, that was simply the occurrence of a disease at the premises at that time: it was not the occurrence of a notifiable disease, since Covid-19 was not then notifiable.
277. The above conclusions are supported by the approach of the Court of Final Appeal (and the lower courts) in the Hong Kong case, *New World Harbourview Hotel Co Ltd and others v Ace Insurance Ltd and others* [2012] HKCFA 21. The case concerned SARS, which had become a notifiable disease on 27 March 2003. The earliest of the appellants' losses was on 9 March 2003, which was within the period of insurance but prior to SARS becoming a notifiable disease. As can be seen from paragraph [44] of the judgment, the appellants' argument was similar in some respects to those advanced by the policyholders in the present case. Thus it was argued that there was no temporal restriction in the relevant clause (which was a disease clause, rather than a hybrid clause), and that it did not stipulate that the insured could only recover loss sustained after the infectious disease becomes notifiable. The only requirement was that the loss

was caused by a notifiable infectious or contagious disease. So long as the loss was so caused, it was the subject of the indemnity, even if it occurred before the disease became notifiable, so long as it occurred within the period of insurance.

278. This argument was rejected in the leading judgment given by Sir Anthony Mason NPJ. He said at [45]:

“The appellants’ argument overlooks the point that the cause of the loss must be a notifiable disease and a disease does not become notifiable until it is required to be notified. That was on 27 March 2003. Before that date any loss caused by SARS was caused by a disease which was not notifiable. It is for this reason that the appellants fail on this issue”.

279. The policyholders sought to distinguish this case on the basis that it involved an attempt to claim for losses prior to the disease becoming notifiable, whereas none of the present policyholders sought to do that. Mr Day also emphasised that the case concerned a pure disease cover, rather than a hybrid cover. Whilst those points could fairly be made, it seems to me that the reasoning of the court was based upon the nature of the disease, namely that it must be notifiable. Notifiability was therefore descriptive of the disease that was required for the purposes of a claim. This reasoning is in my view directly applicable to the issues in the present case and is persuasive. Indeed, it is the conclusion that I have reached on the present wordings without reference to the *Harbourview* case.

280. Furthermore, in paragraph [174] of the *FCA test case*, the Divisional Court – without expressing a final view – considered that:

“... that there would be formidable difficulties in the way of any suggestion that there could be cover under a policy such as the Argenta policy, which, unlike RSA 4, has no deeming provision as to notifiability, before the date on which the disease became notifiable”.

This too is consistent with the conclusion which I have reached, and I have not been persuaded that, in the context of the present policies, there is any material difference between the Argenta wording and the policies that I need to consider. The above passage also shows that it is perfectly possible to draft a clause which applies notifiability retrospectively: see the RSA4 clause (set out in Appendix 2) referred to in this passage. However, none of the clauses with which I am concerned have a retrospective element.

281. The policyholders also relied upon the decision of Jagot J in the Federal Court in one of the cases (*Chubb v Waldeck*) in the Australian test case, *Swiss Re International SE v LCA Marrickville Pty Ltd* [2021] FCA 1206. There was a subsequent appeal, albeit not involving *Chubb v Waldeck*, to the Federal Court of Australia [2022] FCAFC 16. I did not consider that this judgment was of any assistance. The issue which I am considering was not fully argued in that case, or indeed argued at all. In Australia, Covid-19 became notifiable much earlier, on 29 January 2020, and it is not clear that any claim was actually being made on the basis of occurrences prior to that time.

282. Accordingly, I accept the arguments of the insurers in *Excel* and *Hairlab* on this issue. The arguments in *Kaizen* and *Why Not Bar* on each side were not materially different, and I therefore accept the insurers’ argument in those cases as well.

**F: The “Medical Officer of Health of/for the Public Authority” issue**

**F1: The issue**

283. This issue, which arises in Kaizen and Why Not Bar, concerns the construction of clauses which refer to the “Medical Officer of Health of/for the Public Authority”. The Kaizen Policy has the word “of” before “the Public Authority”, and the Why Not Bar Policy has the word “for”. The parties’ submissions did not suggest that this difference was of any significance.

284. The relevant issue, as formulated in Kaizen, is:

“What (if anything) is the effect of the requirement in the Premises Closure or Restrictions Extension that any closure or restrictions must be placed on the Premises “on the advice or with the approval of the Medical Officer of Health for the Public Authority”?”

285. In summary, the policyholders contend that the relevant expression includes the Chief Medical Officer and/or Deputy Chief Medical Officer in England and each of the other nations in the UK. The insurers contend that neither of these individuals comes within that expression, because the words “Medical Officer of Health for the Public Authority” do not concern those who advise the UK government or the governments of the other UK nations. These words refer, and refer exclusively, to officers carrying out functions and duties on behalf of local government.

**F2: The statutory context**

286. The following summary is based upon the agreed facts in the Kaizen proceedings. The agreed facts in the Why Not Bar proceedings were not drafted in precisely the same way, but there was no difference which was material to the issue requiring resolution.

*The role of “Medical Officers of Health”*

287. The Kaizen proceedings agreed facts traced in some detail the statutory background, going back to 1846, of the role of “Medical Officer of Health”. It is not necessary to set out all the detail, since the insurers accept that no reasonable SME policyholder would have researched the 19<sup>th</sup> century history of the post. It is, however, clear from the 19<sup>th</sup> century history, as described in detail in the agreed facts, that the position of “Medical Officer of Health” was a role to which a legally qualified medical practitioner or member of the medical profession was to be appointed by local rather than national authorities.

288. Moving into the 20<sup>th</sup> and 21<sup>st</sup> century, the key agreed facts concerning the “Medical Officer of Health” can be summarised as follows.

289. At the time that each of the Claimants’ policies were entered into, the role of “Medical Officer of Health” no longer existed.

290. The “local” nature of the former position of “Medical Officer of Health” can be seen in provisions of the Local Government Act 1933, where it was stated that county councils, the councils of every borough and district councils were to appoint medical officers of health. The duties of these medical officers included an obligation to “inform himself

as far as practicable respecting all matters affecting or likely to affect the public health in the county and be prepared to advise the county council on any such matter”.

291. The creation of the National Health Service (“NHS”) in 1948 altered the structure of public health. It removed the active medical functions of local health authority departments and reduced the role of Medical Officers of Health by shifting ‘community medicine’ out of local authorities’ remit and into the NHS. Local authorities retained the responsibility for broad-based public health measures related to food hygiene and environmental health.
292. Under the Local Government Act 1972 and the National Health Service Reorganisation Act 1973, both of which came into effect in April 1974, the post of the Medical Officer of Health was abolished and replaced with “District Community Physicians” and “Regional and Area Medical Officers”. The effect of this was to replace Medical Officers previously employed by local government for each county with Medical Officers based on the new Area Health Authorities within the NHS.
293. The Public Health (Control of Disease) Act 1984 (“the 1984 Act”), (which is more fully described in Section A3 above) as originally enacted, was a statute consolidating Victorian and other legislation. The role of former medical officers of health is referred to in that statute. By section 74 of the 1984 Act, an “authorised officer” in relation to a local authority, means:
  - (1) “an officer of the authority authorised by them in writing, either generally or specially, to act in matters of a specified kind or in a specified matter, or
  - (2) by virtue of his appointment and for the purposes of matters within his province, a proper officer of the authority, appointed for purposes corresponding to any of those of the former medical officers of health, surveyors and sanitary inspectors”.

*Public Health England, the UKHSA and the Chief Medical Officer*

294. Public Health England (“PHE”), which is now UKHSA (UK Health Security Agency), was established on 1 April 2013 to bring together public health specialists from more than 70 organisations into a single public health service. It was an executive agency of the Department for Health and Social Care. It provided national government, local government, the NHS, Parliament, industry and the public with evidence-based professional, scientific expertise and support. PHE was disbanded and its health protection functions taken over by the UKHSA from April 2021.
295. The Chief Medical Officer (“CMO”) acts as the UK government’s principal medical adviser, and the professional head of all directors of public health in local government and the medical profession in government. As of 2020, there were four CMOs in the United Kingdom: Professor Chris Whitty, the CMO for England, Chief Medical Adviser to the UK government and head of the public health profession; Dr Michael McBride, the CMO for the Department of Health in Northern Ireland; Professor Sir Gregor Smith, the CMO to the Scottish government; and Sir Frank Atherton, the CMO to the Welsh government.

296. The CMO is the country's most senior medical adviser, providing advice to the Secretary of State for Health and, when necessary, the Prime Minister. The CMO is also the head of the public health profession and represents it within government.
297. The role has three overarching responsibilities: to provide independent advice on public health issues, in particular during public health emergencies; to recommend policy changes to improve public health outcomes; and to act as an interface between the government and medical researchers and clinical professionals.
298. The CMO plays a prominent role in supporting the government's response to public health emergencies. Alongside ministers, the CMO is responsible for keeping the public informed on health issues of high public concern and explaining the government's response.
299. The CMO plays a leading role in advising on the national response to public health emergencies and attends COBR meetings on health issues. The CMO co-chairs the Scientific Advisory Group for Emergencies (SAGE) with the government's chief scientific advisor. SAGE is responsible for ensuring that a single source of coordinated scientific advice is provided across government and into COBR.
300. The CMO can also set up ad hoc advisory groups in response to a public health emergency. During the Ebola outbreak in 2015, Professor Davies set up the Ebola Scientific Assessment and Response Group to draw in additional expert advice on specialist issues relating to the disease.
301. The CMO plays a key role in working with the Department of Health and Social Care public health agencies, and the National Health Service, to convert the scientific advice from expert committees into a policy response.

*Response to notifiable diseases*

302. The agreed facts also covered the relevant powers concerning notifiable diseases. As described in Section A3 above, at the time that the polices were placed local authorities no longer had any statutory power to designate diseases as notifiable. Instead, that role was undertaken by the Secretary of State pursuant to the Public Health (Control of Disease) Act 1984.
303. However, local authorities, as well as national bodies, have roles in responding to notifiable diseases.
304. The UKHSA delivers a specialist health protection service which includes responding to incidents and outbreaks through local HPTs (formerly Health Protection Units). According to a 2014 operational guidance document issued by PHE, Health Protection Teams are staffed by Consultants in Communicable Disease Control, Consultants in Health Protection, Health Protection nurses and practitioners and other staff with specialist health protection skills. They "have a key role in" responding to, investigating and managing outbreaks of communicable disease.
305. The same document records that:

(1) The roles of local authorities and the UKHSA (then PHE) in the public health system are complementary in investigating and managing outbreaks of communicable disease.

