Neutral Citation Number: [2026] EWHC 1195 (Comm)

Claim Nos: CL-2023-000596, CL-2023-000597,
CL-2023-000604, CL-2023-000610, CL-2023-00073

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: 20/05/2026

Before :

CHRISTOPHER HANCOCK KC

- -

Between :

In Claim No. CL-2023-000596

ANN GRIMES t/a THE CLEVELAND ARMS
and Claimants (2) to (10) and (12) to (13) as set out in the Schedule to the Particulars of Claim

Claimants

- and –

LIBERTY MUTUAL INSURANCE EUROPE SE

Defendant

In Claim No. CL-2023-000597

THE ONE HAIRDRESSING LIMITED
and Claimants (2) to (9), (11) to (13) and (15) as set out in the Schedule to the Particulars of Claim

Claimants

- and -

LIBERTY MUTUAL INSURANCE EUROPE SE

Defendant

In Claim No. CL-2023-000604

MISS ELAINE RAFFERTY t/a NO. 1 COB SHOP
and Claimants (2) and (4) to (11) as set out in the Schedule to the Particulars of Claim

Claimants

- and -

LIBERTY MUTUAL INSURANCE EUROPE SE

Defendant

In Claim No. CL-2023-000610

MR PAUL WILSON t/a BOLTON CASTLE
and Claimants (2) to (8) as set out in the Schedule to the Particulars of Claim

Claimants

- and -

LIBERTY MUTUAL INSURANCE EUROPE SE

Defendant

In Claim No. CL-2023-000733

LIGNUM JONES LIMITED
and Claimants (2) to (3) and (7) to (13) as set out in the Schedule to the Particulars of Claim

Claimants

- and -

LIBERTY MUTUAL INSURANCE EUROPE SE

Defendant

- -
- -

Anna Greenley and Sam Way (instructed by **Barings Law**) for the **Claimants**
Sushma Ananda (instructed by **DAC Beachcroft LLP** and **DWF Law LLP**)) for the Defendant

Hearing dates: 3-6 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Christopher Hancock KC :

Introduction

1. This is the trial of certain preliminary issues relating to a business interruption insurance policy.The claims arise out of the COVID-19 pandemic.

The issues

2. The Preliminary Issues can be conveniently divided into (1) those which relate to the construction of Extension 2(a), knowledge and causation and (2) those relating to notification of the claims.

3. The first category comprises issues 1-3, namely:

> *(1) For the purposes of Extension 2(a), do the words "discovery of a notifiable human infectious or contagious disease at the Premises" when applied to Covid-19:*
>
> *(a) As the Claimants contend, mean an "occurrence" or "suffering of" or "sustained" and require only that a person was at the respective Premises at a time when he or she had contracted Covid-19 and not that the person was symptomatic or diagnosed at the time that they were at the Premises?*
>
> *(b) As the Claimants alternatively contend, mean the "manifestation" of symptoms requiring either a person to have displayed symptoms of and/or to have been diagnosed as having had Covid-19 whilst at the Premises?*
>
> *(c) As the Defendant contends, require that the infection of a person attending at the Premises with such disease be (i) apparent (through diagnosis (including testing), the displaying of symptoms alone being insufficient for the infection of Covid-19 to be apparent and/or to amount to a "discovery" of Covid-19); and (ii) known contemporaneously, and prior to the time of the compulsory closure of the Premises?*
>
> *(2) Does Extension 2(a) require (as the Defendant contends, and the Claimants dispute) that in order to constitute a relevant discovery of Covid-19 at the Premises for the purposes of Extension 2(a), and/or one which was capable of giving rise to a compulsory closure of the Premises, the discovery of Covid-19 be reported or otherwise known to the relevant public body prior to the imposition of the compulsory closure of the Premises, and/or be specifically taken into account by the public body in imposing the closure?*
>
> *(3) On the proper construction of Extension 2(a), in order to show that interruption of or interference with the Claimants' businesses at the Premises was proximately caused by compulsory closure by a public body authorised to prevent or restrict access to the Premises "arising from… discovery of a notifiable human infectious or contagious disease at the Premises", is it:*
>
> *(a) Sufficient to prove, as the Claimants contend, that the compulsory closure was introduced by the government in response to all cases of*

Covid-19 in the UK, whether known or unknown, which included at least one "discovery" of Covid-19 at the Premises which had taken place after the date that Covid-19 became a notifiable disease in the relevant territory but by the time of the compulsory closure?

OR

(b) Necessary to prove, as the Defendant contends, that:

(i) The discovery of Covid-19 at the Premises was reported or otherwise contemporaneously known to the relevant public body prior to the imposition of the relevant compulsory closure, and was specifically taken into account by the public body in imposing the closure; and/or

(ii) The discovery of notifiable disease at the Premises was a necessary cause of such closure; and/or the compulsory closure was directed at and taken in specific response to the (prior) discovery of notifiable disease at the Premises?

4. The second category, which concerns notification, comprises Issues 4 and 5:

(1) *On the proper construction and application of General Condition 5 (Claims):*

(a) Is General Condition 5 (Claims) a condition precedent to the Defendant's liability under the Policy?

(b) In order to satisfy the requirement in General Condition 5 (Claims) that the insured shall "immediately advise" the Defendant "on the happening of any event which could result in a claim under this Policy":

(i) Is it sufficient to prove, as the Claimants contend, that notification was provided by each of the Claimants within a reasonable period following the handing down of the Supreme Court judgment in FCA v Arch Insurance (UK) Ltd & Ors on 15 January 2021 and/or that notification was provided by each of the Claimants within a reasonable period following the handing down of the Court of Appeal judgment in London International Exhibition Centre Plc v Allianz Insurance Plc and others on 6 September 2024?

OR

(ii) Is it necessary to prove, as the Defendant contends, that the notification was made "immediately" or, in other words, with all reasonable speed, after 21 March 2020 and/or 26 March 2020 when the government implemented measures requiring the compulsory closure of the Claimants' premises such that, at the very least, all notifications from January 2021 onwards did not satisfy the requirement in General Condition 5 (Claims)?

OR

(iii) By what other date were the Claimants required to notify to the Defendant their claims for business interruption losses arising out of the compulsory closure(s) implemented by the government in March 2020 in response to the Covid-19 pandemic?

(c) In relation to the issue of estoppel, by the Defendant's letters denying liability in response to the Claimants notifying the Defendant of the existence of a claim or potential claim under the Policy and/or its pre-action letters of response to the Claimants' respective letters of claim (which letters are pleaded in the Replies at paragraphs 18(a) and 18(f) in the Ann Grimes and One Hairdressing actions and at paragraphs 17(a) and 17(f) in the Elaine Rafferty, Paul Wilson and Lignum Jones actions), did the Defendant unequivocally represent to each of the Claimants that it did not intend to rely on General Condition 5 (Claims), subsection (a) as a condition precedent to liability? The Barings Claimants are the operators of various small businesses whose operations were affected by the Covid-19 pandemic and the various measures taken by the UK Government in response to that pandemic.

The agreed facts

The policy

5. The relevant terms of the policy are set out below, after the agreed facts.

SARS-Cov-2 and Covid-19

6. 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.

7. 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:

8. Symptoms of Covid-19, flu and common respiratory infections include:

(1) continuous cough;

(2) high temperature, fever or chills;

(3) loss of, or change in, your normal sense of taste or smell;

(4) shortness of breath;

(5) unexplained tiredness, lack of energy;

(6) muscle aches or pains that are not due to exercise;

(7) not wanting to eat or not feeling hungry;

(8) headache that is unusual or longer lasting than usual;

(9) *sore throat, stuffy or runny nose; and*

(10) *diarrhoea, feeling sick or being* sick.

9. Most of these symptoms are not unique to Covid-19 and may be symptoms of infection with a virus or pathogen other than SARS-CoV-2.

10. 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.

11. A proportion of individuals with Covid-19 may be asymptomatic or pre-symptomatic. Such an asymptomatic or pre-symptomatic individual may be infectious and cause further cases of infection and/or disease, although some studies show that asymptomatic cases may be less infectious than symptomatic cases.

Spread of COVID 19[1]

12. 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.

13. 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.

14. The first reported case of infection with SARS-CoV-2 arrived in the UK on 23 January 2020 from Hubei province in China.

15. The UK Government reported daily and cumulative numbers of 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.

16. 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

[1] The Defendant contended that none of the facts in this section were relevant to the determination of the preliminary issues.

a clinical need, and health and care workers), and Pillar 2 (i.e. virus testing for the wider population) testing.

17. Data available only reflects cases with a positive Covid-19 test (i.e. "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 5000 per day during the week commencing 9 March 2020 and had exceeded 10,000 per day by 23 March 2020.

18. In March 2020 and prior to 21 or 26 March 2020, it is likely that 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)".*

The legislative framework

19. The Health Protection (Notification) Regulations 2010 in England and The Health Protection (Notification) (Wales) Regulations 2010 in Wales were made under the Public Health (Control of Disease) Act 1984 (the "**1984 Act**"). It includes a list of notifiable diseases (and "syndromes", in respect of the Welsh regulations) at Schedule 1 and causative agents at Schedule 2.

20. In Scotland, the notification of infectious diseases and the voluntary reporting of organisms is governed by the Public Health etc. (Scotland) Act 2008 (the "**Scotland 2008 Act**"). Relevantly, the Scotland 2008 Act empowers the Scottish Ministers to vary the list of notifiable diseases and organisms and other aspects of notification by regulations, to restrict international travel and to conduct public health investigations. It includes a list of notifiable diseases at Part 1 of Schedule 1 and notifiable organisms in Part 2 of Schedule 1.

The UK government response to Covid-19

21. On 31 January 2020, the UK announced its first recorded Covid-19 cases. On 2 February 2020, the DHSC launched a UK-wide public information campaign with the aim of reducing transmission of Covid-19.

22. 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 1984 Act. In broad terms the 10 February Regulations provided for the detention, isolation and screening of persons reasonably suspected to have been infected or contaminated with Covid-19.

23. On 22 February 2020, Covid-19 was made a notifiable disease in Scotland by the Public Health etc. (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2020, regulation 2, amending the Scotland 2008 Act to add "Coronavirus disease 2019 (COVID-19)" to Part 1 (notifiable diseases) of Schedule 1 and "Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)" to Part 2 (notifiable organisms) of Schedule 1.

24. On 25 February 2020, the UK Government published guidance for employers and businesses. This provided information relating to Covid-19, including symptoms and methods of transmission, and gave advice as to measures to prevent the transmission of Covid-19 within workplaces. The guidance did not recommend closure of workplaces even if a member of staff or a member of the public who had been confirmed to have Covid-19 had been present.

25. On 28 February 2020, the first confirmed case of Covid-19 in Wales was announced.

26. On 1 March 2020, the first confirmed case of Covid-19 in Scotland was announced.

27. On 2 March 2020, the UK recorded the first death relating to Covid-19, although the first death from COVID-19 was only announced publicly by the Chief Medical Officer for England on 5 March 2020.

28. On 3 March 2020, the UK government published a Covid-19 action plan consisting of a phased response to Covid-19 including discussion of four phases of the response: 'contain', 'delay', 'research' and 'mitigate'.

29. On 5 March 2020 at 6:15 pm, Covid-19 was made a notifiable disease in England by The Health Protection (Notification) (Amendment) Regulations 2020, regulation 2, amending the Health Protection (Notification) Regulations 2010 to add "Covid-19" to the list of notifiable diseases at Schedule 1 and "SARS-COV-2" to the list of causative agents in Schedule 2.

30. On 6 March 2020, Covid-19 was made a notifiable disease in Wales by the Health Protection (Notification) (Wales) (Amendment) Regulations 2020 amending the Health Protection (Notification) (Wales) Regulations 2010.

31. Accordingly, Covid-19 became a "*notifiable human infectious or contagious disease*", within the meaning of Extension 2(a) of the subject policies, in Scotland from 22 February 2020, in England from 6.15pm on 5 March 2020 and in Wales from 6 March 2020.

32. As of 9 March 2020, there were a cumulative total number of 319 reported UK cases of Covid-19.

33. On 10 March 2020, at the fourteenth UK Government Scientific Advisory Group for Emergencies ("**SAGE**") meeting about Covid-19, it was discussed that "*the UK likely has thousands of cases – as many as 5,000 to 10,000– which are geographically spread nationally*".

34. On 11 March 2020, the World Health Organisation declared that there was a Covid-19 pandemic.

35. On 11 March 2020, the Secretary of State for Health and Social Care and the Chief Medical Officer gave advice to avoid close contact (i.e. being within two metres for more than 15 minutes) with anyone who has active Covid-19 symptoms.

36. On 12 March 2020, there were a total number of 460 reported UK cases of Covid-19. The same day, the government decided to retreat to testing for Covid-19 principally within hospitals.

37. Also on 12 March 2020, the UK government announced a move from the "contain" phase to the "delay" phase of the phased response to Covid-19. The UK Prime Minister made a statement stating, "*if you have coronavirus symptoms, however mild – either a new continuous cough or a high temperature – then you should stay at home for at least 7 days… At some point in the next few weeks, we are likely to go further and if someone in a household has those symptoms, we will be asking everyone in the household to stay at home*".

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 13 March 2020, the first death related to Covid-19 in Scotland was announced.

40. On 16 March 2020, the Chief Medical Officer for Wales confirmed the first death in Wales of a patient who had contracted Covid-19.

41. On 16 March 2020, after an emergency COBR meeting, a press conference was held, attended by the Chief Medical Officer for England and the Chief Scientific Advisor, at which 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*". This was far above the number of reported cases, which were 1,950 on 17 March 2020 at 2pm.

42. On 17 March 2020, the First Minister of Scotland issued advice that people experiencing Covid-19 symptoms should self-isolate for 7 days and that anyone else living in a household with someone symptomatic should self-isolate for 14 days. The First Minister of Wales made a similar statement on the same day.

43. On 18 March 2020, the Prime Minister made an announcement reiterating his statement on 16 March to avoid non-essential contact and travel, and to work from home if possible, stating "*stay at home for seven days if you think you have the symptoms… Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can*."

44. On 20 March 2020, the Prime Minister reiterated his previous advice and announced the closure of certain businesses:

> *"And so following agreement between all the four nations of the United Kingdom, all the devolved administrations, we are*

collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow. Though to be clear, they can continue to provide take-out services. We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale."

45. Also on 20 March 2020, the First Minister of Wales announced the closure of "*restaurants, pubs, bars and other facilities where people gather. This also includes leisure centres, gyms, cinemas, theatres and betting shops*" from 21 March 2020. The First Minister of Scotland made a similar statement that "*restaurants, cafes, pubs, gyms and cinemas to close*".

46. On 21 March 2020, in England the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 and in Wales the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 were made pursuant to powers under the 1984 Act (the "**21 March Regulations**").

47. The 21 March Regulations each provided for the following businesses in England and Wales to close any premises, or part of the premises, in which food or drink are sold for consumption on those premises, and to cease selling food or drink for consumption on their premises:

> *"1. Restaurants, including restaurants and dining rooms in hotels or members clubs.*
>
> *2. Cafes, including workplace canteens, but not including—*
>
> *(a) cafes or canteens at a hospital, care home or school;*
>
> *(b) canteens at a prison or an establishment intended for use for naval, military or air force purposes or for the purposes of the Department of the Secretary of State responsible for defence;*
>
> *(c) services providing food or drink to the homeless.*
>
> *3. Bars, including bars in hotels or members' clubs.*
>
> *4. Public houses."*

However, the above businesses could remain open for the purposes of selling food or drink for consumption off the premises (i.e. for delivery or takeaway services). Pursuant to regulation 2(2) of the 21 March Regulations, food or drink sold by a hotel or other accommodation as part of room service was not to be treated as being sold for consumption on its premises.

48. The 21 March Regulations also provided, in regulation 2(4), for the closure of the following businesses in England and Wales:

> "*5. Cinemas.*
>
> *6. Theatres.*
>
> *7. Nightclubs.*
>
> *8. Bingo halls.*

9. *Concert halls.*
10. *Museums and galleries.*
11. *Casinos.*
12. *Betting shops.*
13. *Spas.*
14. *Massage parlours*
15. *Indoor skating rinks.*
16. *Indoor fitness studios, gyms, swimming pools or other indoor leisure centres*."

49. 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 shops selling non-essential goods and stop all gatherings and social events. The First Minister of Wales and the First Minister of Scotland made similar statements the same day.

50. On 23 March 2020, the UK government issued further guidance to businesses stating that following the 21 March Regulations the closures on the original list from 20 March "*are now enforceable by law in England and Wales due to the threat to public health. The government will extend the law and enforcement powers to include the new list of premises for closure*."

51. 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.

52. On 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 in England (the "**26 March England Regulations**") were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. On the same day, The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (the "**26 March Wales Regulations**") were made by the Welsh Ministers pursuant to powers under the 1984 Act (the 26 March England Regulations and the 26 March Wales Regulations together are referred to as the "**26 March Regulations**").

53. The 26 March Regulations required the continued closure of the businesses in England and Wales closed by the 21 March Regulations. In addition to the businesses closed by the 21 March Regulations, the 26 March Regulations provided for the closure of retail shops, holiday accommodation providers, places of worship and other businesses including nail, beauty, hair salons and barbers.

54. On 26 March 2020, The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 came into force pursuant to powers of the Scottish Ministers under the Coronavirus Act 2020 (the "**26 March Scotland Regulations**"). The 26 March Scotland Regulations required wide-ranging business closures in Scotland, and

relevantly required the closure of public houses, nail, beauty, hair salons and barbers, and bed and breakfast accommodation.