(2) In practice these organisations work closely as part of a single public health system to deliver effective protection for the population from health threats.

306. Every local authority with public health responsibilities must, acting jointly with the Secretary of State, employ a specialist Director of Public Health.
307. All registered medical practitioners have a statutory duty to report every case of a notifiable infectious disease to the ‘proper officer’ of the local authority or local UKHSA Health Protection Team via a Statutory Notification form. This is in accordance with Section 45C(3)(a) of the 1984 Act and the Health Protection (Notification) Regulations 2010.

**F3: The parties’ arguments**

308. For the Kaizen policyholders, Mr Gruder submitted that the most relevant agreed fact was that the role of Medical Officer of Health no longer existed, and had not done so for 50 years. The meticulously researched legislative history would not have been knowledge available to an SME policyholder or context that would have been taken into account in understanding what the language of the policy meant. Instead, the ordinary policyholder would have understood the role of the “Public Authority” to refer to the Secretary of State or the government, and for the “Medical Officer for Health” to refer (if to anyone) to the Chief Medical Officer and/or the Deputy Chief Medical Officers for England and Wales. In his oral submissions, Mr Gruder said that the formulation in his written submissions was probably too restrictive. The relevant expression would include people other than the Chief Medical Officer and/or the Deputy Chief Medical Officers for England and the other nations in the UK. However, it would not exclude those senior people. A broadly similar argument was advanced by Mr Chapman KC on behalf of Why Not Bar.
309. For HDI, the insurer of the Kaizen policyholders, Mr Howie submitted that the “Public Authority” was necessarily a local authority. The use of the word “the” showed that the draftsman had a particular type of authority in mind. The meaning of that term should be gleaned from the wider context, and in particular (i) other policy terms, (ii) the immediate contractual context of the coverage for infectious diseases, and (iii) the specific reference to “Medical Officer of Health”.
310. In his oral submissions, Mr Howie acknowledged that it was not possible to reconcile all the references to “public authority” wherever they appeared in the policy, and to come up with a single meaning that was going to fit every clause. He submitted, however, that some assistance could be derived from the fact that the policy contained certain provisions (see Appendix 1) which referred to “the government or any public authority”. This showed that the government was to be distinguished from “any public authority”: the draftsman could refer to government and national government specifically when he wanted to. More generally, the use of the expression “Public Authority” was highly sensitive to the immediate context in which the words were used.

311. In relation to the immediate contractual context, Mr Howie relied upon the fact that other limbs of the cover for “Premises Closure or Restrictions”, leaving aside the infectious disease provision in 1 (a), were concerned with local matters; for example food and drink sold at the premises, or vermin and pests at the premises, or murder or suicide at the premises. The clause used “Public Authority” in all of those local contexts. It was inconceivable that the UK government would concern itself with these parochial matters. In support of this argument, he also repeated the submission that the infectious disease coverage was exclusively concerned with what happens at the specific premises. This is the argument which, in the context of causation, I have already rejected.
312. The argument as to context was, he submitted, further supported by the fact that the cover refers to “Medical Officer of Health for the Public Authority”. On its true construction, this referred to personnel whose role required them to advise a local authority, and/or to give approval on its behalf, in respect of the closure and/or placing of restrictions upon premises falling within its jurisdiction. The phrase showed that the parties intended the involvement of a particular officer, someone with a specific role. The parties could have, but did not, refer to the Chief Medical Officer by its “well-known name”. The phrase “Medical Officer of Health” was an unusual one, and was redolent of having a technical meaning.
313. With those points in mind, it was highly relevant that there did exist for many years the statutory role known as “Medical Officer of Health”. This was local in nature. Although that role no longer exists, the local responsibilities formerly discharged by those Medical Officers of Health had now been assumed by other locally appointed officers. In that connection, Mr Howie referred to section 74 of the 1984 Act. The logical and reasonable conclusion was that when the parties used that expression, they had in mind the modern counterparts whose roles relevantly correspond to those of the former Medical Officers of Health. The clause therefore refers to authorised officers of local authorities who are concerned with local questions of public health and disease in the area in which the authorities operate, and whose responsibilities include giving advice or approvals with respect to the exercise of local authorities’ powers in such matters. It therefore refers to the authorised officers of local authorities who are the modern equivalents of the Medical Officers of Health.
314. Although the terms of the Why Not Bar Policy are not precisely the same, Mr Christie’s argument relied upon essentially the main themes in Mr Howie’s argument. For example, the Why Not Bar Policy only referred to the “Public Authority” in two parts of clause 6: the notifiable disease cover in 6A and the defects in drains cover in 6C, rather than in each of the parts of the equivalent cover in the Kaizen policies. Mr Christie submitted that the drains cover in 6C showed the local context of “Public Authority” and must refer to the local authority. The same meaning should therefore be given to the phrase in 6A. To construe clause 6 as encompassing national governments and those advising them would be (wrongly) to give no weight to the immediate contractual context. Mr Christie’s submission also emphasised that the authority that is responsible for and would be expected to act in respect of each of the matters identified in the extensions immediately surrounding 6A is a local authority or local police; for example to address injury or illness arising from foreign or injurious matter in food or drink sold from the premises, or to deal with a murder or suicide at the premises. He accepted that both central and local authorities had powers to impose restrictions on

premises in response to manifestations of notifiable disease at the premises. However, it did not follow that the relevant clause was concerned at all with the powers of central government.

*Discussion*

315. I consider that, applying the relevant principles of construction summarised in the *FCA test case*, any ordinary reader of the policies issued to the Kaizen and Why Not Bar policyholders would understand the words “Public Authority” to have a broad meaning which includes national governments. The ordinary meaning of that expression includes all types of authority exercising public functions, whether local or national. Declaration 9 made by the Supreme Court in the *FCA test case* was that, in the context of a number of policies: “the UK Government is a government, governmental authority or agency, public authority, civil authority, competent civil authority, competent local authority and/or statutory authority” within various different wordings which were there being considered. (My underlining).
316. I accept, of course, that words used in a contract must take their meaning from their context. But I see no reason to give a restrictive interpretation to the broad expression “Public Authority” by reason of any of the matters relied upon by the insurers.
317. As far as concerns other usages of the expression “Public Authority” or “public authority” in the Kaizen Policy, Mr Howie accepted that it was elusive to search for a consistent meaning to that expression, whether capitalised or not, wherever it appears in the policy. In my view, there is nothing which indicates that it is restricted to a local authority, and there are positive indications that it has the wide meaning that it would ordinarily have, including governments and other bodies operating at a national level.
318. Thus, the definition of “Notifiable Human Disease”, in the Definitions section of the Kaizen policy refers to any human infectious or contagious disease “an outbreak of which the competent public authority has stipulated shall be notified to them”. This clause is directly linked with clause 1 a) of the “Premises Closure or Restrictions” provision which is central to the dispute, and which uses the expression “Notifiable Human Disease”. At the time that the policy was placed, it was only the national government, rather than local authorities, which stipulated for notification of outbreaks of disease. Accordingly, the expression “competent public authority” in the Definitions section must include the national government.
319. It is true that that some provisions of the policy refer to “government or any public authority”. For example, the exclusion for “Government Action” excludes loss arising from “nationalisation confiscation requisition seizure or destruction by the government or any public authority”. (A similar exclusion is contained in the cover for riot, civil commotion and strikes). Even in the context of that expression, however, there is no reason to confine “public authority” to “local authority”. The expression is a broad one, capable of including bodies acting at a national level (such as quasi-governmental authorities or agencies to which governmental functions have been outsourced) even if not actually the “government”. Indeed, one would not expect “nationalisation” to be a matter for a local authority, and one might ordinarily expect the other matters referred to in the clause to be national rather than local.

320. I do not attach significance to the fact that sometimes the words “public authority” are capitalised, and sometimes they are not. This is indicative of a policy which, in this respect, has been drafted (by the insurers) unevenly, and (at least in relation to this aspect of the policy) with insufficient care or thoroughness. This is also apparent from other matters: the absence of a definition of Public Authority even though it has been capitalised, and Mr Howie’s acceptance that it is not possible to identify a consistent meaning to that expression throughout the policy. All of these matters to my mind serve to reinforce the conclusion that “Public Authority” should simply be given its ordinary, broad meaning.
321. The drafting of the Why Not Bar Policy is scarcely any better, and it is not possible to discern from other clauses any intention that the broad term “Public Authority” should be read as limited to local authorities. There is no definition of “Public Authority” in clause 6A and 6C, and indeed (unlike the Kaizen Policies) no definition of “notifiable human disease”. The policy sometimes capitalises the expression “public authority”, and sometimes does not. Thus, the exclusion to the riot cover excludes “confiscation, requisition or destruction by order of the government or any public authority”. For reasons already given, there is no reason to confine “public authority” in that context to a local authority: it can include quasi-governmental or other national agencies.
322. The “Basis of Settlement” provision for property damage refers to “Public Authorities requirements”. Clause (B) under Basis of Settlement indicates that “Public Authorities’ requirements” encompass a range of requirements laid down by different bodies, not confined to local authorities: “such additional cost of reinstatement ... in complying with building regulations or local authority or other statutory requirements or EU requirements”.
323. There are also provisions which refer expressly to local authorities. The policy schedule contains a Licenced Premises Condition, which requires compliance with licence requirements detailed by “the Local Authority”. The Special Conditions in the main policy wording concerning “Risk Protections” refer, in clause E 10, to notification “from a Local Authority or Magistrate” imposing any requirement for abatement of nuisance. In the light of both of these clauses, it can fairly be said that if the draftsman had wanted to confine “Public Authority”, in clause 6A and 6C, to local authorities or Local Authorities, then they could have said so.
324. I accept that one should not make too much of the latter point, in view of the Supreme Court’s approach in paragraphs [77] – [78] of the *FCA test case* judgment. The important point, in my view, is that the uneven drafting of the policy, the absence of any definition of “Public Authority”, the use of the expression elsewhere in the policy to encompass a variety of bodies, and the fact that the simple expression “local authority” is not used, all lead to the conclusion that “Public Authority” should be given its broad, ordinary meaning.
325. The arguments of Mr Howie and Mr Christie focused in particular on other parts of the clauses of which the cover for closure consequent on notifiable diseases forms part. The argument largely restates, in a different context, the causation argument as to the localised nature of “at the premises” cover that I have rejected. In relation to the argument advanced in the present context, I accept some aspects of these clauses are more likely to result in local authority action than action at a national level. However, this does not mean that, in the context of the notifiable disease cover, the broad

expression “Public Authority” should be construed restrictively and otherwise than in its ordinary meaning.