55. On 29 May 2020, restrictions in Scotland were eased so as to allow businesses to provide hot or cold food for consumption off the premises, and the reopening of certain businesses enacted by the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020.

56. On 12 June 2020, The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 amended the 26 March England Regulations to permit additional movement in England from 13 June 2020 and the reopening of certain 'non-essential' retail businesses.

57. On 4 July 2020, the 26 March England Regulations were revoked and replaced by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (the "**4 July England Regulations**"). The 4 July England Regulations permitted the reopening of pubs, bars, restaurants, cafés in England for service of food and drink indoors or outdoors and permitted the reopening of holiday accommodation in England as well as hairdressers.

58. On 6 July 2020, restaurants, cafes, bars and pubs in Scotland were permitted to sell food and drink for consumption in outside areas of the premises (but not indoor areas) as implemented by the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 6) Regulations 2020.

59. On 10 July 2020, the 26 March Wales Regulations were revoked and replaced by The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 (the "**10 July Wales Regulations**") which permitted restaurants, cafes, bars and pubs in Wales to reopen for service of food and drink outside from 13 July 2020.

60. On 13 July 2020, The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) Regulations 2020 amended the 4 July England Regulations to permit close contact services and treatments in England (such as those provided by beauty salons).

61. On 15 July 2020, relevant provisions of the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 came into force (repealing certain provisions in the 26 March Scotland Regulations), permitting restaurants, cafes, bars and pubs in Scotland to open indoor spaces for the consumption of food or drink as well as permitting the reopening of holiday accommodation (including B&Bs) and hairdressers in Scotland.

62. On 31 July 2020, the Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 3) Regulations 2020 amended the 10 July Wales Regulations and permitted restaurants, cafes, bars and pubs in Wales to reopen for service of food and drink indoors from 3 August 2020.

Additional agreed facts as to Covid-19 and insurance claims[2]

[2] The Defendants contended that none of the facts in this section were relevant to the determination of the preliminary issues. .

63. On 17 March 2020, the Association of British Insurers released a statement on Covid-19 business interruption coverage:

> *"Irrespective of whether or not the Government orders closure of a business, the vast majority of firms won't have purchased cover that will enable them to claim on their insurance to compensate for their business being closed by the Coronavirus.*
>
> *Standard business interruption cover – the type the majority of businesses purchase – does not include forced closure by authorities as it is intended to respond to physical damage at the property which results in the business being unable to continue to trade.*
>
> *A small minority of typically larger firms might have purchased an extension to their cover for closure due to any infectious disease. In this instance an enforced closure could help them make the claim, but this will depend on the precise nature of the cover they have purchased so they should check with their insurer or broker to see if they are covered".*

64. On 17 March 2020, the Chancellor of the Exchequer, Rishi Sunak, responded to a question about pubs, clubs and other leisure venues:

> *"The right hon. Gentleman asked about insurance for the leisure sector. I can confirm that, after extensive meetings today between my hon. Friend the Economic Secretary to the Treasury and the insurance industry, the insurance industry will honour insurance contracts that would have been triggered if the advice had been to ban certain things, rather than it being advisory not to do them. That has been agreed and negotiated by my hon. Friend. I thank him for those efforts, and I thank the insurance industry for doing the right thing."*

65. On 17 March 2020, the Association of British Insurers released a further statement on Covid-19 business interruption coverage:

> *"The Chancellor's statement today is consistent with our statement this morning where we said in the event businesses have the right cover, this type of notification could help make a claim.*
>
> *But, as the Chancellor acknowledged, the vast majority won't have purchased extended cover and this remains unchanged"*

66. On 18 March 2020, HM Treasury published a Covid-19 fact sheet titled "*How to access government financial support if you or your business has been affected by COVID-19*" which stated:

> *"If the only barrier to your business making an insurance claim was a lack of clarity on whether the government advising people*

to stay away from businesses, rather than ordering businesses to shut down, was sufficient to make a claim on business interruption insurance:

(1) The government's medical advice of 16 March is sufficient to enable those businesses which have an insurance policy that covers both pandemics and government ordered closure to make a claim - provided all other terms and conditions in their policy are met. Businesses should check the terms and conditions of their specific policy and contact their providers if in doubt.

(2) However, most businesses have not purchased insurance that covers pandemic related losses. As such, any affected businesses should note the government's full package of support, including the Coronavirus Business Interruption Loan Scheme and business rates holiday."

67. On 15 April 2020, the FCA issued a Dear CEO letter noting that "*Insurers and brokers have an essential role to play in supporting their customers who may be unclear whether they have appropriate cover in place… our estimate is that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic. While this may be disappointing for the policyholder we see no reasonable grounds to intervene in such circumstances.*"

68. On 1 May 2020, the Economic Secretary to the Treasury provided a written answer to a question regarding insurance coverage of pubs and restaurants:

> Question: *"To ask the Chancellor of the Exchequer, if he will publish any correspondence he has had with insurance companies on covering the contingent liability of losses suffered by pubs and restaurants between 16 and 20 March 2020 due to the covid-19 outbreak."*
>
> Answer (from John Glen, Economic Secretary to the Treasury): *"The Government is in continual dialogue with the insurance sector given the significant role it has in supporting businesses in the current situation. However, on 17 March, following a roundtable with the insurance industry, the Chancellor made it clear that the Government's social distancing instructions of 16 March would be treated the same as government-ordered closure for insurance purposes (https://www.gov.uk/government/speeches/chancellor-of-the-exchequerrishi-sunak-on-covid19-response). As long as all other terms of the policies are met, pubs and restaurants should therefore be able to make a claim for the period between 16 and 20 March."*

69. On 1 May 2020, the FCA issued a statement that it intended to obtain court declarations aimed at resolving contractual uncertainty in selected business interruption insurance policies.

70. On 9 June 2020, the FCA commenced a test case with Claim Number FL-2020-000018 (the "**FCA Test Case**") seeking declarations in respect of a selection of business interruption policy wordings.

71. On 15 September 2020, judgment was handed down by the High Court in the FCA Test Case with Neutral Citation Number: [2020] EWHC 2448 (Comm).

72. On 2 October 2020, the High Court gave permission to all parties in the FCA Test Case to appeal and certified that the appeals were suitable for the leapfrog procedure by which an appeal could proceed directly to the Supreme Court. The Supreme Court gave permission to appeal on 2 November 2020.

73. On 15 January 2021, judgment was handed down by the Supreme Court in the FCA Test Case with Neutral Citation Number: [2021] UKSC 1.

74. On 22 January 2021, the FCA published a Dear CEO letter including information about how the FCA expected insurers to handle claims and complaints following the judgments of the High Court and the Supreme Court in the FCA Test Case. That letter stated:

> *"To treat customers fairly and act in their best interests, insurers should not include the period between 17 June 2020 and the date of issue of the Supreme Court's declarations when relying on any time limits within which policyholders must make potentially affected claims or take any other step under the terms of their policies, such as notifying circumstances in relation to a claim. Insurers should not limit any payment that may be due to a policyholder because of the time period that has elapsed before the potentially affected claim was made.*
>
> *...*
>
> *Where any further judicial decisions may have a wider impact for the interpretation of similar policies, then firms should take them into account in their claims and complaints handling."*

The Claimants and their businesses

75. The Claimants are a range of businesses of the following descriptions and operated in the territories noted:

(1) Public House (in England, Wales and Scotland)

(2) Inn (in England)

(3) Hotel and Restaurant (in England)

(4) Hotel (in England)

(5) Hair & Beauty Salon (in England)

(6) Hairdresser (in both England and in Scotland)

(7) Café (in England)

(8) Coffee Shop (in England)

(9) Beauty Salon (in England)

(10) B&B (in both England and in Scotland)

(11) Restaurant (in England)

(12) Sandwich Bar (in England)

(13) Fish & Chip Shop (in England)

(14) Mobile Phone Retailer (in England).

76. Those present at each of the Claimants' premises following the designation of Covid-19 as a notifiable disease in Scotland (22 February 2020), England (5 March 2020) and Wales (6 March 2020) would have included both the Claimants' employees and members of the public. It is the Claimants' case that the nature of their businesses is such that there are many individuals who would have been present at their premises during the period of time set out above of whom the Claimants have no knowledge.

77. For the purposes of the hearing before me, it is assumed that there was a person present at each of the Claimants' premises between 22 February 2020 (for those Claimants in Scotland), 5 March 2020 (for those Claimants in England) or 6 March 2020 (for those Claimants in Wales), and 21 March 2020 or 26 March 2020:

(1) who had contracted Covid-19 but who was not symptomatic and had not been diagnosed as having Covid-19; or

(2) who had contracted Covid-19 and who displayed symptoms of Covid-19 at the time they were at the premises, but who was not diagnosed as having Covid-19; or

(3) who had contracted Covid-19 and who had been diagnosed as having Covid-19 at the time they were at the premises, but did not display symptoms of Covid-19 at the time they were at the premises; or

(4) who had contracted Covid-19 and who had been diagnosed as having Covid-19 and displayed symptoms of Covid-19 at the time they were at the premises.

78. Each of the Claimants' businesses were compulsorily closed by the 21 March Regulations and/or the 26 March England, Wales or Scotland Regulations as set out above insofar as applicable to the territory in which the relevant Claimants' Premises was situated.

79. For each relevant case, it is assumed that either:

(1) The relevant state of affairs had been reported to or was otherwise known to the relevant public body prior to that Claimant's business being compulsorily closed in March 2020; or

(2) The relevant state of affairs had not been reported to or was not otherwise known to the relevant public body prior to that Claimant's business being compulsorily closed in March 2020.

80. It is further assumed that either:

(1) The relevant public body took into account the report in deciding to compulsorily close that Claimant's business; or

(2) The relevant public body did not take into account the report in deciding to compulsorily close that Claimant's business.

Assumed facts on notification

81. It is assumed that the date of first notification by each Claimant to the Defendant of a claim under the Policy or the happening of an event which could result in a claim under the Policy is the "*Date of [First] Notification of Claim*" noted in the last column of the Claimants' Amended Schedules following service of their Replies and it is assumed that that date is correct for the purposes of the preliminary issues hearing only. For the avoidance of doubt, (i) where the relevant box only includes a date of first notification of claim set out in red, that is to be the assumed date of first notification of claim; (ii) where the relevant box includes a date in red and a different date in green, it is to be assumed for the purposes of the preliminary issues only that the green date is the date of first notification of claim. The relevant schedules are annexed to this judgment.

The Defendant's response to claims

82. It is agreed that the Defendant or its agent, Davies Claims Solutions ("**Davies**"), sent to each Claimant who first sent notification of a claim or a potential claim under the subject policies a letter in materially the same terms which denied the Claimant's claim without mention of (or reliance being placed on) General Condition 5 (Claims) of the subject policies as a reason for denying cover.

83. It is agreed that, in response to Letters of Claim sent pursuant to the Practice Direction – Pre-Action Conduct and Protocols - the Defendant or its agent sent each Claimant a Letter of Response in materially the same terms and which denied liability without any reference to (or reliance being placed on) General Condition 5 (Claims) as a reason for denying cover.

84. It is agreed that, prior to the filing and service of the Defences in each of the subject proceedings, in each letter sent by the Defendant to the Claimants in which the Defendant denied liability under the subject policies, whether those referred to above or others, the Defendant denied liability without any reference to General Condition 5 (Claims). The first time General Condition 5 (Claims) and the associated late notification issue was raised by the Defendant was in the Defences to the Claimants' Particulars of Claim.

The relevant terms of the Policy

85. The Policies were contained in and/or evidenced by:

(1) The ARO Retail Package policy wording; and

(2) The Policy Schedules.

86. Pursuant to the Policies, the Defendant provided the Claimants with cover for various matters. This included, in Section 2, cover for Business Interruption ("**BI**") risks.

87. The main insuring clause in Section 2 provides cover for standard property damage based BI, i.e., BI consequent on proof of damage to property insured. It is not suggested that this responds to COVID-19 BI losses.

88. Section 2 adds a number of limited extensions to that standard BI cover. The Claimants' claims are brought under one such extension, i.e., Extension (2)(a). Extension 2 provides in full as follows:

> *"2. Compulsory closure*
>
> *(a) Interruption of or interference with the **Business** in consequence of compulsory closure by a public body authorised to prevent or restrict access to the **Premises** arising from*
>
> *(a) discovery of a notifiable human infectious or contagious disease at the **Premises** [or][3] foreign or deleterious matter in food or drink sold, supplied or provided at the **Premises***
>
> *(b) the occurrence at the **Premises** of murder, manslaughter, suicide or rape*
>
> *(c) defective sanitation or the presence of vermin or pests.*
>
> *For the purpose of this cover the maximum indemnity period is restated as 3 months."*

89. General Condition 5 (Claims) provides in full as follows:

> *"5. Claims*
>
> *It is a condition precedent to the liability of the **Company** that on the happening of any event which could result in a claim under this Policy (disregarding any deductible) the **Insured** shall*

[3] On the proper construction of Extension 2(a), and to make sense of it, an "or" needs to be added between "*notifiable human infectious or contagious disease at the **Premises***" and "*foreign or deleterious matter in food or drink sold, supplied or provided at the **Premises***", such that that extension responds to a discovery of either, if the other requirements of Extension 2 are met. As I understood it, this was not controversial.

(a) *immediately advise the **Company** in writing by email or by phone to the Claims Manager whose details are shown on page 2*

(b) *not make any admission of liability or promise of payment without the **Company's** written consent*

(c) *immediately notify the police following loss, destruction or damage by theft, riot, vandalism or malicious act or if property be accidentally lost*

(d) *in respect of any loss, destruction or damage to the property insured submit, at **Insured's** own expense, a claim in writing with all such particulars and proofs as may be reasonably required within*

(i) seven days in the case of loss, destruction or damage caused by riot, civil commotion, strikes, labour disturbances or malicious persons

(ii) thirty days in the case of any other loss, destruction or damage

(e) *inform the **Company** immediately of any claim being made, or of any impending prosecution, inquest or fatal accident inquiry. Every letter, claim, writ or other document relating to any accident, claim, prosecution or civil proceedings must be sent to the **Company** immediately, unacknowledged*

(f) *give all such information and assistance as the **Company** may request."*

The applicable principles of construction

90. I was referred in this regard to a number of well known authorities, including Wood v Capita Insurance Services Ltd [2017] AC 1173 at [10] to [15] and Arnold v Britton [2015] AC 1619 at [15]-[21]. The Defendant emphasised two points:

(1) **First**, where the parties have used unambiguous language, the court must apply it, thereby giving effect to the natural and ordinary meaning of the words used.[4] As the majority of the Supreme Court pointed out in the ***FCA Test Case*** at [62]: *"The cautionary words of Lord Mustill in Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 388 are apt, [namely that] there comes a point at which the court should remind itself that … to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."*

(2) While the unitary exercise of contractual construction can require a court to give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with commercial common sense,[5] commercial

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4 See ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900 (SC) at [23] (Lord Clarke). See also ***Arnold v Britton*** (SC) at [17] (Lord Neuberger).

5 See ***Wood v Capita*** (SC) at [11]-[12] (Lord Hodge).

common sense should not be invoked retrospectively, or to rewrite a contract, in an attempt to assist an unwise party or to penalise an astute party.[6]

(3) **Second**, the Defendant pointed out that the Claimants sought in their pleaded case to rely on *contra proferentem*, in relation to the late notification issue. However, said the Defendant, to the extent that the principle has any validity at all in the construction of commercial contracts, it "*can only apply if there is genuine ambiguity, which cannot otherwise be resolved by applying the ordinary principles of construction.*"[7] It should not be deployed to create an ambiguity where none exists.[8]

91. In the final analysis, however, in my judgment, the most helpful summary of the applicable principles of construction is that at paragraphs 62 to 66 of the judgment of the Divisional Court in the FCA Test Case [2020] Lloyds' Rep IR 527 as referred to by the Supreme Court [2020] AC 649 at paragraph 47:

> *"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 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."*

92. At paragraph 77 of its judgment in the same case the Supreme Court elaborated:

> *"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."*

93. The Claimants contended that the Court must therefore consider both the language of the relevant policies and the commercial consequences of the parties' rival constructions.

The Claimants' submissions on Issues 1 to 3

Discovery as equivalent to occurrence

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6 See ***Arnold v Britton*** (SC) at [17], [19]-[20] (Lord Neuberger).

7 ***FCA Test Case DC*** at [71].

8 See ***Cornish v Accident Insurance Co Ltd*** (1889) 23 QBD 453 (CA) at 456 (Lindley LJ); see also ***McGeown v Direct Travel Insurance*** [2004] 1 Lloyd's Rep IR 599 (CA) at [13] (Auld LJ); and *Lewison on the Interpretation of Contracts*, 8th Ed. (2023), paras 7.88-7.92.

94. At the time of opening, it was the Claimants' primary position that the word "discovery" in the context of Extension 2a of the policy was synonymous with "occurrence" as considered by the Supreme Court in the *FCA Test Case*, namely "*something which happens at a particular time, at a particular place, in a particular way".*

95. As reflected in the declaration made by the Supreme Court in the FCA Test Case, a contrast was drawn between those cases in which the policy wording required there to be an "occurrence" and those where the language required something more apparent like a "manifestation". This was summarised by Jacobs J in London International Exhibition Centre v Royal Sun Alliance [2023] Bus LR 1513 ("*LIEC*") at paragraph 351:

> *"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."*

96. Whilst this court has not previously been asked to consider the meaning of the word "discovery", Jacobs J was asked to consider the meaning of "suffered by" in respect of the Mayfair policy wording in *LIEC*. Recognising that the common usage of a word does not always give a complete answer it was said at paragraph 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"*

97. At paragraphs 355 to 358, Jacobs J further reasoned:

> *"355…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 [2021] AC 649) 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".