326. Mr Christie’s submissions fairly acknowledged that it cannot be disputed that both central and local government have powers to impose restrictions on premises in response to manifestations of notifiable disease at the premises. The statutory context described in section A3 above indicates the broad range of powers which are available to the national government. Paragraphs [78] – [88] of the arbitration award of Lord Mance in *Taiping* contains a detailed description of the various powers which exist at both a national and local level. As Lord Mance said at [88]

“There is, therefore, a great range of duties and powers imposed or conferred on local authorities to address the sort of situations with which Extensions 1 and 2 are concerned. But the central government also has certain powers which it can use to address such situations, when intervention at a countrywide or broader than local basis is or deemed appropriate”.

327. Given the nature of notifiable diseases as described in the *FCA test case* and discussed in Section D, and the broad range of possible responses that might be required at either a local or a national level, depending upon the severity of the problem, there is in my view every reason to give “Public Authority” the broad meaning which it would ordinarily have.
328. All of these considerations lead to the conclusion, without (in my view) the need to consider in detail the expression “Medical Officer of Health”, that any reasonable reader of the policy, and in particular a reasonable SME, would conclude that “Public Authority” must include the national government. The concept of a “local authority” is very well known, and the reasonable reader would conclude that the expression “Public Authority” was obviously wider and not confined to a local authority. The reasonable reader would also conclude that there was no apparent reason for the capitalisation of the undefined expression “Public Authority”, and that there was certainly nothing in the capitalisation which led to the conclusion that it was confined to a local authority.
329. The obvious conclusion that the reasonable reader would then draw is that the expression Medical Officer of Health in the context of provisions which referred to advice or approval, would without doubt include the senior national government medical advisers on health matters. A well-informed reasonable reader, at least in England, would know that the most senior person has the title Chief Medical Officer. Many reasonable readers might not be able to identify precisely the name of the post, or its holder at the relevant time (Professor Sir Chris Whitty in England). But they would in my view all conclude that the UK government, as well as the governments of the nations in the UK, were likely to have senior medical advisers, and that the expression in the policy extended to them.
330. I do not accept that any reasonable reader of the policy would go through the sort of analysis posited by the insurers’ submissions, based on the history of the position of “Medical Officer for Health” which, by the time that these policies were written, had not existed for nearly 50 years; and then reach the conclusion that the broad expression “Public Authority” should be read down to mean local authorities only, on the basis

that the long defunct position was a local position, and that the functions formerly exercised by that office-holder had been transferred to other local authority officials.

331. In my view, the argument has the flavour of something that would occur and perhaps appeal to the pedantic lawyer referred to in paragraph [77] of the Supreme Court's decision in the *FCA test case*, but whose approach should play no part in the analysis of what the policy means. Furthermore, the argument produces the strange result that the obvious person who, giving "Public Authority" its ordinary broad meaning, comes within the expression "Medical Officer for Health" or for "the Public Authority" – namely the Chief Medical Officer is outside the expression; whilst at the same time, less obvious people operating at a local level and who have no medical qualifications come within it.
332. To explain the latter point in more detail: the insurers' argument was based on the proposition that, under the 1984 Act, an "authorised officer", in relation to a local authority, includes a "proper officer of the authority, appointed for purposes corresponding to any of those of the former medical officers of health, surveyors and sanitary inspectors". As Mr Howie explained, this potentially includes a large number of local authority officials in whom the former functions of the Medical Officer of Health now reside. These include, or at least may include, officials who have no medical qualifications, such as environmental health officers, and other people who may have no medical qualification. In my view, it would be a strange conclusion indeed that all of these officials were to be regarded as a "Medical Officer for Health" within the meaning of the policy, but that Professor Chris Whitty was not.
333. That said, I accept that a reasonable reader would conclude that, given the width of the expression "Public Authority", it included local authorities and therefore those who, at a local level, occupied positions which were similar or equivalent to the chief medical officer of the national government or who had a similar advisory role. I do not need to decide whether or not that would extend to every local authority official, whether medically qualified or not, who now has a function corresponding to the former Medical Officers of Health. (The insurers contended that all such officials would be included, and the policyholders ultimately did not disagree).
334. I reject the insurers' argument, based upon the *Taiping* award, that the present clause is solely concerned with action by local authorities. The *Taiping* award concerned a policy which specifically referred to the actions of the "Police or other competent local authority". The clause contained no reference to "Public Authority" and is of no assistance to the insurers' argument in relation to the present policies. If the clause in *Taiping* had referred to "Public Authority", I have little doubt that the policyholders would have succeeded. (The award also seems to me to raise an interesting question, on the "competent local authority" wording, which may perhaps have to be considered in court on some future occasion: I cannot necessarily assume that the award of Lord Mance, despite his eminence, is necessarily the last word on the "competent local authority" wording).
335. I therefore reach the same conclusion, for essentially the same reasons, as Mr Thomas in the Financial Ombudsman Service award concerning Allianz. I consider that the reasoning in that award is sound and well-expressed:

“Allianz has said that Professor Chris Whitty is the Chief Medical Officer and that he is not the Medical Officer of Health for the Public Authority. Allianz has also argued that, in the context of this clause, “Public Authority” is the local authority only, rather than the national government.

I noted that neither of these terms are defined within the policy. As such, they need to be interpreted as they would be understood by a reasonable person at the time of entering the contract.

I explained that “Medical officer of health” is largely a historical term. It was used in the Public Health Act 1961, but it is not in more recent public health legislation. Section 37 of this Act relates to the sale of verminous articles and appears to be the only legislative term relating to the medical officer of health. The role itself is also historic and no longer exists. I noted that when the role was in existence, it did have a focus on local authority matters rather than anything national. But [I] considered this to be a reflection of the make-up of healthcare services generally at the time medical officers of health were introduced, rather than the current situation which is more of a mix between national and localised healthcare.

I considered the current set-up of the healthcare system was also significant when considering the potential actions taken in the face of the occurrence of many of the diseases covered by R’s policy. As set out above, the responses to many of these diseases would be widespread and would require more nationally-orientated action. To say that the policy provides cover for a disease that would likely only be acted upon by national government, but then to limit cover to the actions of a local authority would, to my mind, provide an irrational result.

Ultimately, I said the clause refers to a term that is dated and it would not be reasonable to expect a customer taking out an insurance policy of this nature to understand the historical positioning of a redundant role, and then apply that to how the clause in question should be interpreted in relation to cover for a wide-spreading disease. An alternative question is whether a reasonable customer would consider that a clause referring to the advice of the Medical Officer of Health would include the advice of the Chief Medical Officer for England. I considered that this is how a reasonable person would have interpreted this clause at the time the policy was taken out.

[...]

I considered the words “Public Authority”, in the absence of any further definition, could only be fairly interpreted in a broad sense. And so would include the actions of the Government.

Whilst I took Allianz’s points into account, I was not persuaded that a reasonable person reading R’s policy would interpret the wording used in Extension 1 as relating only to advice or approval of a locally based

medical officer, and excluding any action by Government. I didn't believe such a restrictive interpretation to be reasonable. To paraphrase the Supreme Court, I didn't think this would be the understanding held by the ordinary policyholder who, on entering into the contract, has read through R's policy conscientiously in order to understand what cover they were getting."

336. Mr Christie submitted that this decision was reached "per incuriam", because the Ombudsman was not referred to the provisions of the 1984 Act which referred to former medical officers of health. It did not seem to me that this invalidated the Ombudsman's conclusion that the term is not in more recent public health legislation, and I certainly do not think that it casts doubt on his reasoning as a whole. However, it is not necessary to consider this point further. I have formed my own view on the issue in the light of the arguments of the parties in this case.
337. Accordingly, I accept the case of the Kaizen and Why Not Bar policyholders on this issue.

## G: The Mayfair wording

### *The issues and the parties' arguments*

338. Specific issues arose on the Mayfair policy wording which had features different to the wordings contained in the other cases as well as in the *FCA test case*. The relevant provision was as follows:

#### **“Murder, suicide and infectious diseases extension 2006**

Section B (loss of Profits) is extended to included losses arising from the closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee or by defective sanitation vermin or pests at the Premises as specified in the schedule or by murder or suicide occurring at the Premises.”

339. The principal argument concerned the words “suffered by”. These contrasted with other policy terms: “outbreak or occurrence” (*Excel*), “occurrence of” / “occurring” (*Hairlab*, *Kaizen* and *PizzaExpress*), and “manifesting” (*Why Not Bar*).

340. Mayfair contended that “suffered by any visitor or employee” was not materially different to the occurrence wording in other policies and which was considered by the Supreme Court in the *FCA test case*. It required no more than that a visitor or employee had the disease whilst at the premises. Accordingly, there would be coverage in respect of any visitor or employee who contracted Covid-19 so that it could be diagnosed, whether or not it was verified by medical testing or formally confirmed or reported to PHE, and whether or not it was symptomatic.

341. Mayfair’s primary case was not really reflected in the formulation of the preliminary issue, which indicated that the issue was whether or not “suffered” required a display of symptoms of Covid-19 at the premises, or whether it also included a person to have been diagnosed with Covid-19. This may, however, have been a consequence of Mayfair’s factual case, which asserted that two employees had actually displayed such symptoms (and one of them had died). At all events, insurers did not object to Mayfair advancing this primary case, which raised an issue of construction which could be addressed at the hearing.

342. If its primary case were rejected, then Mayfair submitted that the words were not materially different to the “manifesting” language considered in the *FCA test case*. On this basis visitors or employees would suffer the disease if they had symptoms of the disease whilst at the premises, or if they had been at the premises and (even if not symptomatic) had been diagnosed as having had Covid-19 whilst there.

343. The Mayfair insurers (“Axa”) argued, in summary, that “suffered by” was not to be equated either with an occurrence of the disease, or a person “sustaining” the disease, nor with manifestation of the disease. Suffering involved the visitor or employee subjectively experiencing the disease. Accordingly, it was necessary for the visitor or employee to have been experiencing the symptoms of the disease whilst at the premises. A subsequent diagnosis, even if it indicated that the individual had the disease when at the premises, would not be sufficient.

344. Thus, in its written submissions, Axa submitted that “suffered” in context meant that a visitor or employee is required as a minimum to have had symptoms of the relevant disease at the premises, and also to have displayed those symptoms at the premises. The use of the word “suffered” would convey to a reasonable reader that it is not enough that a person merely has an infection, but rather that they are afflicted by the infectious disease by reason of suffering symptoms. This was supported by declaration 6 of the Supreme Court in the *FCA test case*: this referred to circumstances where “any such person was infected with and/or was suffering from Covid-19...”, which indicated that there was a distinction between the two concepts of being infected and suffering. To suffer from Covid-19 is contemplating symptomatic cases. Accordingly, Axa submitted that the clause limited the relevant disease circumstances at the premises to stipulated types of people connected with the premises (visitors or employees) who experience adverse effects from being infected with the disease, rendering them symptomatic whilst at the premises. The symptoms are physical or mental features which indicate a condition of disease, particularly a feature that is apparent to the patient. Accordingly, when disease was suffered by any visitor or employee at the premises as a result of having symptoms, those symptoms were required to be apparent or displayed at the premises.
345. In summary, the visitor or employee must have (1) displayed symptoms of Covid-19 at the premises and/or (2) be diagnosed as having had Covid-19 whilst at the premises. However, a diagnosis of Covid-19 alone is not sufficient to establish a case which has been “suffered” at the premises because it does not necessarily mean that a symptomatic case of Covid-19 came to light at the premises. It must therefore be established that the relevant person was displaying symptoms of Covid-19 while at the premises, with the identity of the disease capable of being proved by a positive diagnosis of Covid-19 before, during or after attendance at the premises.
346. Axa accepted that, in the present case, if it were to be proved that Covid-19 was manifested at the premises by two employees on 8 March 2020, and they were then hospitalised shortly thereafter due to Covid-19, that would demonstrate the display of potential Covid-19 symptoms at the premises and a court would not require much persuasion that hospitalisation and diagnosis of Covid-19 shortly thereafter allows the inference to be drawn that the symptoms displayed at the premises were actually symptoms of Covid-19.
347. In his oral submissions, Mr Davie said the word “suffering” imported the idea of enduring something unwelcome and that it connoted a subjective experience. (Mr Fawcett had used the word “subjective” in his submissions, albeit in a different sense to the point being made by Mr Davie). The word, in context, was focusing on the actual impact on the relevant person: an actual experience, enduring an unwelcome development.
348. Axa also submitted that their interpretation of “suffered by”, when viewed in conjunction with the need for the disease to be suffered by “a visitor or employee”, reinforced and demonstrated the correctness of their submission as to the appropriate causation test discussed in section D above. In his oral submissions, Mr Davie emphasised that the words told the reader that the clause was concerned with people who had a “particular relationship with the premises”. Furthermore, these words were deliberately identifying a relationship with the premises that could be seen to be relevant to the health and safety obligations which are imposed on a business owner

who has obligations in relation to employees but also obligations to anybody who might be affected by the working practices which, therefore, covers visitors. They were therefore concerned with a specific category of person at a specific place. In support of this submission on causation, the insurers also referred to the fact that, at the end of the schedule to the policy, there was wording in which policyholders were specifically reminded of their obligations in respect of health and safety.

*Discussion*

349. I start with the issue of how to interpret “suffered by any visitor or employee” in the context of the clause as a whole.

350. By way of background, these words were not considered in the *FCA test case*. As reflected in the declarations made by the Supreme Court, the policy wordings in that case referred to the disease being “sustained” or “occurred” or “manifested”. The declarations at paragraphs 5 to 7A thus drew a contrast between those cases in which there was required to be an “occurrence” and those where the language required something more apparent, like “manifestation”:

“5. Subject to paragraph 7A below, there was COVID-19, and COVID-19 was “sustained” or “occurred” within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons contracted COVID-19 so that it could be diagnosed, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

6. Subject to paragraph 7A below, there was “illness sustained by any person resulting from” COVID- 19 within a radius of 25 miles of the premises in MSAm1in1-2 (disease clauses), when any such person was infected with and/or was suffering from COVID- 19, whether or not they were diagnosed with COVID-19, and were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

7. Subject to paragraph 7A below, COVID-19 was “manifested” within QBE1 and RSA1, within a radius of 25 miles of the premises, wherever a person displayed symptoms of, or was diagnosed with, COVID-19 and was/were within a 25 mile radius of the premises.

7A. There was no “occurrence” or “manifestation” of COVID-19, and COVID-19 was not “sustained”, within a given radius of the premises for the purposes of Argenta1, Hiscox4 (hybrid), MSAm1in1-2 (disease clauses), QBE1-3 and RSA1 and 3 merely by reason of the fact that a person travelled through that geographical area and had no contact with anyone living in the area.”

351. Accordingly, the wider language is “sustained” or “occurred”: this captures all people who had the disease, whether or not they were symptomatic or it was diagnosed. Those where the disease is “manifested” is a subset of that wider group, and there the display

of symptoms or diagnosis is required. Declaration 7 encapsulated the decision of the Divisional Court, which was not appealed to the Supreme Court, in paragraph [224] of its judgment:

“[224]. One minor issue of construction should be addressed at the outset. This is what is meant by “manifested” as used within clause 7.3.9(a). Clearly someone who is displaying symptoms of a disease can be said to “manifest” it. We consider that it would also be the case that a person “manifested” the disease if, though superficially asymptomatic, he or she was diagnosed with the disease, because the disease would have “manifested” itself to the diagnoser. We do not consider that it is possible to speak of someone who is asymptomatic and has not been diagnosed as having the disease as having “manifested” it.”

352. It is unquestionably a common usage of the word “suffer” to mean that a person is undergoing a degree (including a very considerable degree) of discomfort as a result of a disease or injury. However, this is by no means the only usage of the word, including in the context of disease. The Oxford English Dictionary gives various definitions (as well as illustrations) of the word “suffer”:

**“I To undergo, endure.**

1. *transitive*. To have (something painful, distressing, or injurious) inflicted or imposed upon one; to submit to with pain, distress, or grief.

a. pain, death, punishment, judgement; hardship, disaster; grief, sorrow, care.

b. wrong, injury, loss, shame, disgrace.

c. bodily injury or discomfort, a blow, wound, disease. *archaic*.

2. To go or pass through, be subjected to, undergo, experience (now usually something evil or painful).

3.

a. *intransitive*. To undergo or submit to pain, punishment, or death.

b. *from* or (now rare) *under* a disease or ailment.

...

8. To be affected by, subjected to, undergo (an operation or process, *esp.* of change). Now only as *transferred* of 1.

...

10. To sustain injury, damage, or loss; to be injured or impaired.”

353. In the light of these definitions, the word “suffer” in the context of illness or disease can be used synonymously with “sustained”. This is clear from paragraph [93] of the

Divisional Court's judgment, relied upon by Mr Fawcett on behalf of Mayfair, and which was later reflected in the Supreme Court declarations quoted above:

“[93]. In relation to the first argument it is helpful to deal at the outset with two preliminary points. The first is that it is common ground that COVID-19 was a Notifiable Disease for the purposes of Extension vii (a)(iii) in all parts of the United Kingdom by 6 March 2020. The second is as to what constituted an “occurrence” of COVID-19, and in particular what constituted such an “occurrence” within the 25 mile radius provided for in Extension vii. The FCA’s case is that there will have been an occurrence of the disease whenever or wherever a person had contracted COVID-19 such that it was diagnosable, whether or not it had been verified by diagnosis, and whether it was symptomatic. RSA’s pleaded case is that nothing less than an actual diagnosis of COVID-19 would be sufficient to establish any relevant “occurrence”. We consider that there will have been an “occurrence” of COVID-19 within an area when at least one person who was infected with COVID-19 was in the relevant area. We do not consider that it is necessary for there to have been an “occurrence” of the disease that the case should have been diagnosed. The definition of Notifiable Disease is in relevant part “illness sustained by any person resulting from ... any human infectious or human contagious disease...” Such a Disease thus “occurs” when the illness is “sustained” by a person, which we consider means, in simple terms, that they are suffering from it, not that they have been diagnosed with it. This fits in with the other parts of the Extension. For example, in sub-clause a(i) of Extension vii, if there were cases of food poisoning at the premises, which led to business interruption, but it took some time for it to be diagnosed that this was due to a Notifiable Disease, we would consider that the Notifiable Disease had “occurred” when there were the first cases of food poisoning, and that the “occurrence” was not postponed until there was diagnosis. (Emphasis supplied).”

354. It is true that the Divisional Court was not here considering the present argument, but rather was addressing whether or not an actual diagnosis was required in order for there to be an occurrence or for the disease to be “sustained”. Nevertheless, the paragraph shows that “suffer” is not confined to the case where a person is subjectively experiencing a level of personal discomfort. In a case where a disease has been diagnosed, there is in my view no difficulty in saying that the person has been “suffering” from the disease from the time that the person contracted the disease, even though it may have taken some time for the individual to experience the level of discomfort which led to the consultation of a doctor or the taking of a test for the disease. In view of the use of the word “sustained” synonymously with “was suffering” in the body of the judgment of the Divisional Court, I do not attach any significance to the fact that declaration 6 (which is based on the Divisional Court’s judgment) refers to “such person was infected with and/or was suffering from COVID- 19”.
355. The question remains, however, as to how the words “suffered by any visitor or employee” in the present insurance policy are to be interpreted. Whilst the argument of the insurers is certainly grammatically possible on the basis of the word “suffer”, I think that it makes far more commercial sense to interpret it as being synonymous with

“sustain”. This gives a clear and simple test to apply, and (as shown by the decision of the Supreme Court in the *FCA test case*) this is a relevant factor when it comes to interpreting the policy.