Causation and knowledge

98. Approving the decision of Jacobs J in the Divisional Court, the Court of Appeal in *LIEC* observed at paragraphs 63 to 64:

> *"[63] Accordingly, if the parties had applied their minds to the circumstances in which the insured premises were likely to be closed by a relevant authority as a result of an occurrence of disease at the premises, they would have contemplated that closures or restrictions imposed by the authority in such cases would be unlikely to be a response only to the occurrence of the disease at the insured premises. Rather they would be imposed in response to the outbreak as a whole over the relevant area, whether local or national. Indeed, the worse and more widespread the outbreak of the disease, the more likely it would be that such restrictions would be imposed. If the disease clauses were to have meaningful content, therefore, the parties must have intended that there would be cover in such circumstances.*
>
> *[64] These considerations demonstrate, in our judgment, that the parties cannot have intended a conventional 'but for' approach to causation to apply. In the circumstances in which the insured peril was likely to arise, and cover under the disease clause would be most needed, it would in general be difficult or impossible for the policyholder to prove that the restrictions would not have been imposed 'but for' the occurrence of the disease at the insured premises. Accordingly the parties must have intended that the causation requirement would be satisfied if the occurrence at the premises was one of a number of causes of the closure (or, in the case of a 'pure' disease clause, of the BI losses suffered as a result of the disease). Moreover, it would not have mattered to the parties whether the number of other causes was large or small. Indeed, the larger the number, the*

more likely it was that restrictions would be imposed and the cover would be needed."

99. In going on to consider the question of knowledge of the "relevant authority", the Court of Appeal held at paragraph 66:

> *"[66] The question then arises whether the causation requirement would only be satisfied if the relevant authority actually knew of (or as Mr Kealey submitted, had a reasonable belief as to) the occurrence of the disease at the insured premises. Again it is necessary to consider the circumstances in which closure or other restrictions would be likely to be imposed in response to occurrences of a notifiable disease. It is unrealistic to think that the authority would apply its mind to identifying the particular premises at which there had been such occurrences. It would know in the case of a serious outbreak that there had been a number of occurrences of the disease in its area (or perhaps in particular kinds of premises in its area, such as restaurants, schools or other places where people gather) and would react to those occurrences by imposing restrictions accordingly. Identification of the particular premises at which there had been such occurrences would be an irrelevant consideration."*

100. In concluding that there was no reason to distinguish between the radius clauses considered by the Supreme Court in the *FCA Test Case* the Court of Appeal held at paragraphs [72] to [73]:

> *"[72] It follows that the government's order or advice to close the ExCeL Centre was caused by what is agreed to have been an occurrence of Covid-19 at the Centre, operating in combination with all other cases of Covid-19 in the country which had occurred. The same analysis applies to the other policies. On the assumption that there were occurrences of Covid-19 at each of the policyholders' premises, those occurrences together with all other cases of Covid-19 in the country were a cause of the closure of those premises. In ordering the national lockdown, therefore, the government was responding to the fact of disease having occurred at each of these premises. This is an approach which is clear and simple to apply, in contrast with an interpretation which would require the policyholder to establish precisely what knowledge (or belief) the relevant authority had as to the existence of a disease at any given location. In our judgment it reflects the way in which the words of the contract would be understood by a reasonable person and in particular the ordinary policyholder taking out this kind of policy.*
>
> *[73] Accordingly, although we have preferred to base our conclusion on the language and context of the 'at the premises' clauses in issue and the presumed common intentions of the parties, rather than on how the Supreme Court interpreted the*

radius clauses, we agree with the conclusion and much of the reasoning of the judge on the common causation issues. Although there are differences between radius and 'at the premises' clauses, those differences do not materially affect the nature of the causal link which must be proved, save that in the case of 'at the premises' clauses the occurrence of disease must be at the premises themselves and not within a specified distance from them."

101. The Claimants are all small business owners, for example of public houses, hairdressing salons, etc. They would not and cannot have been expected to subject the policy wording to a forensic or "pedantic" lawyers' analysis. The reasonable and commercially sensible interpretation is that the Policy responded to an event or occurrence of one of the insured perils, in this case a notifiable disease, namely COVID-19.

102. Extension 2(a) provides cover arising from three categories of event listed at (a) to (c). There is nothing in the wording to suggest one carries a more stringent requirement than the other; each is no more than a potential cause of loss caused by "Interruption of or interference with the Business in consequence of compulsory closure by a public body" encompassed by the clause.

103. Such an approach reflects the Supreme Court's analysis of similar clauses in the FCA Test Case. In particular, the RSA 3 and QBE 2 policy wordings are similar to the Policy in that they both use the terms occurrence and discovery interchangeably in relation to different insured perils.

104. The RSA 3 wording provides:

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

(a) 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 Premise;

(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 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 or advice of the competent local authority; or

(d) any occurrence of murder or suicide at the Premises." [emphasis added]

105. At paragraph 71, the Supreme Court noted the interchangeability between an event, occurrence and discovery:

> *"As a matter of plain language, the clause covers only cases of illness resulting from Covid-19 that occur within the 25-mile radius specified in the clause. That is consistent with the other sub-clauses of the extension. In each case they cover events (or the discovery of events) that occur at the premises, that is to say at a particular time and place."*

106. This Policy has a similar construction with a list of alternative events, some referred to as occurrences and others as a discovery. The Supreme Court does not suggest that one sub-clause has a more onerous requirement than the other – rather they are treated as equivalents.

107. The QBE 2 wording provides cover for:

> *"Loss resulting from interruption of or interference with the business in consequence of any of the following events:*
>
> *(a) <u>any occurrence</u> of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
>
> *(b) <u>any discovery</u> of any organism at the premises likely to result in the occurrence of a notifiable disease;*
>
> *(c) <u>any occurrence</u> of a notifiable disease within a radius of 25 miles of the premises;*
>
> *(d) <u>the discovery</u> 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) <u>any accident</u> 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 or advice of the competent local authority;*
>
> *(f) <u>any occurrence</u> of murder or suicide at the premises; provided that the . . .*
>
> *(h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;*
>
> *(i) insurer's maximum liability under this cover extension clause in respect of any one incident shall not exceed £100,000 or 15% of the total sum insured (or limit of liability) for this insured section B, whichever is the lesser, any one claim and £250,000 any one period of insurance."* [emphasis added]

108. At paragraph 91 the Supreme Court observed:

> *"It can be seen that this wording is virtually identical to the corresponding provisions of RSA 3, save in two respects. First, the list of insured perils in the clause is not preceded by the word "following" but by the words "in consequence of any of the following events" (and the word "event" is also used in the definition of the "indemnity period"). Second, the term "incident" is used in several places, apparently as a synonym for the term "event"."*

109. The preface in the QBE 2 wording, "any of the following events" therefore makes clear that whether termed an "occurrence" or a "discovery" each is an "event". The same is true of the Policy wording, it being of no consequence which noun is ascribed to which peril.

110. At paragraph 93, the Supreme Court reflected on the Divisional Court's findings (cited at paragraph 92) finding:

> *"We agree with these observations but cannot accept that the terms event and incident are necessary to make it clear that what is covered by the clause is any occurrence(s) of a notifiable disease within the 25 miles. That is already plain from the description of the insured peril as any occurrence of a notifiable disease within a radius of 25 miles of the premises. We do not perceive any difference in meaning between the terms "occurrence" and "event", and nothing significant is added by the use of the word "incident" as a compendious term instead of the phrase "occurrence, discovery or accident" used, for example, in the definition of the indemnity period in RSA 3. Furthermore the other matters referred to in (a) [which required an occurrence], (b) [which required "any discovery"] and (d) to (f) [and which required, respectively a discovery, accident and occurrence] in clause 3.2.4 of QBE 2 are exactly the same as those referred to in the corresponding sub-clauses in RSA 3, and the nature of those matters confirms equally in both cases that the clause is concerned with the consequences of particular events occurring at a particular time and place."* [emphasis added]

111. The Claimants therefore argued that the sub-clauses in Extension 2 of the Policy are similarly concerned with the consequences of a range of events occurring at a particular time and place. To find that "discovery" in Extension 2(a) of the Policy imposed an additional requirement of symptoms or diagnosis would be inconsistent with the Supreme Court's analysis without justification and I was therefore invited to accept the Claimants' primary case that that "discovery" should be interpreted as an "occurrence".

The Claimants' alternative case: "Discovery" as equivalent to a "manifestation."

112. In the alternative, the Claimants contended that "discovery" in the context of Extension 2(a) is equivalent to a manifestation (i.e. requiring symptoms or a diagnosis) and not, as the Defendant argued, to require a diagnosis which is contemporaneously known.

113. The Claimants argued that some assistance could be drawn from the analogy drawn by Vaisey J in Beatty (Earl) v Inland Revenue Comrs [1953] 2 All ER 758 who, at paragraph 761-762 observed:

> *"'I have expressed my reluctance to add to the many pronouncements on the subject of what "discovery" [as required by s 125 of the Income Tax Act 1918 (repealed; see supra)] is. To say that it means to "find out" does not seem to me to help very much. Is there perhaps, a distinction to be drawn between "finding" and "finding out"? Does a man discover a diamond by finding it in the ground believing it to be a piece of glass, that is, not finding out that what he has found is a diamond? ... It seems to me that this is a true analogy:—A man finds or discovers in his land a diamond. He thinks it is only a piece of glass, but, though he did not at first find out it was a diamond, he had in the true sense discovered it on the day that he found it…. I think that the discovery need not be a complete and detailed or accurate discovery and that when the commissioners find out, or think that they have found out, the existence of an omission or other error it is not necessary for them to have probed the matter to its depths or to define precisely the ground on which they have made the assessments. Here the relevant facts were all known to them. What was lacking was a comprehension of those facts. The facts were there, the commissioners, to revert for a moment to my analogy, thought that the diamond which they had found was only a piece of glass, but it was none the less a discovery."*

114. Similarly, the discovery of a notifiable disease in the context of Extension 2(a) would not require full comprehension (i.e. diagnosis), it being "none the less a discovery" that an individual was symptomatic and later confirmed to have had COVID-19 at the premises.

115. Whilst the Defendant's interpretation is "grammatically possible", the Claimant's construction makes far more "commercial sense". In this regard, the Claimants contended that the Supreme Court's reminder of the remark of Lord Mustill in Charter Re, which I have cited above, was apposite.

116. Of all the policy wordings so far considered by the courts, to interpret "discovery" as the Defendant contends, would put this Policy into its own considerably more onerous and impractical category apart from the rest of the market. That is not what a reasonable person, and particularly a SME owner, would have understood upon a fair reading.

117. Were diagnosis and contemporaneous knowledge required it would have been made explicit, for example by language such as "confirmation of at the time of attending the Premises" – that would at least flag to a reasonable person entering into the Policy that they would be required to do something (i.e. organise testing and diagnosis) as a pre-requisite for cover. The Defendant's proposed construction of "discovery" imposes additional obligations on an insured hidden behind an apparently benign word. That cannot be the intention of reasonable parties entering into the Policy.

118. Further, the Defendant's interpretation would lead to considerable practical difficulties. At paragraph 357, the High Court in *LIEC* considered the following scenario:

> *"Furthermore, in a case (favoured by the insurers [including the Defendant in this case] 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."*

119. On the Defendant's case, the Policy would not respond as the diagnosis was not made and contemporaneously known when the subject was at the Premises. This is despite the situation described being a very likely way in which such circumstances would unfold. Indeed, the idea that if someone had been diagnosed with a notifiable disease they would attend their business premises is highly unlikely. Rather as the insurers, and court, acknowledged, a likely scenario is that the diagnosis would follow their attendance.

120. Similarly, with incubation and diagnosis of some notifiable diseases likely taking some considerable period of time, it cannot reasonably be intended that the policyholder would not be covered were a public authority to act prior to confirmation of diagnosis, despite their having been at the premises when they had the relevant disease or, where they had been at the premises with symptoms.

121. When the commercial consequences of the parties' rival constructions are considered, the balance weighs heavily in favour of the Claimants' and against the Defendant's construction. The latter would render cover illusory and impose a higher burden on policyholders outwith the market and the commercial and practicalities of what would be reasonably understood.

Causation and knowledge.

122. The Court of Appeal in *LIEC* having already held that the Supreme Court's reasoning in relation to *radius* clauses in the FCA Test Case applies to *at the premises* clauses, this court is bound to find that:

(1) the discovery did not need to be reported or otherwise known to the relevant public body prior to the imposition of the compulsory closure of the Premises and/or be specifically taken into account in imposing the closure arising from the insured peril.

(2) it is sufficient to prove that the compulsory closure was introduced by the government in response to all cases of Covid-19 in the UK, whether known or unknown, which included at least one "discovery" of Covid-19 at the Premises which had taken place after the date that Covid-19 became a notifiable disease in the relevant territory but by the time of the compulsory closure.

123. That remains the case were "discovery" to be equivalent to "manifesting" or "manifestation", the Court of Appeal having found at paragraph 106 (in response to arguments made by the *Why Not* insurers) that:

> *"Whilst the word 'manifesting' is narrower than 'occurring', it does not follow from the fact that a person at the premises must be displaying symptoms of Covid-19 or be diagnosed with it that the Medical Officer of Health must be aware of that specific manifested incidence of Covid-19 and be responding to it at the time when they issue the operative advice."*

124. The *Why Not* insurers had based their arguments on the reference to "approval of the Medical Officer of Health of the Public Authority" to try and distinguish their wording and import an additional requirement. However, at paragraph 107 the Court of Appeal held:

> *"Although what is required to show causation is an independent matter from the identification of the insured peril, it follows inexorably from the resolution of the causation issue that the 'Medical Officer of Health' whose advice leads to the closure of or imposition of restrictions on the premises does not have to know about the manifestation (or occurrence) of the notifiable disease at those specific premises. In those circumstances it is impossible to introduce a requirement of knowledge by implication. Indeed, once it is appreciated that the phrase 'the Medical Officer of Health of the Public Authority' is not restricted to local authority officers, as both these insurers unsuccessfully contended that it was, the argument becomes unsustainable."*

125. There is similarly nothing in the language of Extension 2(a) which would justify accepting the Defendant's case and departing from the Supreme Court and then Court of Appeal's rulings on knowledge and causation which have hitherto been applied to all types of policy wordings in respect of COVID-19 BI cases.

The case in reply

126. Thus far, I have considered the case put forward by the Claimants in opening. By the time of Reply, however, the focus of their case had shifted slightly.

127. In Reply, the Claimants accepted that it was necessary that the case of Covid-19 at the premises be discovered, and that it led to the closure of the premises, along with the other cases of Covid-19 within the country. However, they argued, the discovery of the case of Covid did not need to precede the closure. Thus, if the Claimants discovered a case of Covid at the premises, which in turn led to the closure of the premises, even if the discovery took place after the closure, this would be within the scope of the cover.

The Defendant's submissions on Issues 1 to 3

128. The Defendant argued that central to Extension 2(a) is the requirement for a "*discovery*" of a notifiable disease at the premises. It is the start of the causal sequence embodied

by the extension, without which there can be no finding of coverage, which involved a discovery of Covid at the premises, followed by closure of those premises, leading to an interruption of the business. The Defendant argued that this submission was supported by a number of considerations.

129. Starting with the natural and ordinary meaning of "*discovery"*, the Defendant submitted that there was no difficulty with that word. It is not ambiguous, or obscure; it is not difficult to comprehend. Indeed, it is a word which is in common use. Its meaning would be clear to any reasonable person, including the reasonable policyholder conscientiously reviewing her policy on inception. Understanding what it means does not require one to descend to efforts that only a pedantic lawyer would exert.

130. Any reasonable reader of the Policies would realise the following:

(1) The word communicates the making apparent of something, some place or some happening to a person that was previously unknown such that that person gains awareness and actual knowledge[9] of that thing, place or happening.

(2) Mere suspicion or speculation or even reasonable belief that there was a hitherto undetected thing, place or happening would not be described, in common parlance, as the "*discovery*" of that thing, place or happening.

(3) By the same token, an undetectable happening is not a "*discovery*" and cannot be the subject matter of a "*discovery*". A detect*able*, but yet *un*detect*ed*, happening is also not a "*discovery*" but *can* amount to a "*discovery*" when, and only when, the event or occurrence is found out, i.e., when it becomes apparent and there is knowledge of it. The "*discovery*", therefore, takes place at the time the knowledge of the subject matter of the discovery is acquired, but not before.

131. The natural and ordinary meaning of "*discovery*" is supported both by dictionary definitions, and by the contextual usages of the word "*discovery*" (or similar) in the ARO policy wording:

(1) Dictionary definitions of "discovery".

(a) Oxford English Dictionary: "*The action of finding out or becoming aware of something for the first time; the action of being the first to find (a place); the action of bringing to light something (as a substance, scientific phenomenon, etc.) which was previously unknown.*"

(b) Cambridge Dictionary: "*the process of finding information, a place, or an object, especially for the first time, or the thing that is found*."