356. By contrast, if the word “suffer” were to denote the subjective experience of the visitor or employee, there would be an uncertain threshold for the identification of the point at which the subjective experience was sufficiently bad to mean that the person was “suffering”. The insurers contended that this was not difficult to ascertain: it would depend upon whether the individual was symptomatic. However, it is not clear why a person experiencing minor symptoms, but was not in any significant discomfort at all, would be regarded as “suffering” from the disease, if a subjective experience approach were required.
357. Furthermore, in a case (favoured by the insurers in the context of their causation arguments) where a serious and highly infectious disease had been diagnosed in an individual on the day after he or she had been at the premises, and where the authorities had decided that closure was required because of that very illness, there is no reason why a claim for BI losses should depend upon whether the individual happened to be feeling perfectly well (and was therefore asymptomatic) on the day of the visit to the premises, or happened to be feeling unwell to a degree.
358. Accordingly, I accept Mayfair’s primary case as to the meaning of “suffer” as being equated with “occur” or “sustain”. If I had not accepted that case, I would have accepted Mayfair’s alternative case that “suffer” would include all of those in whom the disease was manifested in accordance with the approach in declaration 7. If a visitor or employee was at the premises and either displayed symptoms of Covid-19 there, or was diagnosed with Covid-19 (and therefore had the illness when he or she was there), then in both cases the disease was suffered by the individual whilst at the premises. I can see no good reason why the use of the word “suffer” should be interpreted more narrowly than “manifest” in the present context. The example given in the previous paragraph illustrates why it should not be. However, I agree with Mayfair that there is nothing in the clause which requires the disease to be apparent (either to the individual or to a diagnoser), and this is one reason why I prefer Mayfair’s primary case to its alternative. However, if the disease is actually apparent, either because the individual knows that he is suffering unwelcome symptoms, or because it is actually diagnosed, then in both cases the requirement of “suffered by” is met. I therefore do not accept the insurers’ argument that “suffered by” means something more apparent, or more visible, than “manifested”.
359. I now turn to the Mayfair insurers’ broader arguments on causation, but I can deal with these briefly. In short, I do not consider that any of the differences between the Mayfair policy language and the language of other policies produces a causation analysis different to that discussed in Section D above. I have already considered the word “suffer” and concluded this is to be equated with “occur/ sustain”, alternatively “manifested”, both of which were subject to the Supreme Court’s causation analysis.
360. There is also, in my view, no significance – in terms of the causation analysis – to the provision requiring the person who “suffers” to be a visitor or employee. In practical terms, this is likely to cover practically all of the people who will have been in the night-club premises. The only possibly excluded people, on the insurers’ submission, are directors or employers or owners. However, the owner in the present case is a corporate

entity, and it is by no means clear that any shareholders in the owning company, who went to the premises, would be excluded from the concept of a “visitor”. It is also open to argument whether a director, who went to the premises, was also a “visitor”, and it is also possible that a director may have an employment contract as well and therefore come within the expression “employee”. In any event, at best (from insurers’ perspective) only a very small subset of people who sustained the illness, or in whom the illness was manifested, would fail to qualify as a visitor or employee. The existence of this small subset can in my view make no difference to the causation analysis. In that context, it is to be noted that those in whom the disease was manifested is likely to be a much larger subset of the people in whom the disease occurred, but nevertheless the existence of this large subset made no difference to the Supreme Court’s causation analysis.

361. I also do not consider that causation analysis is affected by the reminder, towards the end of the schedule to the Mayfair Policy, of Mayfair’s health and safety obligations. The relevant wording is as follows:

“We also remind you of your obligations under the Health & Safety at Work Act 1974 to protect the health safety and welfare of your Employees which includes

- Workplace risk assessments
- Full and effective training
- Provision of appropriate personal protective equipment (PPE)
- Communication of health and safety procedures”

362. This reminder does not amount to a contractual term, and in any event, I do not see how it can have any bearing on the causation analysis. All of the claimants in the present cases are businesses which are likely to have employees, and duties will be owed to those employees (and indeed to visitors under, for example, the Occupiers Liability Act 1957). The fact that one aspect of Mayfair’s legal obligations is referred to at the end of the Mayfair Policy schedule, but not the other policies, is of no significance.

## **H: Answers to the preliminary issues.**

363. This section contains my answers to the various preliminary issues in the light of the reasons set out in the earlier sections of this judgment. As previously stated, there were some preliminary issues which were no longer live at the time of the hearing, or were resolved by agreement of the parties. The preliminary issues are numbered in the order in which they appear in the order made at the CMC on 6 December 2022, but with some adjustment in order to reflect an amendment to the *Hairlab* preliminary issues, and the addition of issues in *Why Not Bar*. Ordinary text sets out the preliminary issue, and my answer is in bold text.

### *Excel*

1. For the purposes of the Infectious Diseases Extension, in order to show that loss resulting from interruption of or interference with the Claimant's business at the Premises was proximately caused by closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an occurrence of COVID-19 at the Premises, is it sufficient to prove that the order or advice was made or continued in response to cases of COVID-19 which included at least one case of COVID-19 at the Premises which had occurred by the date of the order or advice?

**Yes: it is sufficient so to prove.**

2. If so, does that one case of COVID-19 need to have occurred within a certain period of time before the date of the order or advice (and how in principle is that period of time to be ascertained)?

**The relevant case of Covid-19 at the Premises must be a proximate cause of the order or advice. Whether it needs to have occurred within a certain period of time before the date of the order or advice is a factual question, rather than a question of construction of the policy.<sup>2</sup>**

3. For the purposes of the Infectious Diseases Extension, in order to show that loss resulting from interruption of or interference with the Claimant's business at the Premises was proximately caused by closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an occurrence of COVID-19 at the Premises, is it necessary to prove:

(a) That the occurrence was diagnosed?

**No.**

(b) That the occurrence was reported or otherwise made known to the relevant local or governmental authority prior to the order or advice for closure?

**No.**

---

<sup>2</sup> This reflects the agreement of the parties as to the terms of a declaration in response to this question.

- (c) That the order or advice for closure would not have been made in the absence of (i.e. ‘but for’) the occurrence, or that some other causal requirement is satisfied (and if so, what)?

**It is not necessary to prove that the order or advice for closure would not have been made in the absence of (i.e. ‘but for’) the occurrence. For the causal requirement to be satisfied: see issue 1 above.**

4. Does an occurrence of COVID-19 at the Premises before it was made a notifiable disease on 5 March 2020 in England constitute an “*occurrence ... of any human contagious or infectious disease ... an outbreak of which is required by law or stipulated by the governmental authority to be notified*” within the meaning of the Infectious Diseases Extension?

**No. Only occurrences of COVID-19 after it became a notifiable disease are relevant for purposes of the Extension.**

***PizzaExpress***

5. In relation to Extension 2(a)(i), and on its proper construction, is the causal requirement in that Extension satisfied:

(a) As the Claimants submit, by proof that the relevant order or advice of the relevant government restricting the use of the Premises was introduced in response to cases of COVID-19 in the relevant territory as a whole (whether known or unknown), which included at least one case of COVID-19 at the Premises in the relevant territory, which case occurred after COVID-19 became a Notifiable Human Disease and by the date of such order or advice; or

(b) As the Defendants submit, by proof of at least one case of COVID-19 at the Premises in the relevant territory, which case occurred after COVID-19 became a Notifiable Human Disease and by the date of such order or advice, and by proof that:

(i) The case(s) of COVID-19 at the Premises was a necessary cause of the relevant restrictions on the use of the Premises; and/or

(ii) The relevant order or advice of the relevant government restricting the use of the Premises was specifically directed at and taken in response to the case(s) of COVID-19 at those Premises?

**Yes to (a). No to (b).**

6. On the proper construction of Extension 2(a)(i), what must the Claimants prove to establish a relevant “*occurrence of a Notifiable Human Disease at the Premises*”? Specifically:

(a) As the Claimants submit, is it sufficient to prove that a person was present at the relevant Premises who could have been diagnosed with COVID-19 at the time of the visit, whether or not the infection was ever in fact verified by a medical professional or by medical testing, and whether or not the infection was symptomatic at the time of the visit; or

- (b) As the Defendants submit, is it necessary to prove that:
- (i) A person was present at the relevant Premises and was diagnosed as having been infected with COVID-19 at the time of that visit (whether the diagnosis was at the time of the attendance or prior to the attendance or subsequent to the attendance); and/or
  - (ii) The case of COVID-19 at the relevant Premises was reported or otherwise known to the relevant authorities prior to the making of the order or the giving of the advice restricting the use of the Premises?

**Yes to (a). No to (b).**

***Kaizen Cuisine***

7. For purposes of the Premises Closure or Restrictions Extension to Section 2 of the Policies, in order to show that loss from interruption or interference with the Claimant's business was proximately caused by closure or restrictions placed on the Premises on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of COVID-19 occurring at the Premises, is it sufficient to prove either:

- (a) That the interruption or interference was in consequence of closure or restrictions placed on the Premises in response to cases of COVID-19 which included at least one case of COVID-19 at the Premises which had occurred by the date of such closure or restrictions; or

**Yes.**

- (b) That the interruption or interference was in consequence of closure or restrictions placed on the Premises in response to cases of COVID-19 which included at least one case of COVID-19 at the Premises which had occurred within a certain period of time before the date of such closure or restrictions (and, if so, how in principle is that period of time to be ascertained)?

**Occurrences of COVID-19 which took place before 26 March 2020 cannot qualify as proximate causes of closures or restrictions which were introduced subsequent to the lifting of the first national lockdown on 4 July 2020.<sup>3</sup>**

8. If the answer to issue 7 is 'no', is it necessary to prove that the interruption or interference was in consequence of closure or restrictions which would not have been placed on the Premises but for the occurrence of COVID-19 at the Premises, or does the Premises Closure or Restrictions Extension impose some other causal requirement (and if so, what)?

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<sup>3</sup> This reflects the agreement of the parties as to the terms of a declaration in response to this question. It also reflects the statements by on behalf of the Kaizen parties in the following paragraphs of their opening submissions: paragraph 104 ("It is not part of the Claimants' case in these actions that cases before 21 or 26 March 2020 were the cause of restrictions after the first lockdown was eased on 4 July 2020"); and paragraph 107 ("The position later in the year is very different. The disease was better understood. The fact that the restrictions were eased on 4 July 2020 demonstrates that the pre-March 21, 2020 cases had lost their potency. Subsequent developments in the progression of the disease led to subsequent restrictions").

**Since the answer to 7 (a) is “yes”, this issue does not arise. However, for the avoidance of doubt: “but for” causation does not have to be proved, and the relevant causal requirement is set out in paragraph 7 (a) above.**

9. What (if anything) is the effect of the requirement in the Premises Closure or Restrictions Extension that any closure or restrictions must be placed on the Premises “*on the advice or with the approval of the Medical Officer of Health for the Public Authority*”?

**The “Medical Officer of Health” wording is satisfied by the restrictions imposed by the government (including the 21 and 26 March Regulations) taken on the advice or with the approval of the Chief and/or Deputy Chief Medical Officer.**

10. Does an occurrence of COVID-19 constitute an occurrence of a “Notifiable Human Disease” (being “An illness sustained by any person caused by ... any human infectious or contagious disease an outbreak of which the competent public authority has stipulated shall be notified to them”) within the meaning of the Policy only if it takes place after COVID-19 had been designated as a notifiable disease by the competent public authority?

**Yes.**

#### *Hairlab*<sup>4</sup>

11. On the proper construction of the Disease Extension, is the causal requirement in that Extension between the occurrence of a Notifiable Disease at the Premises and the interruption or interference satisfied:

(a) As the Claimants submit, by proof that the interruption was a result of Government action taken or continued in response to the danger to life and health posed by Covid-19, which was constituted by every case of Covid-19 including at least one case of Covid-19 at the premises covered by the clause, and which had occurred by the date of such Government action and whether before or after 5 March 2020?

OR

(b) As the Defendants submit, by proof of at least one occurrence of Covid-19 at the Premises which occurred after Covid-19 became a notifiable human disease on 5 March 2020 and by the date of the action resulting in closure or restrictions on the Premises, and by proof that:

(i) The relevant closure or restriction was specifically directed at and taken in specific response to the cases(s) of Covid-19 occurring at the Premises? and/or

(ii) The relevant closure or restrictions and/or interruption or interference would not have happened but for the said occurrence(s) of Covid-19 at the Premises?

---

<sup>4</sup> The issues were originally numbered 11 and 12 in the CMC order dated 6 December. They were subsequently revised so as to give rise to three issues. I have renumbered these 11, 12 and 12A.

**Yes to (a) in relation to causation. However, only occurrences of Covid-19 after it became a notifiable disease are relevant for the purposes of the Disease Extension.**

**No to (b).**

12. 'On the proper construction of the 'any occurrence of a Notifiable Disease ... at the Premises', is there an 'occurrence':

(a) As the Claimants submit, by proof of a case of Covid-19 at the premises which had occurred by the date of any relevant Government action?

OR

(b) As the Defendants submit, by proof that a person was actually diagnosed as having Covid-19 while at the Premises and such case(s) were reported to, or known by, the persons/authorities who were authorised to take measures to respond to the occurrence at the Premises?'

**Yes to (a); No to (b).**

12A. Subject to the above, on the proper construction of the Disease Extension within the policy as whole,

(a) Is the First Claimant, whose policy was for the period of 12 months from 31 January 2020, entitled to recover its claimed losses

(i) under only a single indemnity period limited to 12 months and, if so, on what basis?

OR

(ii) under multiple indemnity periods and, if so, what does the First Claimant need to prove to establish such entitlement by reference to each such indemnity period?

And

(b) As regards the Second and Third Claimants, whose policies expired on 6 August 2020,

(i) are those Claimants entitled to recover for losses claimed in respect of restrictions imposed after 6 August 2020, as the Claimants submit, and if so, what do the Second and Third Claimants need to prove to establish such entitlement?

OR

(ii) is there no cover for losses resulting from occurrences of a Notifiable Disease and/or restrictions imposed or continuing after the end of the policy period, as the Defendants submit?

**Not applicable.**<sup>5</sup>

*Mayfair*

13. For the purposes of the Disease Clause in *Mayfair* do the words “*suffered by any visitor or employee...at the Premises*” when applied to COVID-19 mean the “*manifestation*” of symptoms (requiring a person to have displayed symptoms of and/or was diagnosed with COVID-19 whilst at the Premises) or do they mean a person was displaying symptoms of COVID-19 while at the Premises?

**They mean that a visitor or employee was at the Premises at a time when he or she had contracted Covid-19.**

14. For the purposes of the Disease Clause in *Mayfair*, in order to show that loss from interruption of the insured business was proximately caused by closure of the Premises by Government due to any visitor or employee suffering from COVID-19 at the Premises is it sufficient to prove that the closure of the Premises by Government was due to at least one case of COVID-19 being suffered by a visitor or employee at the Premises which had occurred by the date of such Government action?

**Yes.**

15. For the purposes of the Disease Clause in *Mayfair*, in order to show that loss from interruption of the insured business was proximately caused by closure of the Premises by Government due to any visitor or employee suffering from COVID-19 at the Premises is it necessary for the Claimant to prove that the closure of the Premises by Government was proximately caused by at least one case of COVID-19 being suffered by a visitor or employee at the Premises:

(a) As to which the Government had information prior to the date of such Government action?

(b) Which the Government took into account in taking such Government action?

**No.**

16. Is it the case that the Disease Clause in *Mayfair* does not provide an indemnity in respect of the effects of national or regional closure measures by Government:

(a) Taken without reference to circumstances at the Premises? and/or

(b) Which would have been taken in any event irrespective of whether human notifiable infectious disease was suffered by any visitor or employee at the Premises?

**No (i.e. the clause in *Mayfair* can provide a remedy in circumstances 16 (a) and (b)).**

---

<sup>5</sup> Mr Gruder said (Day 7/page 98), following earlier discussion, that the parties had agreed that issue 3 could be left to a later date.

**Why Not Bar<sup>6</sup>**

17. On the proper construction of Extension 6A, what must the Claimant prove to establish “notifiable human disease manifesting itself at the Premises”? Specifically, in circumstances where it is common ground that a notifiable human disease, such as Covid-19, was “manifesting itself at the Premises” whenever a person attended such Premises and was medically diagnosed as having been infected with the notifiable human disease and/or displayed symptoms of the notifiable human disease at the time of that attendance:

(1) Does the relevant manifestation of Covid-19 need to have occurred after Covid-19 was designated as a notifiable disease in the relevant territory (in this case Wales)?

**Yes.**

(2) Does the relevant manifestation of Covid-19 need to have occurred before the relevant closure or restrictions were placed on the Premises?

**Yes.<sup>7</sup>**

(3) Does the manifestation of Covid-19 need to have been reported or otherwise known to the relevant authority identified in Extension 6A prior to the time of the imposition of the relevant closure or restriction?

**No.**

18. On the proper construction of Extension 6A, is the causal requirement in that Extension between the manifestation at the Premises and the closure or restrictions satisfied:

(1) As the Claimant submits, by proof that the interruption or interference was in consequence of closure or restrictions placed on the Premises in response to cases of Covid-19 which included at least one case of Covid-19 manifesting itself at the Premises?

**Yes.**

If so, does that one case of Covid-19 manifesting itself at the Premises have to have occurred within a certain period of time before the date of the relevant closure or restriction (and how in principle is that period of time to be ascertained)?

**Without prejudice to Why Not Bar’s right to argue that all government restrictions relating to nightclubs, including those post-dating the first lockdown in Wales and those post-dating the end of the Period of Insurance, are to be treated as substantially the same restriction and thereby proximately caused by manifestation(s) of COVID-19 at the Premises prior to 20 March 2020:**

---

<sup>6</sup> These issues were agreed subsequent to the order made at the 6 December CMC. In the relevant order, they were issues 1-4, which I have renumbered 17 – 20.

<sup>7</sup> This was not in dispute at the hearing.

- (a) **Any manifestation(s) of COVID-19 at the Premises prior to 20 March 2020 were not the proximate cause of subsequent restrictions placed on the premises after the end of the first lockdown in Wales on 13 July 2020.**
- (b) **The Claimant has to establish that the case of COVID-19 manifesting itself at the Premises was a proximate cause of the relevant closure or restriction.<sup>8</sup>**

OR

- (2) As the Defendants submit, by proof of at least one case of Covid-19 manifesting itself at the Premises which manifestation occurred after Covid-19 became a notifiable human disease in the relevant territory and by the date of the relevant closure or restriction placed on the Premises, and by proof that:
- (a) The case(s) of Covid-19 manifesting at the Premises was a necessary cause of the relevant closure or restriction; and/or
- (b) The relevant closure or restriction was specifically directed at and taken in specific response to the case(s) of Covid-19 manifesting at the Premises?

**No to (2) (a) and (b).**

19. As regards the authority identified in Extension 6A, on the proper construction of Extension 6A:

- (1) What is the meaning and effect of the requirement in Extension 6A that the relevant closure or restriction is placed on the Premises “*on the advice or with the approval of the Medical Officer of Health of the Public Authority*”?

**The Medical Officer of Health can include a relevant medical officer at the Welsh Government and the UK Government and so is not restricted to a “local authority”.**

- (2) Do the measures of the Welsh Government and/or the UK Government relied upon by the Claimant, identified at paragraph 3.7 of the Reply, constitute closures or restrictions placed on the Premises “*on the advice or with the approval of the Medical Officer of Health of the Public Authority*”?

**Yes, the measures relied upon by Why Not Bar are capable of fulfilling the relevant requirements.**

20. Does the (or any) Indemnity Period in respect of the Claimant’s claim last for 24 months, as alleged by the Claimant, or, save possibly for a short period of time after its end, is there no cover under the Policy for any of the Claimant’s claimed losses after the end of the Period of Insurance on 1 November 2020, as the Defendants contend?

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<sup>8</sup> This reflects the agreement of the parties as to the terms of a declaration in response to this question.

**Not applicable.<sup>9</sup>**

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<sup>9</sup> The parties agreed that there was no identifiable issue of law which could appropriately be resolved as a preliminary issue: see Day 6/ pages 144 and 147.

## **Appendix 1**

### *Excel*

#### **Property Policy Schedule**

Policyholder: London International Exhibition Centre Plc, London International Exhibition Centre Holdings Plc, LIEC Phase 3 WE4A Ltd, LIEC Phase 3 WE4B Ltd & Greater London Authority

Policyholder's Address: 1, Western Gateway, London, E16 1XL

Business Description: Exhibition centre operators, property owners, property developers and any allied or ancillary activities.

#### **Your Policy Dates:**

Effective Date: 23 March 2020

To: 30 May 2020

#### **Policy Wordings**

It is here noted and agreed that the following Policy Wordings apply

UKC02170G in respect of Property Damage Business Interruption Money and Terrorism Insurance

#### **Denial of Access (Non-Damage) – Extension**

This clause applies to the Business Interruption Insurance section of this Policy

Cover 10 Any other accident is extended to cover interruption of or interference with the Policyholder's Business in consequence of access to the Premises being hindered or prevented as a result of the actions or advice of a government or local authority due to an emergency arising which is likely to endanger life or property at or in the immediate vicinity of the Premises provided that there shall be no liability under this Extension for

...

4) any consequence of labour disputes, infectious or contagious diseases drought

...

Special Condition

...

The liability of the Company in respect of this Extension shall in no case exceed £7,500,000 or as otherwise specified in the Schedule whichever is the lesser amount

### **Murder and Suicide Extension**

This clause applies to the Business Interruption Insurance section of this Policy

The word Damage is extended to include murder or suicide occurring at the Premises and for the purpose of this Extension the Company shall not be liable for more than the limit stated below in respect of any one loss

Limit £15,000,000 Subject otherwise to the terms Exclusions and Conditions of this Policy

### **Infectious Diseases – Extension**

The word Damage is extended to include closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of

- A) Any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified
- B) Food or drink poisoning
- C) Vermin or pests
- D) Defective sanitation

Provided that

- 1) the Maximum Indemnity Period is limited to three months and shall apply from the date from which the closure order is enforced
- 2) the Company shall not be liable under this Extension for more than the limit stated below in respect of any one loss

Limit £15,000,000

Subject otherwise to the terms Exclusions and Conditions of this Policy

## **Property Insurance – Policy wording**

### **Policy Definitions**

#### **Damage**

Accidental loss destruction or damage

#### **Business Interruption Insurance**

If Damage by any of the Covers insured occurs at the Premises, to property used by the Policyholder for the purpose of the Business and causes interruption of, or interference with the Policyholder's Business and the Premises:

the Company will pay to the Policyholder the amount of loss resulting from the interruption or interference caused by the Damage in accordance with the provisions of the insurance.