(c) Merriam-Webster Dictionary: "*the act or process of discovering*" or "*something discovered*" where "discover" is defined as "to *make known or*

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9 As to the meaning of knowledge, see, by analogy, ***Insurance Corporation of the Channel Islands and another v The Royal Hotel Ltd and others*** [1998] Lloyd's Rep IR 151 at 162, col. 1 (Mance J): "*knowledge is not to be equated with absolute certainty… knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning.*"

visible" or "*to obtain sight or knowledge of for the first time*" or to "*find out*".

(2) All the dictionaries speak with one voice.

(3) ARO policy wording. There are three other uses of "discovery" in the Policies (in addition to that in Extension 2(a)). All are telling:[10]

(a) On page 10, General Condition 15 (Reasonable care) states, in part: "*It is a condition precedent to the liability of [the Insurer] that the* ***Insured*** *shall at his own expense… (d) as soon as possible after discovery, cause any defect or danger to be made good or remedied and in the meantime shall cause… such additional precautions to be effected as the circumstances may require*". The obligation placed on the Insured here, as an express condition precedent to the Defendant's liability, can only conceivably require the Insured to make good or remedy the relevant defect or danger, and take additional precautions, once the Insured has actual knowledge of such defect or danger. It does not make sense to require the Insured to take such steps in relation to something of which he was unaware.

(b) On page 28, in the exclusions to Sub-Section 3 of the Policies, concerned with coverage for the physical loss of Money, the following is stated: "*The [Insurer] shall not be liable under this Sub-Section for… 3. any loss due to the fraud or dishonesty of any director, partner or employee unless the loss is discovered within seven working days of the date of its occurrence.*" This is a very clear indication to any reasonable policyholder perusing the ARO policy wording that the draftsperson did not consider a "*discovery*" to be the same thing as an "*occurrence*": the taking place of an occurrence can, and in many cases (depending on the nature of the occurrence) will, pre-date the discovery of it.

(c) On the same page, in the extensions to Sub-Section 3 of the Policies, cover is provided for "*[a]ny amount for which the* ***Insured*** *becomes liable under the terms of issue of any bank charge credit debit or cash card issued and used only in connection with the* ***Business*** *following fraudulent use by any unauthorised person*". As a proviso to that cover, the Insured is required to "*[report] the loss to the issuing company immediately and to the Police within 24 hours of discovering the loss*" (*ibid*.). An Insured could only report the loss to the Police once it had actual knowledge of the loss caused to it by the fraudulent use of its credit card. A discovery which gave rise to an obligation on the Insured to report the subject matter of the discovery has to be something apparent and known. It cannot be describing something which no one knew about.

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[10] See General Condition 12: "*This Policy and its terms… shall be read together as one contract. Any word or expression to which a specific meaning has been attached in any part of this Policy shall bear that meaning wherever it may appear unless such meaning is stated only to apply to a specific part of the Policy.*"; see also ***Barnardo's v Buckinghamshire*** [2019] 2 All ER 175 (SC) at [23] (Lord Hodge): "*it is trite both that a provision in a… formal document should be considered in the context of the document as a whole and that one would in principle expect words and phrases to be used consistently in a carefully drafted document, absent a reason for giving them different meanings*".

(4) Even within Extension 2 itself, the word "*discovery*" is used in sub-clause (a), in contradistinction to "*occurrence*" in sub-clause (b). The parties plainly intended the two words to have different meanings. The use of different language is the most obvious means of communicating an intended difference in meaning.

132. Turning to the meaning of the word in context, the word "*discovery*" in Extension 2(a) is unambiguous. Properly construed, it should be given its natural and ordinary meaning as set out above, which meaning is also consistent with the use of "*discovery*" (or similar) in the ARO policy wording.

133. The Defendant made the following **six** points on the true interpretation of "*discovery of a notifiable human infectious or contagious disease at the **Premises***" in Extension 2(a):

(1) **First**, the subject-matter of the "*discovery*" is specified in the clause. The "*discovery*" that has to be established is of "*a notifiable human infectious or contagious disease at the **Premises***" – a suspected case of notifiable disease will not do; nor will a case of notifiable disease elsewhere than at the premises.

(2) **Secondly**, consistent with the natural and contextual meaning of the word "*discovery*", there would only be a "*discovery*" of a notifiable human infectious or contagious disease at the premises when (i) the infection of a person attending at the premises with a notifiable disease was apparent; and (ii) such infection at the premises became known. The different words "*occurrence*", "*discovery*", and "*manifestation*" bring with them different requirements because the scope of cover intended to be provided in each case is different. That is the simple point. Nor did the Defendant accept that clearer words could have been used if the intention was that Extension 2(a) was to be construed as the Defendant contends: the word "*discovery*" *is* clear in its meaning.[11]

(3) **Thirdly**, the Defendant argued that, on the proper interpretation of Extension 2(a), the "*discovery*" had to take place after the relevant disease became notifiable in the relevant territory but prior to the compulsory closure of the premises.[12] Logic dictates that such "*discovery*" of the notifiable human infectious or contagious disease at the premises occurs at the time knowledge of the infection at the premises is acquired, and not before. Consequently, an infection which occurs at the premises, but which remains unknown at the time of, and is only discovered after, the compulsory closure of the premises, is not a relevant "*discovery*" of notifiable disease for the purposes of Extension 2(a). This reflects the fact that what is insured is not an "*occurrence*" but a "*discovery*" of notifiable disease.

(4) **Fourthly**, Extension 2(a) does not specify *who* has to make the "discovery". The discovery could be first made by the infected person (for example, in the case of the taking of a self-administered lateral flow test) or the diagnoser of the infection (for example, in the case of a PCR test conducted by a medical practitioner),[13] or perhaps others. Properly construed, no limitation is placed on the operation of Extension

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11 In any event, arguments based on the fact that a contract could have 'said it better' are seldom helpful: see *Lewison on the Interpretation of Contracts*, 8th Ed. (2023), Chapter 2, Section 13.

12 See ***LIEC v RSA*** (CA) at [95]-[102].

13 See ***FCA Test Case DC*** at [224].

2(a) in this regard. However, the Defendant did contend that the causal chain in Extension 2(a) contemplates that the public body referenced in the extension is aware and has knowledge of the notifiable disease at the premises prior to imposing the compulsory closure, a matter I consider below.

(5) **Fifthly**, the Defendant did not contend that "*discovery*" means "*diagnosis*". What amounts to a "*discovery*" in any given case is clearly context-specific and will depend on the subject matter of the discovery. In the notifiable disease context, however, proof of a "*discovery*" of notifiable disease at the premises is highly likely to require contemporaneous diagnosis.[14] Anything short of that would, in most cases, amount only to suspicion or speculation, or, at best, reasonable belief as to the presence of such disease, none of which amounts to "*discovery*". However, the Defendant accepts that the intensity of diagnosis required will vary from disease to disease. In the case of notifiable diseases with unique and visually verifiable symptoms – for example, monkeypox[15] or measles[16] – cursory visual observation and evaluation by a healthcare professional may well suffice (and diagnosis of one case may allow it to be easily concluded that other proximate cases exhibiting the same symptoms are also infections with the same notifiable disease). COVID-19 is and was different.[17] The most common symptoms of COVID-19 are equally consistent with those of other commonly occurring diseases or illnesses (such as the common cold and influenza). The mere displaying of such symptoms is, therefore, insufficient for the infection with COVID-19 to be apparent or known, or for a "*discovery*" of COVID-19 to take place. In most cases, a positive (PCR or lateral flow) test indicating the likely infection with the SARS-CoV-2 virus will be required.[18] Put another way, the discovery of someone manifesting a cough at the premises would merely amount to a discovery of a cough; it does not, without more, amount to a discovery of an infection with COVID-19.[19]

(6) **Sixthly**, the purpose of the "*discovery*" requirement, and the commercial sense in its inclusion, was, in the Defendant's submission, obvious. It removes uncertainty as to whether there was a case of infection with notifiable disease at the premises, and as to whether the mandated causal link between such a case and the compulsory

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14 Albeit, of course, that the diagnosis does not itself have to take place at the premises. Contemporaneous diagnosis in the days before or after attendance at the premises, but which indicates that the person was infected while at the premises would suffice (provided that the diagnosis leads to "discovery" of the notifiable disease at the premises before the compulsory closure).

15 https://www.nhs.uk/conditions/mpox/

16 https://www.nhs.uk/conditions/measles/

17 Another example is the Middle East Respiratory Syndrome (MERS), a notifiable disease, where between 2012 and 2019 there were 1,500 suspected cases of MERS tested in labs, but only five confirmed cases.

18 Although the Defendant accepts that in some cases, a contemporaneous diagnosis by a medical practitioner, considering all relevant circumstances, could amount to a "*discovery*" of COVID-19 at the premises, even in the absence of testing.

19 The reliance at [42] of the Claimants' Skeleton on the tax case of ***Beatty v Inland Revenue Comrs*** [1953] 1 WLR 1090 is also misplaced. Quite apart from the different context (e.g., a "discovery" there is not of an objective fact but turns on the subjective assessment of a tax officer as to whether there has been an underassessment of tax), it is notable that Vaisey J was clear that for there to be "discovery", knowledge of the relevant facts was required. Knowledge of a person at a premises with a cough does not equip the knower with knowledge of all relevant facts from which it could be concluded that there had been a case of COVID-19 at the premises.

closure is established. As will be evident from the above analysis, the "*discovery*" requirement mandates *what* must be *proved* to establish notifiable disease at the premises. It is insufficient merely to show, on the balance of probabilities, the existence of a case of infection with a notifiable disease at the premises pre-dating the compulsory closure. It is necessary to go further and establish that the occurrence of the notifiable disease was contemporaneously apparent and contemporaneously known, thereby leaving little doubt that there was such a case of notifiable disease at the premises. Resort to after-the-event, retrospective evidence would, accordingly, be unnecessary and non-probative. The Insurer self-evidently has real interest in such certainty.

134. Turning to the Claimants' case, the Defendant argued that the Claimants contend that a "*discovery*" means the same thing as an "*occurrence*" or "*suffering*"[20] or "*sustained*", and that all that is required to be established is that a person was at the premises at a time when he or she had contracted COVID-19. Alternatively, they contend that "*discovery*" means "*manifestation*" and only requires a person to be at the premises when they were symptomatic or had been diagnosed with COVID-19.

135. The Defendant said that there were (at least) four fundamental problems with the Claimants' approach.

136. **First**, the Claimants' construction gives no effect to the ordinary, natural and obvious meaning of the word "*discovery*", which, at its core, is concerned with knowledge, and specifically the acquiring of knowledge of something that was previously unknown but has now become apparent. That essential requirement of knowledge is absent from the word "*occurrence*". The reasonable policyholder would understand that in order to establish an "*occurrence*" of notifiable disease they would merely need to prove that a person was at the premises at a time when he or she had contracted a notifiable disease, and not that anyone had found out about that infection prior to the relevant government action. As the Divisional Court explained in the ***FCA Test Case*** at [93]:

> *"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,*

[20] As to which see ***LIEC v RSA*** at [350]-[356], [359] (Jacobs J); ***LIEC v Allianz*** (CA) at [114].

and that the "occurrence" was not postponed until there was diagnosis."[21]

The requirement for contemporaneous knowledge is also absent from the word "*manifestation*". While "*manifestation*" is narrower than "*occurrence*" and requires proof of the displaying of symptoms *or* diagnosis,[22] it does not bring with it the additional requirement that there was knowledge of infection with COVID-19 (or other notifiable disease) at the premises by the time of the relevant government action.

137. Put shortly, "*occurrence*", "*manifestation*" and "*discovery*" are different words with different meanings. There is no basis in the language of Extension 2(a) simply to conflate one with the other, or to delete "*discovery*" and replace it with "*occurrence*" or "*manifestation*".

138. **Secondly**, the Claimants' construction is unsupported (and, in fact, contradicted) by the contractual context provided by the ARO policy wording itself: see above. That context demonstrates that (i) "*discovery*" and "*occurrence*" were not intended by the Policies' draftsperson to mean the same thing; and (ii) that "*discovery*" must mean what the Defendant says it means (i.e., the acquiring of knowledge of something that was previously unknown but has now become apparent). Notably, the Claimants do not pray in aid any matters of factual matrix in support of their unorthodox interpretation of "*discovery*", divorced as it is from the word's ordinary and natural meaning. The Claimants' construction is therefore unsupported by the language of Extension 2(a), the broader context of the ARO policy wording, or any matters of factual background.

139. **Thirdly**, the Claimants' position is contrary to the approach in the FCA Test Case and in the LIEC proceedings.

(1) The Supreme Court in the FCA Test Case and the Court of Appeal in LIEC v Allianz recognised the importance of giving effect to the insured peril as written.

(a) In the FCA Test Case, the Supreme Court concluded that the radius clauses before it did not, as the Divisional Court had found, insure against notifiable disease *per se* (at [64]), but against the occurrence(s) of COVID-19 within (and not outside) the insured radial area ([65], [69]-[71], [74], [95]). In doing so, the majority of the Supreme Court emphasised that where, as here, there is no suggestion that the court can be satisfied that something has gone wrong with the language of the clause, and the words of the insured peril are instead clear and unambiguous, effect must be given to the obvious meaning of the words used ([61]-[62]). The Divisional Court's interpretation of the language of the radius clause was "*to stand the clause on its head*" ([61]) and the FCA's construction "*involve[d] an attempt to re-write the wording of the policy*" ([65]). The approach to the meaning of particular words in the insured peril, unlike the approach to the test for causation, turns on the

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21 This conclusion of the Divisional Court was not the subject of the appeal, and was encapsulated in the Supreme Court's declarations, at paras 5-6. See also ***FCA Test Case SC*** at [53].

22 ***LIEC v RSA*** at [350]-[351], [358] (Jacobs J); ***LIEC v Allianz*** (CA) at [106]; ***FCA Test Case DC*** at [224], [295]. See also Supreme Court declarations, para 7.

linguistic meaning of the words used and how they would be understood by an ordinary member of the public ([162]).

(b) Similarly, in the LIEC proceedings, the Court of Appeal explained, in the context of upholding Jacobs J's (clearly correct) conclusion that the 'at the premises' clauses only respond to a person who was at the premises infected with COVID-19 at or after the time that COVID-19 became a notifiable disease in the relevant territory, and not before: "*It is a fundamental tenet of insurance law that cover responds to insured perils and there is no cover unless an insured peril has been made out.*"[23]

(2) The fact that different words describing what must be proved in relation to notifiable disease at or within the insured radial area can mean different things is self-evident from the FCA Test Case. The words "*occurrence*" (or "*sustained*") and "*manifestation*" were given different meanings in accordance with the ordinary and natural import of such language.[24] The fact that "*manifestation*" was narrower than "*occurrence*" or "*sustained*", requiring proof of the additional element of either the displaying of symptoms or diagnosis, did not deter the Divisional Court from construing the words differently. The same approach ought to apply to "*discovery*" and Extension 2(a).

(3) The surprising suggestion in the Claimants' Skeleton (at [32]-[40]) that the Supreme Court's analysis in the FCA Test Case supports their position that "*occurrence*" and "*discovery*" are interchangeable, and should be seen as alternative words with the same meaning, is plainly wrong. The Supreme Court did not in the passages cited, or indeed anywhere in the judgment, consider the meaning of the word "*discovery*". At [61]-[74] and [81]-[95], the Supreme Court rejected the analysis of the Divisional Court that the insured peril in the relevant clauses under consideration was the disease itself, rather than the specific cases of disease within the relevant insured radial area. In doing so, the Supreme Court commented, in relation to the RSA 3 and QBE 2 wordings,[25] that all the sub-clauses of those wordings, including those concerned with an *occurrence* of disease or *discovery* of vermin or pests, were concerned with events occurring at a particular time and place and not, for example, disease or vermin or pests generally. The Court said nothing, however, to suggest that the event constituted by the "*discovery of vermin or pests at the Premises*" was to be construed as requiring only an "*occurrence*" of vermin or pests at the premises. That would be to re-write the parties' policies, something which the Supreme Court had expressly eschewed at [65]. Put shortly, the fact that a "*discovery of vermin or pests at the Premises*" can be seen as something happening at a particular time, place, etc., cannot conceivably mean that "*discovery*" has the same meaning as "*occurrence*". Indeed, this was expressly acknowledged by the Supreme Court at [71] where a distinction was drawn between "*events*" and the "*discovery of events*".

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23 ***LIEC v Allianz*** (CA) at [96].

24 See ***FCA Test Case DC*** at [93], [224], [295]; Supreme Court declarations, paras 5-7; ***LIEC v RSA*** at [350]-[351] (Jacobs J).

25 See clauses quoted at ***FCA Test Case SC*** at [50], [88].

140. **Fourthly**, construing "*discovery*" in accordance with its ordinary, natural, and contextual meaning does not give rise to difficulties in application,[26] or to an uncommercial result. Determining whether or not there is, on particular facts, a "*discovery*" of notifiable disease at the premises at or before the time of the relevant compulsory closure is likely to be straightforward, at least in the vast majority of cases. The mere fact that cover is provided for a narrower range of infections than in "*occurrence*" wordings is in no way suggestive of uncommercial cover. There are many situations in which a "*discovery*" of a notifiable disease will be capable of being established without difficulty, for example, (i) where a measles rash is identified in children at a nursery, and diagnosed by the local GP, leading to the shutdown of that nursery and several other nurseries in the area; or (ii) the discovery of Legionnaires disease at a restaurant leading to its closure; or (iii) where a regular customer attends at a café asymptomatically infected with COVID-19 on 14 March 2020, days before the 21 March Regulations, leaves the premises and proceeds to hospital for a hip operation, where he tests PCR positive for COVID-19; or (iv) the owner of a hair salon who in late October 2020, days before the November lockdown was imposed, feels unwell at the salon, returns home, takes a lateral flow test, and finds out that she has COVID-19, reporting the results of her test on the NHS App.