#### **Item on Gross Profit**

(unless shown as Not Insured in the Schedule)

Subject to the special provisions below the Company will pay as indemnity:

1 In respect of **Reduction in Turnover**

the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period falls short of the Standard Turnover in consequence of the Damage.

2 In respect of **Increase in Cost of Working**

the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period in consequence of the Damage

#### **Definitions**

##### **Indemnity Period**

The period beginning when the Damage occurs, ending when the results of the Business cease to be affected by the Damage, but not exceeding the Maximum Indemnity Period (as shown in the Schedule).

##### **Insurable Amount**

The Gross Profit or Gross Revenue which would have been earned in the twelve months immediately following the date of Damage, if the Damage had not occurred and allowing for trends of the Business or circumstances which would have affected the Business irrespective of the Damage occurring.

##### **Terrorism Insurance**

Notwithstanding any provisions to the contrary within this Policy, the insurance in respect of all items insured by the insurances shown as operative in the Terrorism Insurance section of the Schedule is extended to include Terrorism Insurance as specified below.

This Policy includes Damage or loss resulting from Damage to Property and consequential loss resulting therefrom in so far and to the extent that it is insured by this Policy in the Territories stated below caused by or resulting from an Act of Terrorism, where any Act of Terrorism within Great Britain must be certified as such by HM Treasury or a tribunal as may be agreed by HM Treasury...

*Hairlab*

**Shopkeepers Statement of Fact and Schedule**

Insured Hair-Lab Limited

Premises Address 16 Mayfair House  
Town Centre  
Basingstoke  
RG21 7JT

**Premises Risk Address Occupied As**

1 16 Mayfair House Hairdressing  
Town Centre  
Basingstoke  
RG21 7JT

**Effective From** 31 Jan 2020 00:01 **Expires on** 30 Jan 2021 24:00

**Business Interruption Extension**

**Cover**

Human Infectious Diseases (Premises)/Food Poisoning (MAX IP 12 months) £500,000

**Commercial Guard – Shopkeepers**

**Policy Wording**

**8 Notifiable Diseases, Poisoning, Defective Drains and Murder or Suicide**

The **Company** will indemnify the **Insured** in respect of loss resulting from the interruption or interference with the **Business** in consequence of:

(a)

- iii. any occurrence of a Notifiable Disease (as defined below) at the **Premises** or attributable to food or drink supplied from the **Premises**

- iv. any discovery of an organism at the **Premises** likely to result in the occurrence of a Notifiable Disease (as defined below)
- (e) the discovery of vermin or pests at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (f) any accident causing defects in the drains or other sanitary arrangements in the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (g) any occurrence of murder or suicide at the **Premises**

### **Special Provisions**

- (c) Notifiable Disease shall mean illness sustained by any person resulting from:
  - iii. food or drink poisoning
  - iv. any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the competent Local Authority has stipulated shall be notified to them.
- (d) For the purpose of this Extension the Definition of Indemnity Period is amended to read:

Indemnity Period shall mean the period during which the results of **Business** shall be affected in consequence of the loss beginning:

  - iii. in the case of (a) and (d) above, with the occurrence or discovery of the incident
  - iv. in the case of (b) and (c) above, with the date from which the restrictions on the **Premises** are applied and ending not later than the Maximum Indemnity Period thereafter.

For the purposes of this Extension the Maximum Indemnity Period is 12 months.

The **Company** shall not be liable under this Extension for any costs incurred in the cleaning, repair, replacement, recall or checking of the Property.

The **Company** shall only be liable for the loss arising at those **Premises** which are directly subject to the occurrence described in (a), (b), (c) or (d).

*Muscleworks*

<b>Insured</b>	Muscleworks Limited		
<b>Postal Address</b>	144 Vallance Road London E1 5BW		
<b>Effective From</b>	7 <sup>th</sup> August 2019 00:01 hours	<b>Expires on</b>	6 <sup>th</sup> August 2020 24:00 hours
<b>Premises 1</b>	114 Vallance Road, London, Greater London, E1 5BW		
<b>Notifiable Diseases, Poisoning, Defective Drains and Murder or Suicide</b>			£300,000

**Commercial Guard – Leisure**

**Policy Wording**

**7 Notifiable Diseases, Poisoning, Defective Drains and Murder or Suicide**

The **Company** will indemnify the **Insured** in respect of loss resulting from the interruption or interference with the **Business** in consequence of:

- (a)
- v. any occurrence of a Notifiable Disease (as defined below) at the **Premises** or attributable to food or drink supplied from the **Premises**
  - vi. any discovery of an organism at the **Premises** likely to result in the occurrence of a Notifiable Disease (as defined below)
- (h) the discovery of vermin or pests at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (i) any accident causing defects in the drains or other sanitary arrangements in the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the Local Authority
- (j) any occurrence of murder or suicide at the **Premises**

**Special Provisions**

- (e) Notifiable Disease shall mean illness sustained by any person resulting from:

- v. food or drink poisoning
  - vi. any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the competent Local Authority has stipulated shall be notified to them.
- (f) For the purpose of this Extension the Definition of Indemnity Period is amended to read:

Indemnity Period shall mean the period during which the results of **Business** shall be affected in consequence of the loss beginning:

- v. in the case of (a) and (d) above, with the occurrence or discovery of the incident
- vi. in the case of (b) and (c) above, with the date from which the restrictions on the **Premises** are applied and ending not later than the Maximum Indemnity Period thereafter.

For the purposes of this Extension the Maximum Indemnity Period is 12 months.

The **Company** shall not be liable under this Extension for any costs incurred in the cleaning, repair, replacement, recall or checking of the Property.

The **Company** shall only be liable for the loss arising at those **Premises** which are directly subject to the occurrence described in (a), (b), (c) or (d).



*Mayfair*

**Schedule of Insurance**

The Insured	<b>Mayfair Banqueting Ltd</b>
The Address	<b>3<sup>rd</sup> Floor</b> <b>13 Maddox Street</b> <b>London</b> <b>W1S 2AU</b>
Trading Name	<b>Maddox Club &amp;/or Pucci</b>
The Business	<b>Late Night Bars</b>
Type of insurance	<b>Commercial Combined and Legal Costs Insurance</b>
Premises/Situation	<b>3-5 Mill Street, London W1S 2AU</b>
...	
The Period of Insurance	<b>08/08/2019 to 24/03/2020</b>  both days inclusive, and for such further period or periods as may be mutually agreed upon

**CPM10 Murder, suicide and infectious diseases extension 2006**

Section B (loss of Profits) is extended to included losses arising from the closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee or by defective sanitation vermin or pests at the Premises as specified in the schedule or by murder or suicide occurring at the Premises.

Notwithstanding the above losses arising from either avian flu or legionnaires diseases are limited to £ 50,000 any one occurrence and in the aggregate.

**Page 13 of 13**

We also remind you of your obligations under the **Health & Safety at Work Act 1974** to protect the health safety and welfare of your Employees which includes

- Workplace risk assessments
- Full and effective training
- Provision of appropriate personal protective equipment (PPE)
- Communication of health and safety procedures

*Kaizen*

Restaurant Package Insurance

**INCEPTION DATE**                    18 October 2019 to 17 October 2020

**BUSINESS NAME**                    Kaizen Cuisine Ltd t/a Kaizen Cuisine

**BUSINESS ADDRESS**                70 Parchment Street  
    Winchester  
    Hampshire  
    SO23 8AT

**Small Commercial/SME Package Cover Policy Document**

**Definitions**

**Notifiable Human Disease – An illness sustained by any person caused by**

- a) food or drink poisoning
- b) any human infectious or contagious disease

an outbreak of which the competent public authority has stipulated shall be notified to them

Premises – The Buildings and the land inside the boundaries at the risk address stated in the Schedule

**General Exclusions**

This Policy does not cover

- 1) War Government Action Radioactive Contamination and Sonic Bangs

Damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any **Consequential Loss** or legal liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from

...

- b) nationalisation confiscation requisition seizure or destruction by the government or any public authority

...

## SECTION 1 – MATERIAL DAMAGE

In the event of **Damage** to **Property** insured at the **Premises** from an **Insured Peril** during the Period of Insurance the **Insurer** will indemnify the Insured for the loss or amount of **Damage** or at its option replace or reinstate such **Property** in accordance with the provisions of the Policy.

...

### Insurable Perils

The following are the Insurable Perils operative as Insured Perils if stated in the Schedule

...

6) Riot civil commotion strikers locked out workers persons taking part in labour disturbances or malicious persons

Excluding damage

a) Arising from cessation of work or due to confiscation nationalisation seizure requisition or destruction by order of the government or any public authority

### Basis of Settlement Clauses

...

4) Day One (Non Adjustable) – Property Insured other than Domestic Contents and Stock

...

Special Provisions relating to **Computers**

...

For the purposes of this clause, the *Declared Value* shall mean the **Insured's** assessment of the *Cost of Reinstatement* of the items specified on the Schedule showing a *Declared Value* at the level of costs applying at the inception of the Period of Insurance including the extent to which indemnity is provided for

a) the additional *cost of reinstatement* to comply with European Union and Public Authority requirements

...

6) European Union and Public Authorities

The **Insurer** will indemnify the **Insured** for the additional cost of

a) reinstating the damaged parts of the **Buildings**

b) upgrading any undamaged parts of the **Buildings**

for an amount not exceeding the amount that would have been payable if the **Buildings** had been totally destroyed incurred solely by the necessity to comply with any building or other statutory regulations or Public Authority Bylaw or European Community Legislation in force at the time of such **Damage** excluding...

### Conditions

...

#### 6) Minimum Level of Security

...

f) all electrically operated doors must be secured by either

i) an internal opening switch locked in the off position by means of an integral lock and/or padlock or

...