141. It also bears emphasis again that the inclusion of the "*discovery*" requirement is not inconsistent with the principles of concurrent causation espoused in the FCA Test Case and in the LIEC proceedings. If the relevant Claimant can establish that a "*discovery*" of a notifiable disease at the premises was *a* cause of the compulsory closure, it matters not (i) that the closure was also caused by other cases of notifiable disease in the wider area, or (ii) that the government would have closed the premises in any event, regardless of the "*discovery*" of disease at the premises. Adapting Mr Kealey KC's nurseries example in the LIEC proceedings,[27] where an area had 11 nurseries, and measles was discovered at five of them, and the local authority then closed all nurseries, the five nurseries, which had purchased cover on the ARO policy wording, would be able to recover: the Insurer would not be able to respond to the claims of any of these five 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. The other six nurseries, which purchased similar policies, would not be in a position to make any claim, not because of the application of any "*but for*" or "*distinct effective cause*" causation test, but because even if it were later proved that there were cases of measles at those nurseries, those cases were not "*discoveries*" of measles at the premises which took place prior to the closure order.[28] There is nothing surprising or unjust about this; it is simply the inevitable consequence of purchasing notifiable disease cover on "*discovery*" and not "*occurrence*" wording.

Causation and knowledge.

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26 Cf., ***FCA Test Case SC*** at [206]; ***LIEC v RSA*** at [210] (Jacobs J); ***LIEC v Allianz*** (CA) at [72].

27 See discussion at ***LIEC v RSA*** at [223] to [225] (Jacobs J). That example could not get Mr Kealey KC home because the policy wording there had "*occurrence*" wording. Extension 2(a) is different.

28 A similar analysis would apply to the Islington restaurants example at ***LIEC v Alliance*** (CA) at [68].

142. The Defendant argued, under this head, that Issues 2 and 3 could be addressed together, being concerned with causation and the relevant public body's knowledge of the "*discovery*" of a notifiable disease at the premises.

143. The Defendant however emphasised one point at the outset, which was that it did not, in these proceedings, seek to go behind the conclusions of previous judgments in the COVID-19 BI sphere. Most significantly, the Defendant fully accepts the principles of concurrent causation espoused by the Supreme Court in the FCA Test Case, by reference to disease and hybrid radius clauses, which conclusions were extended to 'at the premises' clauses in the LIEC proceedings.[29] It did not, therefore, cavil with:

(1) The factual point that, in imposing the March lockdown, the various governments were responding not just to the reported cases (i.e., the known knowns), but also to the cases of COVID-19 that had so far occurred, whether or not contemporaneously known or reported (i.e., the known unknowns).[30]

(2) The legal analysis that so long as it can be proved that the relevant government action was taken in response to the insured disease (here, the "*discovery of a notifiable human infectious or contagious disease at the* ***Premises***", the relevant causal link is established, even if the government was also responding at the same time to all other cases of COVID-19 in the country which had occurred in the immediate run-up[31] to the government action.[32]

144. While the Defendant did not contend that the "*arising from*" causal link within the insured peril in Extension 2(a) imports a "*but for*" or "*distinct effective cause*" test, it is nonetheless evident from both the proper construction of Extension 2(a) and the judgments in the FCA Test Case and the LIEC proceedings, that it is necessary to prove *a* proximate causal connection between the "*discovery of a notifiable human infectious or contagious disease at the* ***Premises***" and the "*compulsory closure by a public body*". To explain:

(1) On any reasonable reading of Extension 2(a), the "*compulsory closure by a public body*" cannot be said to *"[arise] from*" the "*discovery of a notifiable human infectious or contagious disease at the* ***Premises***" unless that "*discovery*" had some causal involvement in the loss. Most obviously, if the premises were compulsorily closed for reasons unconnected with notifiable disease, for example because of some other violation of local government laws, the required causal link would not be established. The sole cause of the closure would be an uninsured matter.

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29 The critical passages on causation are as follows: ***FCA Test Case SC*** at [168], [176], [194]-[195], [212]-[213]; ***LIEC v RSA*** at [180], [195]-[199], [202]-[206], [207]-[209], [210], [249] (Jacobs J); ***LIEC v Allianz*** (CA) at [62]-[64], [66], and [72]-[73].

30 See ***FCA Test Case DC*** at [112]; ***FCA Test Case SC*** at [176], [179]; ***LIEC v Allianz*** (CA) at [69]-[71].

31 See ***Various Eateries Trading Ltd v Allianz Insurance Plc*** [2024] Lloyd's Rep IR 60 at [54] (Butcher J).

32 See ***FCA Test Case SC*** at [212]-[213]; ***LIEC v Allianz*** (CA) at [64], [72].

(2) The same point emerges from the Supreme Court judgment in the FCA Test Case and the judgments in the LIEC proceedings.[33] They establish that it is necessary for the Claimants to demonstrate that (i) the "*discovery of a notifiable human infectious or contagious disease at the **Premises***" had a sufficient causal connection or causal involvement in the compulsory closure such that the "*discovery*" can be regarded as a proximate cause of the closure; or, put another way, (ii) that the "*discovery*" was at least one of a number of (equally effective) causes which led to the compulsory closure; or, put yet another way, (iii) the "*discovery*" was one of the events to which the public body was responding when it imposed the compulsory closure.

145. The Defendant argued that unlike "*manifestation*", or "*occurrence*",[34] inherent in the concept of "*discovery*" is knowledge of the infection with a notifiable disease at the premises. A public body cannot be responding to a "*discovery*", as opposed to an "*occurrence*", of notifiable disease at the premises if it was unaware of such "*discovery*" at the time of imposing the compulsory closure; similarly, the "*discovery*" of a notifiable disease at the premises cannot be at least one of the causes of the compulsory closure if the public body was none the wiser about such "*discovery*". Knowledge by the public body of the "*discovery*" is therefore a necessary ingredient to establish the causal relationship between disease and closure. Any other construction would equate "*discovery*" with "*occurrence*", would ignore the inherent requirement for contemporaneous knowledge encompassed within "*discovery*" (but absent from "*occurrence*" or "*manifestation*") and would rob the inclusion of the "*discovery*" requirement in Extension 2(a) of much of its purpose. It would atomise Extension 2(a) into its composite elements without properly considering whether the inclusion of the "*discovery*" requirement has any bearing on the internal causal link within the insured peril, as it must.

146. The reality is that construing the causal link between the "*discovery of a notifiable human infectious or contagious disease at the **Premises***" and the "*compulsory closure by a public body*" as requiring knowledge by the public body of the "*discovery*" is unlikely to impose any onerous proof requirement on the Claimants. That is because such knowledge is likely to be a concomitant of the "*discovery*" of a notifiable disease at the premises. Where there is a "*discovery*" of a notifiable disease, such "*discovery*" is highly likely to have involved diagnosis by a registered medical practitioner. That practitioner has obligations to notify cases of infection with notifiable disease to the local authority, which in turn is obligated to escalate such notifications, including to the UKHSA: see Health Protection (Notification) Regulations 2010 (for England), sections 2 and 6. Therefore, where there is proof of a "*discovery*" of a notifiable disease at the premises, the consequential requirement that that "*discovery*" be reported or otherwise known to the relevant body is also highly likely to be met.

147. For all the reasons set out above, the Defendant submitted that I should conclude that the discovery of COVID-19 had to be reported or otherwise known to the relevant public body prior to the imposition of the compulsory closure on the premises; that such discovery also had to be taken into account by the public body in imposing the relevant

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33 See ***FCA Test Case SC*** at [168], [191], [212]; ***LIEC v RSA*** at [180], [182] (Jacobs J); ***LIEC v Allianz*** (CA) at [64], [72].

34 See ***LIEC v Allianz*** (CA) at [106]-[107].

compulsory closure, (although it was said that this imposed no additional requirement to that identified in the FCA Test Case that it had to be proven that the public body was acting in response to the insured peril (here, the "*discovery*"), regardless of whether it was also simultaneously acting in response to all other cases of COVID-19 in the country at the time[35]); but that provided that the public body had knowledge of the discovery of COVID-19 at the premises, and the causal connection between the "*discovery of a notifiable human infectious or contagious disease at the* ***Premises***" and the "*compulsory closure by a public body*" is met, the Defendant does not dispute that there can be cover where that discovery is merely one of several causes to which the public body is responding.

Discussion and conclusions on Preliminary Issues 1 -3

148. I deal with these issues together because in my judgment they are interlinked.

149. Although this may seem illogical, I start with the issue of causation. It was, as I understood it, common ground that the authorities which imposed the closure (here central government) were acting in response both to the "known knowns", as it was put, and the "known unknowns". Since the UK Government knew both that there were in fact cases of Covid-19, and that there would be others that they did not know of specifically, but which had to exist, this was a sufficient causative link.

150. In these circumstances, I see no reason why any distinction should be drawn, as a matter of causation, between unknown occurrences, unknown manifestations, and unknown discoveries. Where the insured peril is the discovery of a notifiable disease, but what leads to the closure is the notifiable disease, there is no reason, in my judgment, to conclude that the public authority has to have known of the particular instance of Covid-19 at the premises at the time of the decision to close this, and other, premises. The discovery does not need to be by the authority. In this regard, I agree with the Court of Appeal in the LIEC case.

151. This in turn, in my judgment, informs the meaning to be given to the word "discovery" in the context of this policy. Given the circumstances, I see no reason why the normal chain of causation, commencing with discovery and leading to closure, should apply. Instead, in my judgment, as long as closure is due to the existence of a notifiable disease – here Covid-19 – whether or not the particular case of Covid-19 is known to the authorities at the time of closure, if such a disease is discovered at the premises and in fact caused closure (even if together with other cases of that disease), whether or not that discovery takes place before or after closure, the discovery will be sufficient to trigger coverage. Thus, if there was a case of Covid-19 at the premises in the period between the date when Covid-19 became a notifiable disease and the date of closure, which, together with other cases of Covid-19 nationwide, caused closure, this will be covered, whether it is discovered before or after closure.

152. This renders the debate as to the precise meaning of the word "discovery" less relevant. For the reasons I have given, I have concluded that the case of Covid-19 which has

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[35] See ***FCA Test Case SC*** at [212]. For the avoidance of doubt, as Insurers do not pursue the "*distinct effective cause*" test, they do not contend that the "*discovery*" had to be "*specifically*" taken into account by the public body in imposing the closure: see framing of Preliminary Issues 2 and 3(b)(i).

taken place within the relevant period must be discovered, but it matters not whether that discovery is before or after closure.

153. Nor do I think that the discovery must be in any particular way. Thus, there may have been a diagnosis of the particular individual; or there may be other evidence which establishes the happening of the relevant event within the relevant period. As I understand it, however, I am not required, for the purposes of answering the questions before me, to make any determination as to whether any particular proof put forward is or is not adequate, and, in these circumstances, I say no more about the point. If I am required to do so, then I will require further argument on the point.

154. To sum up:

(1) It is necessary for the assured to show a discovery of a case of Covid-19 at the premises between the date on which Covid-19 became a notifiable disease and the date of closure.

(2) That discovery may have taken place before or after closure.

(3) I make no finding as to how the discovery has to be evidenced, since, as I understand the position, this question is not before me.

(4) The closing authority does not need to have known of the specific case of Covid-19 at the premises and does not need to have taken it into account in imposing the closure order.

(5) It is sufficient that the case of Covid-19, taken together with other cases in the relevant locality, caused the closure.

Issues 4(a) and 4(b): Condition precedent

155. I consider these issues together because, in my judgment, the parties' submissions conflated them to some degree. I deal with the issue of estoppel below.

156. These issues and the issue of estoppel arise in relation to those Claimants whose claims have been defended in this action on the basis that there has been a failure to comply with General Condition 5 (Claims) relating to late notification. Those claims are indicated in the schedule of Claimants appended to this judgment.

157. As set out in the Agreed and Assumed Facts, where there is a dispute as to the date of notification, it is to be assumed for the purposes of this Preliminary Issues Trial that the date relied on by that Claimant (which is also indicated in the Schedule of Claimants appended to this judgment) is correct and it is this date which is include in the Schedule appended to this judgment. I was not asked to resolve those factual disputes at this Preliminary Issues Trial.

The Claimants' submissions

158. The Claimants made a number of submissions in this regard. Before considering those submissions in more detail, I would venture to summarise the propositions put forward as follows:

(1) The label of a clause as a "condition precedent" does not determine whether, on its true construction, it has that effect.

(2) General Condition 5 (Claims) is a clause of the nature identified in George Hunt Cranes Ltd, which attaches the label of "condition precedent" to a variety of different obligations. This type of clause is unlikely to be a condition precedent.

(3) The clause contains significant ambiguity, which militates against it being construed as a condition precedent.

(4) The clause, on its face, requires notification of events which are not known to the assured, which again militates against it being construed as a condition precedent.

159. First, they submitted that the label of a clause as a "condition precedent" does not determine whether, on its true construction, it has that effect. Thus, in George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd [2002] 1 All ER (Comm) 366 [11], it was said that:

> *"11. In this connection it is frequently pointed out that in relation to clauses of this kind, if the contract states that the condition is a 'condition precedent' or a 'condition of liability', that is influential but not decisive as to its status, especially when the label condition precedent is attached on an indiscriminate basis for a number of terms of different nature and varying importance in the policy."*

160. Secondly, the Claimants submitted that General Condition 5 (Claims) is a clause of the nature identified in George Hunt Cranes Ltd, which attaches the label of "condition precedent" to a variety of different obligations identified as sub-clauses (a) to (f), which vary in their nature. Each of those are stated to be conditions precedent rather than one specific item being identified as such (in contrast, for example, to clause 2(c) in George Hunt Cranes Ltd which identified a specific condition as a condition precedent). The Claimants argued that this militated against the entire clause being construed as a condition precedent.

161. Thirdly, of particular relevance to this issue, General Condition 5 (Claims), subclause (a), would place the insured under an obligation to "immediately" advise the Defendant in writing, where there was (1) "the happening of any event" (2) "which could result in a claim under this Policy". There is no definition of "event" in the Policy, but in general,an "event" is a thing happening at a particular time, in a particular place and in a particular way: see Axa Reinsurance (UK) Plc v Field [1996] 1 WLR 1026 at 1035, followed in the FCA Test case at [67]. However, as applied to the circumstances of the Covid-19 pandemic by way of example, General Condition 5 (Claims) does not make plain what the "event" which would trigger the obligation to notify would be.

(1) It cannot be the "discovery of a notifiable human infectious or contagious disease at the Premises", said the Claimants, as that alone is insufficient in and of itself to give rise to a claim under Extension 2(a), without the subsequent closure and interruption and interference with the business that is required under Extension 2(a).

(2) It cannot be the compulsory closure by a public body, as similarly that is insufficient in and of itself to give rise to a claim under Extension 2(a).

(3) It may only be the "interruption of or interference with the Business" as a result of that compulsory closure. However, "interruption or interference" is not, properly construed, an "event" which occurs at a particular time, in a particular place and in a particular way. "Interruption or interference" is by its nature a process rather than a specific "event". On a strict construction of the clause as it would apply to exactly the claims made in this case, an insured could not reasonably identify an "event" consisting of "interruption or interference".

162. The Claimants further submitted that, on its face, General Condition 5 (Claims) requires notification of an "event which could result in a claim" whether or not that event is known about by the insured. However, similar attempts by the insurer in Zurich Insurance PLC to recast a notification clause as being one which places the insured under an obligation to notify upon becoming aware that an event is likely to give rise to a claim were rejected, at paragraphs 29 and 32-33 of the judgment:

> *"29. Mr Moxon Browne submitted as follows. In Layher the condition required " immediate" notice. That is markedly different to the present condition which requires notice " as soon as possible ", in contrast to the reference to " immediately " in the following sentence. In Layher the judge found that no claim was likely at the date of event. The Court did not, therefore, have to grapple with what the position would be if such a claim was likely but the insured was not aware that that was so; or with what he submitted would be the absurdity of an insured being required to give notice of an event of which he was not aware. In Jacobs , the assumption that the court was prepared to make – that the clause must be construed and applied objectively, but taking account of such knowledge as the insured had – provided a means of avoiding that absurdity. In the present case, where immediate notice is not required, it would be almost equally absurd if the insured did not have to give notification as soon as he became (or should have become) aware of an event that was likely to give rise to a claim. The true meaning of the clause must be that, if the insured did not know of the event when it occurred he must nevertheless give notice of it to the insurers when he becomes aware of the event, and that it was likely to give rise to a claim, or when he ought to have become so aware. The effect of the phrase " as soon as possible " was not limited to specifying a period after the event within which notice must be given. It also meant that the obligation to notify arose when the state of knowledge of the insured was such that it was, or should have been, possible to do so. The obligation was to give full particulars. That itself is consistent with a duty on the part of the insured to be pro-active in making inquiries and signifies that the notice might fall to be given some considerable time after the event when such particulars are available."*

> *"32. I do not accept Zurich's construction of the condition. This is a condition introduced by Zurich into its policy which has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so.* ***It is possible to construe the use of the phrase " as soon as possible " as meaning that even if, when the event occurred, it was not likely to give rise to a claim, the obligation to notify would arise whenever thereafter the insured knew or should have known that an event which had occurred in the past was likely to give rise to a claim. But I regard this as a strained interpretation and erroneous****.*
>
> *33. It is, in any event, far from clear that that is the right interpretation and given the nature of the clause the ambiguity must be resolved in favour of Maccaferri. Clauses such as these need to be clear if they are to have effect: Royal and Sun Alliance v Dornoch [2005] EWCA Civ 238. That is particularly so in circumstances where the context in which the clause was agreed was that Layher and Jacobs had been decided as they had. Although the wording in the present case is not identical to the wording in those cases, the two cases indicate that* ***prima facie whether there is an obligation to notify an occurrence as one likely to give rise to a claim is to be determined by reference to the position immediately after it occurs****. Further,* ***Zurich's construction imposes an obligation to carry out something of a rolling assessment as to whether a past event is likely to give rise to a claim (and possibly as to whether an event has happened at all) as circumstances develop****. There are clauses which have that effect, particularly in claims made policies insuring against professional liability, but they are not in this form. If that was what was intended, the insurers could be expected to have spelt it out."* (emphasis added)

163. General Condition 5 (Claims), subclause (a) requires notification of the happening of any event which "could" result in a claim. On its face, that is a more general requirement than an obligation to notify of any event which is "likely" to result in a claim (which would mean an event with at least a fifty per cent chance that it would result in a claim). This further ambiguity in General Condition 5 (Claims), subclause (a), arising from the matters set out above renders it unworkable as a condition precedent, notwithstanding its inclusion in a list of matters each of which are stated to be conditions precedent.

164. Overall, said the Claimants, construing the clause "fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology" (per MacGillivray, 15th edition at para 19-040, the same wording of which in the 9th edition was approved in George Hunt Cranes Ltd at para 11 and in the 10th edition in Pilkington United Kingdom Limited v CGU Insurance [2005] 1 All ER (Comm) 283 at [65]), the proper construction of General Condition 5 (Claims), subclause (a) is that it is an innominate term breach of

which may sound in damages but which cannot be relied upon by the Defendant as a complete defence to this claim.

165. Turning to what was required to satisfy the clause, the Claimants again put forward various propositions.

(1) No notice was in fact necessary since the relevant events, namely Covid-19 and closure of premises resulting from it were already known to the Defendant.

(2) The Claimants only had the requisite knowledge following the judgments of the Courts in the FCA Test case, alternatively LIEC. Notification was given in good time following knowledge of the existence of those judgments.

166. The Defendant's proposed construction is that the "event" following which the Claimants had an obligation to notify had taken place "*by 21 March 2020 and/or 26 March 2020 when the government implemented measures requiring the compulsory closure of the Claimants' premises*", The Defendant had notification of the "event" which could give rise to a claim and any specific notification from each of the Claimants was unnecessary to meet the contractual purpose of General Condition 5 (Claims), subclause (a).

167. Lord Denning MR in Barrett Bros (Taxis) Ltd v Davies [1966] 1 WLR 1334 at 1339D-F, said that where sufficient notification is given by a third party which provides "all the relevant facts" or "all the material information" which renders it "a futile thing" to require the insured to provide that same information, the court will not require the insured simply to give the same notification itself: "*The law never compels a person to do that which is useless and unnecessary*."

168. That remains good law notwithstanding the insurer's attempts to argue to the contrary in Makin v Protec Security Group Limited [2025] EWHC 895 (KB) (at [54] and [67]). It applies where the notification is of the circumstances of the claims arises from an independent public body with no interest in the outcome of the insurance claim (see Ahmed v White & Company (UK) Ltd [2025] EWHC 2399 (Comm) at [261]).

169. The principle must apply *a fortiori* where the "event" which is relied upon by the Defendant as being the trigger for notification is one which was widely known as one which is imposed upon the entire country and which was announced by the UK Government when it imposed those measures. There is no suggestion that the Defendant was unaware of these measures.

170. As with an assessment as to whether it is "likely" that a claim would be made, matters must be considered "*by reference to the position immediately after it occurs*" (Zurich Insurance PLC [33]). If an insured has no subjective knowledge of the circumstances in question, then they cannot be in breach of the policy (Aspen Insurance UK Ltd v Pectel Ltd [2009] 2 All ER (Comm) 873 at [9], and Euro Pools Plc (In Administration) v Royal and Sun Alliance Insurance Plc [2020] 2 All ER (Comm) 40 at [95]: "*In order to give a valid notice, the insured must be aware of the circumstances in question. You cannot notify something of which you are not aware.*"

171. As set out above, there is substantial ambiguity in the "event" of which the Claimants were required to notify the Defendant. As set out above, the only reasonable

interpretation of the "event" is that it is constituted by the interruption or interference to the Claimants' businesses as a result of the compulsory closure of those businesses as a result of the discovery of a case of Covid-19 at the Premises.

172. The nature of the Claimants' businesses and of Covid-19 as a disease means that it was intrinsically difficult for the Claimants to establish contemporaneously that this had occurred. The nature of Covid-19 as a disease meant that it was intrinsically difficult to determine whether or not a case had been discovered at the premises. The nature of the Claimants' businesses also meant that those present would have included both the Claimants' employees and members of the public, hence it is the Claimants' case that there are many individuals who would have been present at their premises of whom the Claimants have no knowledge.

173. The Claimants should not be prejudiced by their inability to notify if on its true construction cover was available under the policy as that would amount to an implicit restriction on the scope of substantive coverage effected through the back door of the difficulties arising from the circumstances in which that cover was triggered. To the extent that there is any ambiguity in the construction of the clause it should be construed in the Claimants' favour as to the date of notification in the same manner as with the trigger for cover itself.

174. The "event" only requires notification if it is one which "could give rise to a claim under the Policy". At the time of the proposed closures, matters in respect of the UK Government's response to the Covid-19 pandemic were uncertain. The nature of the illness itself, its transmission, its symptoms, and the extent of its prevalence in the UK were all unknown. Similarly, the application of business interruption insurance and whether it would respond to the circumstances which existed in the pandemic was also uncertain. That was the very reason that the FCA took the unusual step of initiating test claims to resolve the application of certain points arising out of the application of sample policies to the circumstances that existed at that time.

175. At the very earliest, it was only when those uncertainties were authoritatively resolved by the Supreme Court in its decision in the FCA Test Case on 15 January 2021 that an insured could reasonably consider that the circumstances of the pandemic were such the events of the Covid-19 pandemic "could give rise to a claim". However, as the Defendant themselves noted in their responses to the letters of claim, that litigation did not resolve all of the issues which would arise in respect of all policies that might respond to the circumstances of the Covid-19 pandemic. Specifically, it did not address whether such cover would respond to "at the premises" clauses, which include that in issue in this case. That was only authoritatively resolved in the LIEC litigation, with the Court of Appeal decision being handed down on 6 September 2024.

176. In the unusual and exceptional circumstances of the pandemic, the Claimants should only be taken to have been reasonably in a position to determine that there had been an "event which could give rise to a claim" once those uncertainties as to the manner in which the events of the Covid-19 pandemic would be dealt with under business interruption policies of a sufficiently similar nature to the policy in issue in this claim had been authoritatively determined. That was upon the conclusion of the litigation in the LIEC proceedings, or alternatively at the very earliest upon the Supreme Court handing down its decision in the FCA Test case.

The time to make the notification

177. Per Aspen Insurance UK Limited at para 9 and the authorities cited therein, "immediate" means "with all reasonable speed considering the circumstances of the case".

178. The Defendant's position of defending all claims in which notification was given after the Supreme Court's decision in the FCA Test Case on the basis that there has been a breach of General Condition 5 (Claims) is clearly unsustainable. Even on that proposed construction, a "reasonable period" after that decision would not be immediately upon the judgment being handed down. An insured would require a reasonable period to consider the judgment and its application to their circumstances.

179. The Claimants' primary position is that the events of the Covid-19 pandemic only became notifiable when it was clear that they would permit the Claimants to pursue a claim under this policy.

180. If that was upon the conclusion of the LIEC litigation, then the question of the time within which each Claimant notified is moot, as each Claimant had notified before the end of that litigation.

181. If that was upon the Supreme Court handing down its decision in the FCA Test Case, then notification "with all reasonable speed considering the circumstances of the case" would be notification within six months of that decision, namely by 15 June 2021.

The Defendant's submissions

Is General Condition 5 a Condition Precedent?

182. The Defendant submitted that, properly construed, General Condition 5 *is* a condition precedent to the Defendant's liability to pay claims under the Policies, for several reasons:

(1) **First**, this is what the express words of General Condition 5 unambiguously provide. Specifically, compliance with the matters set out in (a) to (f) is stated to be "*a condition precedent to the liability of the [Insurer]*". The parties' objective intentions, as gleaned from the language of the Policies, is therefore that the Defendant's liability for claims is conditional on compliance with the requirements of (a) to (f), including relevantly for present purposes the obligation to notify potential claims in (a).

(2) **Secondly**, given the express signs are that it was the parties' intention that General Condition 5 should function as a condition precedent to the Defendant's liability, the Court should be slow to conclude otherwise.[36] As Potter LJ put it in George

[36] See *MacGillivray on Insurance Law*, 15th Ed. (2024), para 10-034: "*Where the policy wording demonstrates a clear intention to give a clause the status of a condition precedent, the clause will be recognised as such*"; *Colinvaux & Merkin's Insurance Contract Law*, paras B-0102: "*The labelling of a specific clause as a condition precedent is conclusive*"; and C-0251: "*It has indeed been pointed out that there is no case in which a term individually referred to as a condition precedent has been construed in any other way*."

Hunt Cranes Ltd v Scottish Boiler & Gen Ins Co Ltd [2002] Lloyd's Rep IR 178 (CA) at [11]:[37]

> *"In this connection it is frequently pointed out that in relation to Clauses of this kind, if the contract states that the condition is a "condition precedent" or a "condition of liability", that is influential but not decisive as to its status, especially when the label condition precedent is attached on an indiscriminate basis for a number of terms of different nature and varying importance in the policy. One may at once observe that that is not the case here. It is also the position that where, in a policy, individual terms are described as conditions precedent, while others are not, the label is more likely to be respected in relation to a Clause expressly so identified; for instance, Stoneham v The Ocean Railway and General Accident Insurance Co (1887) 19 QB 237 per Kay J at 241… As with any other contract, the task of construction requires one to construe the policy as a whole. However, in this respect, as it seems to me, if there is a clear expression of intention on the wording of the Clause that it shall be treated as a condition precedent, that label or apparent intention cannot simply be ignored. It should at least be regarded as a starting point. I would adopt the further formulation in MacGillivray, 9th Editions, paragraphs 19-35:*[38]
>
> *Such Clauses should not be treated as a mere formality which is to be evaded at the cost of a false and unnatural construction of the words used in the policy, but should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology."*

(3) **Thirdly**, there is appellate authority firmly in support of the Defendant's position. In Gan Insurance Company Ltd v Tai Ping Insurance Company Ltd (Nos 2 and 3) [2001] Lloyd's Rep 667 (CA), the Claims Co-operation Clause in the reinsurance contract was in similar terms to General Condition 5 and was expressly labelled as "*a condition precedent to any liability under this Policy*": see [7]. Sub-clause (a) required that "*[t]he Reinsured shall, upon knowledge of any circumstances which may give rise to a claim against them, advise the Reinsurers immediately, and in any event not later than 30 days*" and sub-clause (b) provided that "*[t]he Reinsured shall co-operate with Reinsurers and/or their Appointed Representatives subscribing to this Policy in the investigation and assessment of any loss and/or circumstances giving rise to a loss*". Sub-clause (c) was concerned with the

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37 Quoted in part in the Claimants' Skeleton at [61]. As for the Claimants' reliance at [62] on what was said by Potter LJ at [15] in ***George Hunt Cranes***, the context is important. As is clear from [9] of the Court of Appeal judgment, the immediate notice clause in that case (at sub-clause (a)), was *not* labelled as a condition precedent to liability. In other cases where clear language has been used to identify an immediate notification clause as a condition precedent to liability, the Court has had no hesitation in concluding that the clause had that effect: see ***Aspen Insurance UK Ltd v Pectel Ltd*** [2009] Lloyd's Rep IR 440 at [62]-[72].

38 See para 19-040 of the current, 15th Edition.

approval of settlements. Mance LJ, with whom Latham LJ and Sir Christopher Staughton agreed, explained at [26]:

> *"The clause is emphatic in stating that "Notwithstanding anything contained in the Reinsurance Agreement and/or Policy working to the contrary, it is a condition precedent to any liability under this Policy that…". In my judgment, the judge was right on this issue. The clause introduces a "condition precedent" to "any liability under this Policy". It goes on in the ensuing sub-clauses to specify three matters. The first is clearly capable of being a condition precedent. The last likewise. The second is now submitted by Tai Ping to be "plainly too vague to qualify as a condition precedent". But the fact that it may require a degree of judgment to decide whether there has been a failure to "co-operate" cannot, in my judgment, preclude a conclusion that co-operation was a condition precedent. It can often occur that the continued operation of contractual obligations depends upon a careful evaluation and judgment of the significance of complex factual circumstances… Whether or not sub-clause (b) here refers to any or only significant or serious failures to co-operate raises a potential separate issue which cannot impact on the question whether the Claims Co-operation Clause is capable of being read as a condition precedent. Whatever its scope, the Claims Co-operation Clause operates in my judgment as a condition precedent."*[39]

(4) **Fourthly**, this case is not concerned with a general clause which purports to convert all policy conditions into conditions precedent in an indiscriminate and unthinking manner.[40] The ARO policy wording takes a deliberate and considered approach to the labelling of certain specific conditions as conditions precedent to the Defendant's liability under the Policies.[41] Where such individual conditions are specifically labelled to take effect as conditions precedent, effect should be given to the parties' unequivocally expressed intention. This is *a fortiori* where there are other conditions in the Policies[42] which are not labelled as conditions precedent to liability, and would not, therefore, likely be construed as such.[43]

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39 See also ***Phillips & Co v Whatley*** [2008] Lloyd's Rep IR 111 (PC) at [21], [31] (Lord Mance).

40 While (a) to (f) in General Condition 5 are together designated as conditions precedent, these are important sub-clauses relating to the common topic of claims notification and claims handling all contained within the same clause. The structuring of General Condition 5 is materially similar to the Claims Co-operation Clause in ***Gan v Tai Ping*** (*supra*).

41 See, in addition to General Condition 5, General Condition 13 (Reasonable care), General Condition 16 (Security), Conditions to Sub-section 3 (Money), Extension 1 to BI cover, Conditions to Section 3 (Combined Liabilities), Conditions to Section 5 (Goods in Transit) and Conditions to Section 6 (Loss of License).

42 See, e.g., Extension 23 to Sub-section 1 (Building and Contents), Condition 4 to Sub-section 4 (Personal Assault) and Conditions 6, 8, 10 of Section 3 (Combined Liabilities).

43 See e.g., ***Stoneham v The Ocean, Railway, and General Accident Insurance Company*** (1887) 19 QBD 237 at 240-241 (Matthew J and Cave J).

(5) **Fifthly**, commercial common sense does not point to any different construction. The commercial purpose in including a notification requirement in the Policies, as contained in General Condition 5, sub-clause (a), and designating it as a condition precedent is obvious and has been repeatedly recognised by the courts.

(a) In the COVID-19 BI insurance context, the Singapore Court of Appeal recognised in Relax Beach Co Ltd v QBE Insurance (Singapore) Pte Ltd and another [2023] SGCA 45 that the purpose of a clause requiring prompt notification of claims was to "*enable the insurer to investigate and ascertain the bona fides of the claim within a reasonable time of the loss, take steps to mitigate the consequences and to preserve the evidence where necessary… It would therefore have been vital for [Relax Beach] to promptly inform [Insurers] of Mr K's case [of disease at the premises] to enable the latter to properly investigate the validity of the Claim and decide whether the insured peril had occurred.*" The same essential purpose of enabling early investigation of claims, providing insurers the opportunity to minimise loss, and avoiding the prejudice that may be suffered if insurers had to investigate the relevant circumstances long after the event has been recognised in the English cases, e.g., Aspen Insurance UK Ltd v Pectel Ltd [2009] Lloyd's Rep IR 440 at [64], [71] (Teare J); Arch Insurance (UK) Ltd v McCulllough [2022] Lloyd's Rep IR 137 at [15] (Cockerill J).

(b) As to the commercial sense in designating such a notification obligation as a condition precedent to the Defendant's liability under the Policies, that too has been recognised by the courts. Central to why insurers may choose to structure their policies in this way is the importance of notification clauses to insurers for the reasons set out above, and the difficulties in establishing prejudice and loss in the event of non-compliance with the condition. As was explained in the recent decision of HHJ Pearce in Makin v Protec Security Group Limited and others [2025] EWHC 895 (KB) at [84]:

> *"Contractual provisions in an insurance contract imposing an obligation on the insured to give notification of circumstances that might give rise to a claim to the insurer are frequently held to be conditions precedent to the insurer's liability. There are good policy reasons why an insurer should wish such notification to be a condition precedent to its liability. As well as the potential benefits that may come from dealing with a claim that is notified as soon as possible, there is a practical benefit to an insurer in avoiding the kind of arguments that were ventilated in this case as to whether late notification has in fact prejudiced the insurer. It may be difficult in any particular case to show prejudice, even if an insurer is able to show a commercial landscape in which early notification may have advantages to its business. Nevertheless, the desirability to an insurer of a notification clause being construed as a condition precedent is of course balanced by a potential prejudice to an insured or a third party such as the Claimant in this case if it enables the insurer to take notification points which are*

> *either unmeritorious or which relate to matters outside the control of the person who is harmed by the failure of notification. Sympathy for these competing positions cannot however alter the fundament of the argument which is whether on their true construction the clauses here are to be treated as conditions precedent to the insurer's liability under the policy."*

183. For the above reasons, there is no other plausible construction of General Condition 5 other than as a condition precedent to the Defendant's liability. The Claimants' arguments to the contrary lack merit.