Any door or window officially designated a fire exit by the fire authority is excluded from these requirements. These are to be secured internally by panic bolts or fire exit bolts. Any additional devices are to be approved by the local Fire Prevention Officer

## SECTION 2 – BUSINESS INTERRUPTION

### Extensions to Section 2

...

The liability of the **Insurer** includes loss as insured by this Section resulting from interruption or interference with the **Business** in consequence of

#### 1) Premises Closure or Restrictions

- a) Closure or restrictions placed on the **Premises** on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a **Notifiable Human Disease** occurring at the **Premises**
- b) closure of the whole or part of the Premises by order of the Public Authority consequent upon injury or illness sustained by any person caused by or traceable to foreign or injurious matter in food or drink sold from the **Premises** by the **Insured**
- c) closure of the whole or part of the Premises by order of the Public Authority consequent upon vermin and pests at the **Premises**
- d) closure of the whole or part of the Premises by order of the Public Authority consequent upon closure of the whole or part of the **Premises** by order of the Public Authority consequent upon defects in the drains and other sanitation at the **Premises**
- e) closure of the whole or part of the Premises by order of the Public Authority consequent upon murder or suicide occurring at the **Premises**

subject to an aggregate maximum of £50,000 in any one Period of Insurance

The **Insurer** shall not be liable under this extension for costs incurred in cleaning repair replacement recall or checking of property

***Why Not Bar***

Period of Insurance                      **From 2<sup>nd</sup> November 2019 to 1<sup>st</sup> November 2020**

Insured name in full                      **Why Not Bar and Lounge Ltd**

Trade    **Wine Bar**

Business                                        **Late night bar/Licenced entertainment venue**

**Premises Insured                      Address**

Premises 1                                      2 Pier Street, ABERYSTWYTH, Dyfed

**G99 – Licenced Premises Conditions**

You must comply with the following conditions

- 1) You must maintain all necessary licences with the Local Authority and comply with all licence requirements as detailed by the Local Authority

**Policy booklet Commercial Combined**

**General Definitions**

**Premises**

The location(s) as stated in the Schedule or in any Endorsement, that are used by You for the purposes of the Business.

Section 1 Property Damage

...

Covers

The following are the Covers insured except as otherwise stated in the Schedule

...

- 3 **Riot, civil commotion, strikers, locked-out workers or persons taking part in labour disturbances or malicious persons** excluding Damage

- a) arising from confiscation, requisition or destruction by order of the government or any public authority.

...

Basis of Settlement

In respect of Buildings and General Contents (other than motor vehicles, directors', partners', and Employees' personal effects)

...

b) the cost of complying with Public Authorities' requirements, being such additional cost of reinstatement of the property as may be incurred, with Our consent, in complying with building regulations or local authority or statutory requirements or EU requirements, first imposed upon You following the Damage, provided that the reinstatement is completed within twelve months of the occurrence of the Damage or within such further time as We may in writing allow

...

Special Conditions

Risk Protections

...

E Security Precautions

You shall ensure that:

...

10) in the event that You receive any notification:

...

b) from a Local Authority or Magistrate imposing any requirement for abatement of nuisance; or

...

You shall advise Us as soon as possible and in any event not later than 10am on Our next working day and comply with any subsequent requirements stipulated by Us.

### **Business Interruption**

Extensions

The insurance is extended to include business interruption loss as insured in this Section in consequence of

...

6

A) closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises.

- B) closure or restrictions placed on the Premises due to Injury or illness sustained by any customer or Employee arising from or traceable to foreign or injurious matter in food or drink sold from the Premises
- C) closing of the whole or part of the Premises by order of the Public Authority for the area in which the Premises are situate consequent upon defects in the drains and other sanitary arrangements at the Premises.
- D) closure or restrictions placed on the Premises due to murder or suicide occurring at the Premises.
- E) loss destruction or damage caused by any of the Covers to property in the vicinity of the Premises which prevents or hinders the use of the Premises or access thereto whether the Premises or Your property therein shall be damaged or not but excluding Damage which prevents or hinders the supply of electricity gas water or telecommunications services

## *Pizza Express*

### Schedule

<b>The Insured</b>	Pizza Express Group Ltd and Subsidiary Companies
<b>The Business</b>	Operation of restaurants. Dough and pizza base makers and suppliers. Pizza Express branded products manufactured under license, Landlords, occupiers and lessors. Occasional event catering. Limited delivery service (to be sub contracted to third party imminently).

### Trio

### Property and Business Interruption policy

#### General Definitions

Premises	means any premises owned, leased, used or occupied by the <b>Insured</b> within the Territorial Limit, as declared to and accepted by <b>Insurers</b> .
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#### Endorsement

Pages 27 & 28 of the Trio Property and Business Interruption Policy **Extended Incident** is amended as follows –

#### 2 Extended Incident

**Incident** for the purpose of all cover provided by Section 2 includes:

##### a. Notifiable Human Disease and Other Health Risks

- i. any occurrence of a **Notifiable Human Disease** at the **Premises** or a **Notifiable Human Disease** attributable to food or drink supplied from the Premises,
- ii. any discovery of an organism or causative agent at the **Premises** likely to result in the occurrence of a **Notifiable Human Disease**,  
  
that causes restrictions on the use of the **Premises** on the order or advice of a statutory, local or other competent authority,
- iii. the discovery of an infestation of vermin or pests at the **Premises** that cannot be controlled in the ordinary course of the business
- iv. any accident causing defects in the drains or other sanitary arrangements at the **Premises** that cannot be controlled in the ordinary course of the business, including accidental leakage or escape of sewage or effluent,

- v. any occurrence or alleged occurrence (of which the Police are informed and investigating); of death, murder, suicide, assault, rape, abduction, physical abuse or sexual abuse at the **Premises**.

Cover provided by this Extension includes the costs and expenses incurred following any Incident described above, in

- a. cleaning and decontamination of property used by the **Insured** for the purpose of the Business (other than stock in trade),
- b. removal and disposal of contaminated property owned or leased by the Insured or for which the **Insured** is responsible,
- c. repair or replacement of property owned or leased by the **Insured** or for which the **Insured** is responsible, provided that such costs do not increase the **Insurer's** liability beyond the amount which would have been recoverable under items a. and b. above.

Definitions for the purpose of this Extension

**Notifiable Human Disease** means human disease, suspected human disease or contamination which must be notified to the local authority, excluding any occurrence, whether directly or indirectly, of

- a. any mutation of Avian Flu that manifests itself as a human infectious or human contagious disease
- b. Severe Acute Respiratory Syndrome (SARS)

**Premises** means any location included within the Premises definition applying to Section 2, but excluding any location outside Great Britain, Northern Ireland, Republic of Ireland, Channel Islands and the Isle of Man.

## **Appendix 2 – Policy Wording in the FCA Test Case**

The policy wording identified by Supreme Court declarations 5 and 10:

### **Argenta1**

The COMPANY will also indemnify the INSURED as provided in The Insurance of this Section for such interruption as a result of ... Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide

(a) closure or restriction on the use of the PREMISES by order of a Public Authority consequent upon vermin pests defects in drains or defective sanitation at the PREMISES

(b) any occurrence of a NOTIFIABLE HUMAN DISEASE at the PREMISES or attributable to food or drink supplied from the PREMISES

(c) any discovery of an organism at the PREMISES likely to result in the occurrence of a NOTIFIABLE HUMAN DISEASE

(d) any occurrence of a NOTIFIABLE HUMAN DISEASE within a radius of 25 miles of the PREMISES

(e) any occurrence of murder or suicide at the PREMISES.<sup>113</sup>

### **Hiscox4**

We will insure you for your financial losses and any other items specified in the schedule, resulting solely and directly from an interruption to your business caused by: ...

Public authority ... your inability to use the business premises due to restrictions imposed by a public authority during the period of insurance following:

(a) a murder or suicide;

(b) an occurrence of a notifiable human disease within one mile of the business premises;

(c) injury or illness of any person traceable to food or drink consumed on the premises;

(d) defects in the drains or other sanitary arrangements; or

(e) vermin or pests at the premises

### **MSAmlin1-2**

Consequential loss as a result of interruption of or interference with the business carried on by you at the premises following:

(a) i. any notifiable disease at the premises or due to food or drink supplied from the premises;  
ii. any discovery of an organism at the premises likely to result in the event of a notifiable disease; iii. any notifiable disease within a radius of twenty five miles of the premises;

(b) the discovery of vermin or pests at the premises which causes restrictions on the use of the premises on the order of the competent local authority;

(c) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order of the competent local authority; or

(d) any murder or suicide at the premises.

### **QBE1**

[Loss resulting from] interruption of or interference with the business arising from:

(a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it;

(b) actual or suspected murder, suicide or sexual assault at the premises;

(c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the premises;

(d) vermin or pests in the premises;

(e) the closing of the whole or part of the premises by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the premises.

### **QBE2**

Loss resulting from interruption of or interference with the business in consequence of any of the following events:

(a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;

(b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

(c) any occurrence of a notifiable disease within a radius of 25 miles of the premises;

(d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;

(e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order of the competent local authority;

(f) any occurrence of murder or suicide at the premises

### **QBE3**

Loss resulting from interruption of or interference with the business as covered by this section in consequence of any of the following events:

(a) an occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;

(b) the discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

(c) an occurrence of a notifiable disease within a radius of one (1) mile of the premises;

(d) the discovery of vermin or pests at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;

(e) an accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;

(f) an occurrence of actual or suspected murder, suicide or actual or alleged sexual assault at the premises.

### **RSA1**

Loss as a result of

(a) closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises.

(b) injury or illness sustained by any customer or Employee arising from or traceable to foreign or injurious matter in food or drink sold from the Premises.

(c) closing of the whole or part of the Premises by order of the Public Authority for the area in which the Premises are situate as a result of defects in the drains and other sanitary arrangements at the Premises

(d) murder, rape or suicide occurring at the Premises.

(e) closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health or the Public Authority as a result of vermin and pests at the Premises.

### **RSA3**

We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following ... any

- (i) occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises;
- (ii) discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;
- (iii) occurrence of a Notifiable Disease within a radius of 25 miles of the Premises.

#### **RSA4**

In the event of interruption or interference to the Insured's Business as a result of:  
... Notifiable Diseases & Other Incidents

- (a) discovered at an Insured Location;
- (b) attributable to food or beverages supplied at or from the Insured Locations;
- (c) which are reasonably likely to result from an organism discovered at an Insured Location;  
and/or
- (d) occurring within the Vicinity of an Insured Location,

during the Period of Insurance ... within the Territorial Limits, the Insurer agrees to pay the Insured the resulting Business Interruption Loss.