(1) General Condition 5 is not ambiguous. It is clearly expressed to be a condition precedent to the Defendant's liability and to suggest that, in spite of the words used, it should nonetheless be construed as a mere condition only sounding in damages, would be to give the language of that condition a "*forced and unnatural*"[44] construction. Indeed, it would rewrite the parties' contract.

(2) As for the point that it is allegedly ambiguous because "*liability is dependent on the fulfilment of sub-sections (a) to (f), not all of which may apply in any given case*". The sphere of application of each of the sub-clauses is tolerably clear from its terms. The fact that particular sub-clauses may be relevant in particular circumstances but not others cannot conceivably render General Condition 5 ambiguous.

(3) None of the points made as to alleged uncertainty as to what is required to fulfil each of the sub-clauses of General Condition 5 indicates that that condition, and sub-clause (a) in particular, should be interpreted as anything other than a condition precedent to liability. Any perceived uncertainty as to the requirements of each sub-clause is more than capable of being resolved by resort to the usual principles of construction.

(a) As to the meaning of "*event*", an "*event*" is a well-understood term in the insurance context, is commonly included in a variety of clauses (including notification clauses) and is invariably construed to mean something happening at a particular time, in a particular place and in a particular way.[45] The fact that the identity of the event is context-specific and will vary from case to case does not render General Condition 5 ambiguous or its application uncertain.

(b) The same is true for the word "*immediately*" in sub-clauses (a), (c) and (e). Not only does that word have a natural and obvious meaning, it is also commonly used in notification provisions (including provisions construed as conditions precedent to insurers' liability), and has been recognised in the cases to mean "*with all reasonable speed*".

(c) As for the suggestion in the pleadings that sub-clause (f) is unclear as to "*what [is] required or the extent to which any such request might be*

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44 See *MacGillivray on Insurance Law*, 15th Ed. (2024), para 19-040.

45 See e.g., ***FCA Test Case SC*** at [68].

reasonable or capable of fulfilment", that is again just not right. The meaning of sub-clause (f) is clear: it requires the Insured to provide such information and assistance in relation to its claim as the Insurer may request. The fact that what is required may vary from case to case, and determining whether there has been a breach in any particular case will require a degree of judgment, is nothing to the point. It does not suggest that sub-clause (f) is incapable of being construed as a condition precedent to the Defendant's liability.[46] In fact, the Court of Appeal decision in Welch v Royal Exchange Assurance [1939] 1 KB 294 fully supports the Defendant's position. It was held by MacKinnon LJ (with whom Finlay LJ agreed) that:

> *"In condition 4 there is the provision that "the insured shall give all such information as shall reasonably be required." The nature of this requirement does permit compliance with it to be a condition precedent to the right of the insured to recover. It is found by the arbitrator that it has not been complied with. There has therefore been a breach of a condition precedent to the right of recovery… I am driven to the conclusion that the stipulation that the insured shall give all such information as may be reasonably required is one whose nature permits it to be a condition precedent to the right of the assured to recover…"*[47]

(4) The Claimants are seeking to create ambiguity where none exists.

184. General Condition 5 is expressly stated to be, and must be construed as, a condition precedent to the Defendant's liability under the Policies. The consequence of any breach of sub-clause (a) is, therefore, that the Defendant is not liable to indemnify the particular Claimant in respect of its claim. There is no need for the Defendant to establish that it has been prejudiced by the breach.[48]

The requirements of sub-clause (a)

185. Properly construed, sub-clause (a) of General Condition 5 requires that each Claimant advise the Defendant with all reasonable speed on the happening of an event which could give rise to a claim under each of the Policies. In the context of the present claims, this required that each Claimant advised the Defendant within weeks, if not days, of 21 and 26 March 2020 when the government implemented measures requiring the compulsory closure of the Claimants' premises. Cognisant that the Claimants are SMEs, and mindful of the significant difficulties faced by such businesses during the pandemic, the Defendant has, however, not insisted strictly upon notification within

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46 In any event, to the extent necessary, Insurers will say that this point is irrelevant to whether compliance with sub-clause (a), a separate and distinct sub-clause to sub-clause (f), is to be regarded as a condition precedent to Insurers' liability under the Policies.

47 See also Mance LJ's judgment in ***Gan v Taiping (Nos 2 and 3)*** (CA) at [26], quoted at para 1(3) above.

48 See ***Pioneer Concrete UK Ltd v National Employers Mutual General Insurance Association Ltd*** [1985] 2 All ER 395 at 400j-401b and 403g-j (Bingham J); ***Motor and General Insurance Co Ltd v Pavy*** [1994] 1 WLR 462 (PC) at 469D-G (Lord Lowry)); ***Pilkington UK Ltd v CGU Insurance plc*** [2005] 1 All ER (Comm) 283 (CA) at [58] (Potter LJ).

days/weeks of the compulsory closures. It has instead taken the position that any notification prior to January 2021 is to be treated as if in time.

186. The Defendant's position properly reflects the meaning of each of the constituent elements of sub-clause (a), albeit applied more generously in favour of the Claimants in relation to the requirement to notify "*immediately*". To explain further:

(1) There can be little dispute that an "*event*" is something which happens at a particular time, in a particular place and in a particular way.[49]

(2) An "*event which could result in a claim under this Policy*" is an event which is capable of giving rise to a claim under the Policy.

(a) This is a weak test, which sets a low threshold for notification.

(b) It does not require the "*event*" to be one which is "*likely*" to give rise to a claim (i.e., where there is at least a 50% likelihood of a claim being made)[50] or even one which "*may*" give rise to a claim (i.e., where there is a real as opposed to a fanciful risk of a claim).[51] The eschewing of these commonly used phrases in favour of the less demanding "*could result in a claim*" is significant.[52] It suggests, along with the natural meaning of the word "*could*", that no evaluation of the probability of a claim being made is required at all. It suffices that a claim under the policy is possible. There is nothing ambiguous about this.

(c) In evaluating whether the relevant "*event*" is one which "*could*" give rise to a claim, the approach to be adopted is an objective one, asking specifically whether a reasonable person with the knowledge of the insured and of the surrounding circumstances would have regarded the "*event*" as being one which was capable of giving rise to a claim under the Policies.[53]

(d) The clear intention of sub-clause (a) is to cast a wide net for notifications. This is consistent with the purposes of notification clauses as set out at para (5) above: i.e., to enable insurers to investigate potential claims at the earliest possible opportunity.

(3) On the present facts, there are two possible happenings which satisfy the meaning of "*event*": (i) the "*discovery*" of a case of COVID-19 at the premises, and (ii) the implementation of the 21/26 March Regulations closing the Claimants' premises. The Defendant has opted for the latter because (i) it is this event which was the last

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49 In the notification context, see ***Zurich Insurance plc v Maccaferri Ltd*** [2017] Lloyd's Rep IR 200 (CA) at [16] (Christopher Clarke LJ).

50 ***Zurich v Maccaferri*** (CA) at [16], [34] (Christopher Clarke LJ).

51 ***Aspen Insurance v Pectel*** at [9] (Teare J); see also ***J Rothschild Assurance plc v Collyear*** [1999] 1 Lloyd's Rep IR 6 at 22rhc where Rix J described the "*may give rise to a claim*" materiality requirement as a "*weak one*".

52 See ***Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co*** [2003] 4 All ER 43 (HL) at [31] (Lord Hobhouse).

53 See ***Arch Insurance v McCullough*** at [10] (Cockerill J).

in the chain of the composite peril encapsulated by Extension 2(a) and gave rise to interruption of and/or interference with the insured business,[54] and (ii) would have led a reasonable insured with all relevant knowledge to conclude that an "*event*" had happened which "*could*" result in a claim being made under the relevant Policy. The reliance by the Claimants on the decision in Zurich Insurance v Maccaferri is misplaced. The Defendant does *not* seek to impose any "rolling obligation" of the sort argued for by Zurich in that case; it does not seek to divorce the occurrence of the "*event*" from the assessment of the materiality requirement. Rather, the Defendant's straightforward position is consistent with the Court of Appeal's decision: at the time of the compulsory closures, of which the Claimants were undoubtedly aware,[55] any reasonable policyholder would have concluded that an event had happened which "*could*" result in a claim under Extension 2(a) of the Policies.

(4) The requirement for the Insured to "*immediately advise*" the Insurer also does not give rise to difficulty. The natural and ordinary meaning of the word "*immediately*" is forthwith, straightaway or without delay.[56] In a licensing case concerned with the interpretation of the Licensing Act 1872, Cockburn CJ stated: "*It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether, there has been such action is a question of fact, having regard to the circumstances of the particular case.*"[57] In the insurance notification context: (i) "*immediately*" has been equated with a requirement for "*all reasonable speed considering the circumstances of the case*";[58] and (ii) short delays in notification of mere days or weeks have been held to be in breach of the requirement for "*immediate*" notice.[59]

(5) As already noted, the Defendant said it had not adopted a hardline stance. It had instead, taken the position that any notification made within 2020 meets the requirement in sub-clause (a). This is a more than generous interpretation of the requirement for immediacy particularly bearing in mind that the maximum indemnity period applicable to the Claimants' claims is 3 months.

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54 There is a suggestion by the Claimants that "interruption or interference" did not occur at a particular time, in a particular place and in a particular way. This is contrary to authority: see discussion, by reference to Court of Appeal authority, in ***Bath Racecourse v Liberty Mutual*** at [152]-[154]. The interruption or interference, and resulting loss, occurred at the time of the compulsory closure. Perhaps more importantly, a reasonable policyholder would regard a mandatory closure as an interruption to its business.

55 It has not been contended by any of the Claimants that they were not aware of the imposition of the compulsory closures on their premises. A submission to the contrary would be surprising.

56 See definitions in Merriam-Webster, Cambridge and Collins dictionaries, by way of example.

57 See ***R v The Justices of Berkshire*** (1878) 4 QBD 469 at 471 (Cockburn CJ).

58 ***Aspen Insurance v Pectel*** at [9] (Teare J); see also ***Farrell v Federated Employers Insurance Association Ltd*** [1970] 1 WLR 1400 (CA) at 1406D-E (Lord Denning MR).

59 See ***Farrell v Federated Employers Insurance*** (CA) at 1406D-E (Lord Denning MR), 1409A-B (Megaw LJ); ***Amlin Corporate Member Ltd v Baby Basics Ltd*** [2018] Lloyd's Rep IR 291 at [21]-[22] (Cooke J); *MacGillivray on Insurance Law*, 15th Ed. (2024), para 19-044; *Colinvaux & Merkin's Insurance Contract Law*, para C-0256.

187. Turning to the Claimants' case, the problems with the Claimants' position are manifold:

(1) **First**, the Claimants equate the requirement for "*immediate*" notice with "*notification within a reasonable period*". That is wrong. It is contrary to the natural and ordinary meaning of "*immediately*" and is unsupported by the case law.

(2) **Secondly**, the Claimants appear to be contending that the trigger for the notification obligation in sub-clause (a) of General Condition 5 is or should be the Supreme Court judgment in the FCA Test Case, alternatively the Court of Appeal judgment in the LIEC proceedings.[60] There is no policy basis for such a construction. The trigger for the obligations in sub-clauses (a) to (f) is "*the happening of any event which could result in a claim under this Policy*". The above-referenced judgments could not be the relevant "*event*" as they are, self-evidently, not a component part of the composite peril in Extension 2(a) and could not themselves result in a claim under the Policies. The Claimants have no answer to this.

(3) **Thirdly**, while it could be asserted that the handing down of these judgments encouraged the Claimants to claim under the Policies, this is not a relevant consideration. It cannot transform something which is not an "*event which could result in a claim under this Policy*" (i.e., the judgments), into such an event. Nor does that approach take into account the low threshold for notification of potential claims under General Condition 5. Specifically, the threshold that there be an event which "*could*" result in a claim under the Policies would be met at the time of the March 2020 compulsory closures without any need for consideration of the judgments in the FCA Test Case or the LIEC proceedings or for "*uncertainties as to the manner in which the events of the Covid-19 pandemic would be dealt with under [BI] policies of a sufficiently similar nature to the policy in issue in this claim*" to have been "*authoritatively determined*".

(4) **Fourthly**, the Claimants' pleaded case was premised largely, if not wholly, on the terms of a "Dear CEO" letter issued by the FCA to insurers following the handing down of the Supreme Court judgment in the FCA Test Case on 15 January 2021. The key section relied upon is as follows:

> *"To treat customers fairly and act in their best interests, insurers should not include the period between 17 June 2020 and the date of issue of the Supreme Court's declarations when relying on any time limits within which policyholders must make potentially affected claims or take any other step under the terms of their policies, such as notifying circumstances in relation to a claim. Insurers should not limit any payment that may be due to a policyholder because of the time period that has elapsed before the potentially affected claim was made."*

(5) However:

(a) The "Dear CEO" letter post-dates the Policies concluded between each of the Claimants and the Defendant. It does not form part of the admissible

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60 Albeit, in the Claimants' Skeleton, the order has switched – primary reliance is now placed on the timing of the handing down of the Court of Appeal judgment in the ***LIEC*** proceedings.

background against which the Policies are to be construed and has no relevance whatsoever to the exercise of contractual interpretation in which the Court is engaged. This regulatory guidance, if it even has that status,[61] cannot impact what is required to be notified in accordance with the terms of General Condition 5, sub-clause (a).

(b) To the extent that it is contended that the content of the "Dear CEO" letter, and the handing down of the Supreme Court judgment in the FCA Test Case or the Court of Appeal judgment in the LIEC proceedings, have to be taken into account in determining whether each of the Claimants acted with "*all reasonable speed considering the circumstances of the case*", that too is wrong. Neither the "Dear CEO" letter nor the judgments had any impact on the ability or speed with which a Claimant could notify the Defendant of a potential claim. To suggest that the word "*immediately*" in General Condition 5 must be stretched to accommodate what is said in the "Dear CEO" letter is to drive a coach and horses through the language of the Policies.

(c) To the extent necessary, the Defendant will also say that "*immediate*" notification of a potential claim in accordance with sub-clause (a) should have been provided by 17 June 2020 such that, for this further reason, the "Dear CEO" letter (which came later than 17 June 2020) is of no relevance to the Claimants' claims.

(6) **Fifthly**, the Claimants, in their pleaded case, seek to imply a term into the Policies that the Defendant should act reasonably and fairly in accordance with the duty of utmost good faith. The suggestion appears to be that that implied term limits the Defendant's ability to rely on General Condition 5 in accordance with its terms. This does not work for many reasons that can be shortly stated: (i) there is no legal basis for the implication of such a vague, uncertain term with an unclear ambit; (ii) the central test of necessity for the implication of terms is not met; and (iii) the implication of such a term would be inconsistent with the existing law that (a) insurers do not need to prove prejudice to rely upon a condition precedent to their liability, (b) authority on the post-contractual duty of good faith is "*slender*",[62] and does not support the implication of a wide term to act fairly and reasonably, (c) other similar implied terms have been rejected by the courts (e.g., an implied duty on insurers to warn insureds as to the need to comply with policy conditions[63] or an implied term that reinsurers should have reasonable grounds for withholding approval of a settlement[64]).

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61 The FCA itself describes "Dear CEO" letters as containing, merely, the FCA's "*current supervisory expectations*" for senior management: see https://www.fca.org.uk/about/how-we-regulate/supervision/supervisory-correspondence. It is not legally binding. Notably, as the 15 January 2021 letter relied on by the Claimants pre-dates April 2022, it is described by the FCA as "'*historical' and no longer current*".

62 ***Ted Baker plc v AXA Insurance UK*** [2017] Lloyd's Rep IR 682 (CA) at [71] (Sir Christopher Clarke).

63 ***Ted Baker plc v AXA Insurance UK*** at [79] (Sir Christopher Clarke).

64 ***Gan v Taiping (Nos 2 and 3)*** (CA) at [6], [76]-[78] (Mance LJ), and [94]-[97] (Sir Christopher Staughton).

(7) In any event, the Defendant's conduct in insisting that the Claimants act in accordance with their policy obligations, and in exercising its contractual right not to pay claims because of a failure of the Claimants to do so in breach of an express condition precedent, is in no sense unreasonable, unfair or contrary to the duty of utmost good faith. Indeed, the Defendant has very good reasons for wanting to stem the flow of stale claims being notified to it many years after the event.

188. The Claimants take a further (unpleaded) point. They say notification was not required in the present case because the Defendant was anyway aware of the compulsory closures, which were widely known events. This cannot be right. It not only rides roughshod over the requirements of General Condition 5, but it also misunderstands the purpose of notification, and what notification communicates to the Insurer. A notification tells the Insurer that a *claim* may be made by a *particular insured* under a *particular policy* and that therefore resources should be deployed to engage in investigation of the potential claim.[65] No Insured is contractually obliged to advance a claim and no Insurer would assume that every Insured under a particular wording would make a claim – indeed, many Insureds on the ARO policy wording have not pursued claims. Without notification, the Defendant would have had no basis on which to assume that a claim might be pursued by any particular Claimant. This situation is, therefore, entirely different from that which arose in Barrett Bros (Taxis) Ltd v Davies [1966] 1 WLR 1334 where notice of the intended prosecution against the insured *was* provided to insurers, albeit by the police and not by the insured himself.[66] Here, knowledge of the compulsory closures did not provide the Defendant with any knowledge of any particular Claimant's potential claim; the Claimants' notifications were, therefore, in no sense futile.

189. For all these reasons, notifications from January 2021 onwards plainly do not satisfy the requirements of General Condition 5 and are too late.

Discussion and conclusions

190. I start with the question of whether General Condition 5 is a condition precedent to liability. I have concluded that it is, for the following reasons:

(1) First, in my view, this question must be determined as at the date of the conclusion of the contract. Accordingly, the detailed facts of the individual case cannot be relevant to the question of the classification of the term, save to the extent that it may be assumed that they were within the reasonable contemplation of the parties as at the date of the contract. The detailed facts may, however, as I discuss below,

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65 This was expressly recognised in ***Alexander Forbes Europe Ltd v SBJ Ltd*** [2003] Lloyd's Rep IR 432 at [45] (David Mackie QC).

66 In any event, the law in this area is far from settled. Lord Denning MR's judgment on this point is arguably inconsistent with the later (clear) decisions that insurers do not have to establish prejudice to rely on a condition precedent to liability (see footnote 48 above), and the modern approach that the specific requirements of a notification clause should be complied with (see Axa Insurance UK v Thermonex at [78] (HHJ Simon Brown QC)): see also *Colinvaux & Merkin's Insurance Contract Law*, para C-0259/2. Contrary to the Claimants' case, the Court in Makin v Protec did not suggest that Barrett Bros v Davies remained good law. As is clear from [67(ii)], the question was left open. The case of Ahmed v White & Company [2025] EWHC 2399 (Comm) cited by the Claimants in fact supports the Defendant's position in this footnote – see [58]-[60], [260]-[261] (HHJ Pearce) – and confines Barrett Bros to its specific facts.

be relevant to the question of whether the requirements of the clause have been satisfied.

(2) Secondly, although I accept that the description of the clause as a condition precedent may not be determinative, in my judgment, as an expression of the parties' intentions, it must be highly influential. In this regard, I accept the Defendant's submission that the modern trend, as reflected in the leading textbooks, is to treat the description of the clause as of great importance. Certain of the older authorities may therefore need to be revisited.

(3) Thirdly, the fact that, pursuant to the clause, the assured may be required to take a number of different steps does not, in my view, provide any indication that the taking of each of these steps is not to be a condition precedent to liability. The particular steps in subparagraphs (a) to (f) are likely, in my view, to be specific to individual types of claim. Thus, by way of example, subparagraphs (c) and (d) relate to loss of property by reason of theft, riot, etc; subparagraph (e) relates to liability, at least principally; while subparagraphs (a), (b) and (f) will apply across the board. I do not think that any of these subparagraphs can be said to be more or less important so as to justify what would, in my view, be a rewriting of the clause's general introductory words.

191. I turn therefore to the question of when notification must be given pursuant to the clause. The answer to this question flows, in my judgment, from the answer that I have given to Issues 1 to 3, above.

192. In essence, for the reasons I have set out above, the parties put forward a number of times at which the assured might have had sufficient information to require that assured to give notice to the insurer of the fact that, in the words of the clause, an event had occurred which might give rise to a claim. Those times were:

(1) The discovery of the notifiable disease at the premises;

(2) The closure of the premises;

(3) The decisions of the Courts (in the Divisional Court, Supreme Court, Commercial Court and Court of Appeal) which made clear that these matters could give rise to claims on the policies.

193. In my view, the Defendant is correct in saying that the decisions of the various courts were not themselves "events which might give rise to a claim". Instead, they were matters which made clear, as a matter of law, that earlier events might give rise to claims on the policies. Moreover, I do not think that the policy condition is directed to legal decisions. Instead, I take the view that it is directed to factual events.

194. However, I also take the view that insurers are not right in their case that the *last* event in time must necessarily have been the relevant closure. Instead, for the reasons I have already given in relation to the construction of the insuring agreement, the discovery of the case of Covid-19 on the premises may have preceded the closure or it may have occurred after closure. In my judgment, the relevant time for notification would be within the requisite period after the assured became aware, or discovered, that there had been a case of Covid-19 at the premises within the relevant period (ie between the time

when Covid-19 became a notifiable disease and the date of the relevant closure). The requisite period will depend on the circumstances of each individual case, but will be governed by the wording of the clause – ie "immediately". Notification must therefore be very rapid.

Issue 4(c): Estoppel

The Claimants' submissions

195. Starting with the law, it has long been recognised that there may be an estoppel in relation to breach of a condition precedent (as exemplified by Barrett Bros Taxis Ltd v Davis [1966] 1 WLR 1334). Thus, Scrutton J said in Toronto Railway Co v National British & Irish Millers Insurance Co Ltd [1914-15] All ER Rep Ext 1437 at 1451, citing the Supreme Court of Maine in Hanscom v Insurance Company (90 Me 333, 339):

> *"It may happen that a waiver of a breach of the condition in the policy was not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify the belief that waiver was intended and, acting upon this belief, the insured is induced to incur trouble and expense and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principle of equitable estoppel."*

196. Lord Tomlin in Greenwood v Martins Bank [1933] AC 51 said this at 57:

> *"Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation".*

197. Then, in Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) [1990] 2 Lloyd's Rep 431 at 450 Phillips J said:

> *"A party can represent that he will not enforce a specific legal right by words or conduct. He can say so expressly—this of course he can only do if he is aware of the right. Alternatively he can adopt a course of conduct which is inconsistent with the exercise of that right. Such a course of conduct will only constitute a representation that he will not exercise the right if the circumstances are such as to suggest either that he was aware of the right when he embarked on the course of conduct inconsistent with it or that he was content to abandon any rights that he might enjoy which were inconsistent with that course of conduct."*

198. The Claimants argued that these principles must, in the context of an insurance contract in which there is an implied obligation of good faith, be assessed in the context of the possibility that an insurer is under a duty to speak (see Ted Baker Plc v AXA Insurance UK Plc [2017] Lloyd's Rep IR 682 at paras 87-90). The Claimants argued that where there is a representation which is made by remaining silent on a matter whilst raising

others, then there is no meaningful difference between an estoppel by representation and an estoppel by acquiescence.

The relevant representations

199. With those principles in mind, the nature of the representations made to the Claimants whose claims are denied on this basis rests on a construction of the letters that were sent to those individuals. There were two forms of letter that were sent to those Claimants. Those whose first notification preceded the letter of claim were sent a letter by Davies. In each of Davies' letters, notwithstanding a full response to the Claimants' claims, there was no reference to General Condition 5 (Claims), and no statement that the Defendant's rights were reserved. Davies stated, for example:

> *"Based upon the specific circumstances surrounding this matter and having considered the wording of your Policy, LMIE has asked us to communicate to you that, unfortunately, there is no cover for any losses arising out of this event* ***and explain the basis of that decision****."* [emphasis added]

200. The letter then concluded:

> *"We appreciate that this is not the response you would have hoped for but trust the explanation above clearly sets out* ***the reason*** *for this decision."* [emphasis added]

201. Accordingly, said the Claimants, the letter on its own terms contained the Defendant's "basis" or "the reason" for its decision. That was explained in full. That "basis" or "reason" did not set out any defence based on a breach of General Condition 5 (Claims). Nor was there any indication there was any other basis or reason hitherto undisclosed or relied upon. In these letters, there was no reservation of rights.

202. Those Claimants, and those whose first notification was in the letter of claim, were then sent letters of response to those letters of claim by the solicitors for the Defendant (either DAC Beachcroft or Clyde & Co). In each of those letters, again notwithstanding the Defendant setting out a full response to the Claimants' claims, there was no reference to General Condition 5 (Claims), although each letter concluded with a general reservation of rights.

203. The Claimants argued that this was not a situation where the Defendant's silence on the point was equivocal. Each of the letters to the Claimants made clear the basis on which the claims were rejected, and did not do so by reference to any breach of General Condition 5 (Claims). There was a positive representation as to the basis on which the claims would be defended, containing within it an implied representation that the claims were not being rejected on the basis that there had been a failure to comply with the requirements as to notification.

204. In the circumstances of the Covid-19 pandemic, giving rise to the substantial uncertainty referred to above concerning the means by which compliance with General Condition 5 (Claims) could be effected, and in the context of the Defendant's obligation to speak as to the those matters on which the Defendant would rely, by failing to refer

at all to General Condition 5 (Claims), the Defendant represented to the Claimants that it would not rely on that clause in defence to the proposed claims.

205. The Claimants contended that the general statement that the Defendant's "rights remain fully reserved" in the responses to the letter of claim does not change this position. Such wording was used in Ted Baker PLC and did not suffice to prevent there being sufficient communication to amount to an estoppel. It does not suffice to render equivocal that which was otherwise unequivocal, namely that the only basis on which the Defendant denied liability was that it considered the claims not to fall within the wording of Extension 2(a).

206. The Defendant can be taken to have been fully appraised of the circumstances of the claims made and had decided on the basis on which those claims would be rejected; that much is apparent from the pro forma wording used in each of the letters from Davies and from each of the solicitors who sent the letters of response. The circumstances themselves were not equivocal such as to have required further investigation on the part of the Defendant (hence Kosmar Villa Holidays plc v Trustees Of Syndicate 1243 [2008] 2 All ER (Comm) 14 does not apply and/or should be distinguished).

The Defendant's submissions

The law

207. The applicable principles are well established and are not expected to be controversial. The relevant doctrine, where there has been an alleged breach of a procedural condition precedent, is waiver by estoppel and not waiver by election.[67] The Claimants, who bear the burden of proof, must establish that: (i) there was an unequivocal representation by the Defendant, by words or by conduct, that it would not insist on its strict contractual rights under the procedural condition, (ii) the Claimants relied upon that representation to their detriment; and (iii) it would, in all the circumstances, be inequitable for the promise made by the Defendant to be withdrawn.[68] It was agreed that I was concerned only with the first of these requirements.

The facts

208. The Defendant pointed out that the facts are not controversial. They are the subject of agreement in the agreed facts and are twofold: (i) in responding to notifications of (potential) claims, and in the Letters of Response sent at the pre-action stage, the Defendant denied liability on the basis that there was no cover under the insuring clauses, without any reference to or reliance being placed on a breach of General Condition 5; and (ii) the breach of General Condition 5, and the issue of late notification, was raised by the Defendant for the first time in the Defences in these proceedings. However, said the Defendant, neither the Defendant nor its agents nor its solicitors expressly stated at any time that the Defendant would *not* be relying upon a

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67 ***Kosmar Villa Holidays Plc v Trustees of Syndicate 1243*** [2008] Lloyd's Rep IR 489 (CA) at [66]-[70] (Rix LJ). Waiver by election arises, by contrast, in the context of the exercise of a right to choose between inconsistent remedies. For example, where there has been a repudiation of a contract, or where a right to avoid a contract for misrepresentation or non-disclosure arises.

68 *Ibid*. at [38], [70] (Rix LJ).

breach of General Condition 5, sub-clause (a) as a basis for denying liability; nor did they expressly state that the *only* defences that the Defendant would be relying upon would be those set out in pre-action correspondence, and no others. Moreover, each of the solicitors' letters contained a general reservation of rights, although it was accepted that the Davies letters did not.

The Defendant's response to the Claimants' case

209. The Defendant argued that the Claimants' position was wrong for the following reasons.

(1) **First**, on a proper analysis of the correspondence between the 42 Claimants and the Defendant, there was no unequivocal representation by words that the Defendant would not rely on the Claimants' non-compliance with General Condition 5, sub-clause (a) as a basis for denying liability. A representation to that effect was never expressly made in any of the communications from the Defendant. Nor can the representation be inferred or implied: there is simply no basis in the language of the Defendant's communications to support such an inference or implication. This is for the straightforward reason that expressly denying liability on one basis does not tell the reasonable reader of the correspondence anything about any other defences that the Defendant may rely upon in due course should the Claimant persist in its claim. Certainly, no *unequivocal* promise that the Defendant would not, *in the future*, advance any other defences can be divined from the correspondence. The Defendant's silence as to those other defences was wholly equivocal.

(2) The Claimants have sought to suggest that that is not the case. They seem to suggest that the Defendant had a duty to inform the Claimants of all the defences on which it relied, such that the Defendant's silence on General Condition 5 in its pre-action correspondence constituted a clear and unequivocal representation that it would not be relying on that defence. There is no authority to support this proposition. The limited duty to speak recognised in Ted Baker v Axa arose in specific factual circumstances where the conduct of Insurer's loss adjuster led Ted Baker to park provision of further information until the Insurer reverted on certain issues such that it was held that Ted Baker was entitled to expect that if the Insurer regarded the information as outstanding, due and unparked, acting honestly and responsibly, it ought to have said so: see paragraphs [78]-[89].[69] No broader duty to speak has been identified in the cases, and it is difficult to understand *why*, as a matter of principle, there would or should be any such duty.

(3) **Secondly**, there was similarly no unequivocal representation by conduct by the Defendant. The Defendant has consistently denied liability in respect of the Claimants' claims in all its communications. That conduct is consistent with the Defendant rejecting the Claimants' claims for *at least* the reasons set out in the pre-action correspondence. It is, however, in no way *in*consistent with the Defendant

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69 The Claimants' reliance on ***Greenwood v Martins Bank*** [1933] AC 51 (HL) was ill founded. That case was concerned with the duty on the part of a customer of a bank to disclose knowledge of forgery. That duty has no relevance in the present (insurance) context.

defending the Claimants' claims on additional or different bases to those set out in the pre-action responses.[70]

(4) **Thirdly**, *all* the Letters of Response from the Defendant's solicitors contained a general reservation of rights, and additionally stated that if the claim by the relevant Claimant was pursued it would "*be robustly defended*".[71] This is inconsistent with the suggestion of any unequivocal representation by the Defendant that it was limiting itself only to the defences set out in the Letters of Response, and no others. It plainly was not. While it is true that the letters from Davies contained no reservation, that is nothing to the point. The correspondence between the parties, taken as a whole, communicated no unequivocal representation by the Defendant that it would not rely on General Condition 5 as a defence to the Claimants' claims.

(5) **Fourthly**, the Claimants' position is contrary to authority. In Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 (HL), the House of Lords considered whether a landlord was estopped from contending that a tenants' application for a new tenancy of business premises was non-compliant with statutory time limits because it had not taken that objection when first responding to the application. It was held that by stating the grounds on which it would oppose the application, which did not include non-compliance with the statutory time limits, the landlord had *not* unequivocally promised or represented that it would not, in the future, oppose the application on other grounds. Lord Diplock explained the position as follows at 882-884:[72]

> *"As respects estoppel in the strict sense it is difficult to find in the conduct of the landlords in the proceedings or in the letters which their solicitors wrote any representation of an existing fact. Their answer to the tenants' application and their letters prior to December 5, 1968, fairly bear the inference, as was the fact, that the only defence on which they then intended to rely was that arising under section 30 (1) of the Act. But no inference can be drawn from this that they would not change their minds before the hearing and even if it could this would only operate as a promise which might possibly give rise to a promissory estoppel but not to an estoppel in the strict sense. Treated as a mere statement of the landlords' present intention it would operate to estop them from denying that they had that intention at the time the letters were written; but that does not help the tenants on this appeal.*
>
> *Whatever may be the other limits of a High Trees promissory estoppel it cannot arise unless there is a promise intended by the*

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70 The fact that, at the point of refusing cover, Insurers knew the date of first notification of claim. Waiver by estoppel cannot be established in the absence of an unequivocal representation that is irrelevant. Insurers would not rely on defences other than those referenced in the correspondence; there was no such representation here.

71 See ***Kosmar Villa Holidays*** (CA) at [80] (Rix LJ): "*What a reservation of rights does is expressly to preserve a situation where otherwise it might be held that something unequivocal had occurred.*"

72 See also Lord Morris' judgment at 864C-G, 865G-H.

> *promisor to affect his existing legal relationship with the promisee upon the faith of which the promisee has acted. I cannot spell out of the conduct and correspondence of the parties any promise by the landlords that they would never take the point that the tenants' application was out of time, nor can I infer from what they did or said any intention on their part to affect their existing legal relationship with the tenants as lessors and lessee…"*[73]

Discussion and conclusions

210. I can deal with this issue relatively briefly, since there is no dispute between the parties either as to the relevant legal principles or as to the facts.

211. As to the law it is agreed that the first requirement of an estoppel by representation is that there should be an unequivocal representation made by the representor.

212. In this case, I start with the Davies letters. Even at this stage, I have concluded that there was clearly no representation made by virtue of the combination of reliance on some matters and a failure to rely on others, and certainly no unequivocal reliance.

213. Thereafter, moving forward in time, when solicitors' letters were sent by Clyde & Co and DAC Beachcroft, the position is, in my view, even clearer, in view of the reservation of rights in those letters.

214. Overall, therefore, I have concluded that the Claimants have not established an unequivocal representation, and that accordingly, the plea of estoppel must fail.

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[73] See also, in the insurance context, Whyte v Western Assurance Company (1875) 22 LCJ 215 (PC) at 221; Phillips v Whatley (PC) at [30] (Lord Mance).