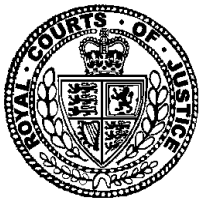

Neutral Citation Number: [2022] EWHC 2548 (Comm)

Case No: CL-2021-000161

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 17/10/2022

Before :

THE HON MR JUSTICE BUTCHER

- -

Between :

STONEGATE PUB COMPANY LIMITED

Claimant

-and-

(1) MS AMLIN CORPORATE MEMBER LIMITED
(2) LIBERTY MUTUAL INSURANCE EUROPE SE
(3) ZURICH INSURANCE PLC

Defendants

- -
- -

Ben Lynch KC, Adam Kramer KC, David Pliener, Louis Zvesper and William Day (instructed by **Fenchurch Law**) for the **Claimant**
Gavin Kealey KC, Adam Fenton KC, Sushma Ananda and Henry Moore (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing dates: 13-16, 21-23, 27-28 June 2022
Further written submissions: 25 July 2022

- -

Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. The Claimant ('Stonegate') is the owner and operator of some 760 pubs, bars, restaurants and other hospitality venues, mostly located in town centres in England, Scotland and Wales.

2. The Defendants ('the Stonegate Insurers') are insurers who insured Stonegate under a Policy with reference number UAR3793819JA ('the Policy'), writing that insurance in the following shares: the First Defendant, 55%; the Second Defendant, 22.5%; and the Third Defendant, 22.5%.

3. In this action, Stonegate brings a claim against the Stonegate Insurers in respect of what it says are business interruption (or 'BI') losses associated with the Covid-19 pandemic which are covered under the Policy issued by the Stonegate Insurers. The Stonegate Insurers, while admitting that Stonegate will have suffered some interruption or interference and business interruption loss proximately caused by covered events insured under the Policy, contend that they have no further liability to Stonegate, as a result of payments which they have made, and that, in any event, if Stonegate has any further claim, the claim made is overstated.

4. The parties agreed, and the Court ordered, that this litigation should proceed by way of the determination, as Stage 1, of certain defined issues, which have been called 'the Stage 1 Issues'. It is the Stage 1 Issues Trial which I have heard, and to which this Judgment relates. All other issues in the case have not been the subject of this trial and stand to be resolved, if and to the extent that they continue to be in issue, at a later stage.

5. The Policy was negotiated and arranged by Marsh Limited ('Marsh'), and makes use of the Marsh Resilience MD/BI v1.1 Form ('the Marsh Resilience Form'). During the course of the proceedings it became apparent to the parties and to the Court that there were various other claims made by other insureds on policies using the Marsh Resilience Form, which raised some of the same issues as are included in the list of the Stage 1 Issues. In particular it became apparent that such claims were made by Greggs Plc ('Greggs') in Action CL-2021-000622 ('the Greggs Action') and by Various Eateries Trading Ltd ('VE') in Action CL-2021-000396 ('the VE Action'). With the cooperation of the parties to all three actions, the Court ordered that trials of certain common or overlapping issues in the three actions should be heard in sequence before me, with a view to my delivering judgments in the three actions at the same time, but only after the evidence and argument in the last of the three hearings had been concluded. Directions were also given for parties in the actions where the hearings took place earlier to have the opportunity of commenting, insofar as relevant, on the evidence and arguments made in the hearings which took place subsequently. The parties to the present action took up the opportunity of making written submissions on points which had arisen out of the trials in the Greggs and VE Actions.

6. Each trial was separate. The three actions were not consolidated. The parties in the different actions were represented by largely different teams. The evidence and assumed or agreed facts differed to some extent. I have to decide the issues which arose in each of the three trials on the basis of the evidence and arguments put forward in the particular trial concerned. Unsurprisingly, however, there was a considerable overlap in the evidence, facts agreed or assumed, and in the arguments adduced between the three trials.

The Placement of the Policy

7. The parties agree that on 26 April 2019 Marsh, the brokers appointed by Stonegate, made a presentation of risk to the Stonegate Insurers. That presentation included a Master Location Schedule.

8. On 14 May 2019, Marsh provided a bound summary to the Stonegate Insurers, and on the same date the Policy Schedule was issued and the Policy was concluded. On 10 March 2020 an Amended Policy Schedule (which I will call hereafter 'the Schedule') was issued.

The Policy

9. The Policy was on terms contained in the Schedule and a Material Damage and Business Interruption Policy wording. The Schedule included those terms set out in Annexe 1 to this Judgment, and the Policy wording those in Annexe 2.

10. Without rehearsing all the terms here, the following provisions are of particular note by way of introduction to the questions involved in the Stage 1 Issues Trial.

11. The Policy is one which was taken out by Stonegate, which was the sole Policyholder and Insured named. The Period of Insurance (also referred to as 'the Policy Period') was specified as 1 May 2019 to 30 April 2020. Under the Policy, Stonegate was insured in respect of a number of risks, including in respect of Business Interruption Loss (as defined) (or 'BIL') resulting from various perils.

12. Of significance for present purposes are two of the perils enumerated under Clause 2.3 of the Insuring Clauses, namely cover (under viii) for 'Notifiable Diseases and Other Incidents', and (under xii) for 'Prevention of Access – Non Damage'.

13. By reason of the terms of the Insuring Clauses and of the definitions of relevant words or phrases, the cover for 'Notifiable Diseases and Other Incidents' included cover where one of the identified diseases, or another disease which comes to be classified as a notifiable disease under the Health Protection (Notification) Regulations 2010 is discovered at an Insured Location or occurs within the Vicinity of an Insured Location during the Period of Insurance. Cover under 2.3(viii) extends (by reason of Definition 69(v)) to BIL resulting from 'enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns.'

14. Covid-19 was made a notifiable disease in England on 5 March 2020 by amendment to the Health Protection (Notification) Regulations 2010, an equivalent step having

been taken in Scotland on 22 February 2020, and was to be taken in Wales on 6 March 2020. It was common ground in these proceedings that Covid-19 was a disease falling within the terms of Definition 69(ii) of the Policy.

15. Cover for 'Prevention of Access – Non Damage' includes (by reason of Definition 87(ii)) BIL resulting from 'the actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency in the Vicinity of the Insured Locations'.

16. 'Vicinity', which is a term relevant both to the cover under Insuring Clause 2.3(viii)(d) and to that under 2.3(xii), is defined (by Definition 120) as 'an area surrounding or adjacent to an Insured Location in which events that occur within such area would be reasonably expected to have an impact on an Insured or the Insured's Business'.

17. Subject to immaterial exceptions, there is a Limit of Liability in respect of loss resulting from 'Notifiable Diseases & Other Perils' (ie from the perils set out in Insuring Clause 2.3(viii)) of £2,500,000 any one Single Business Interruption Loss (as defined) ('SBIL'), and in respect of loss resulting from 'Prevention of Access – Non Damage' (ie from the perils set out in Insuring Clause 2.3(xii)) of £1 million any one SBIL (as defined). There is a Retention of £100,000 each SBIL, with a £400,000 annual Aggregate. There are also provisions, which were not the subject of detailed examination before me, for a 'non-ranking' deductible of £5000 per SBIL, and of £5000 per Single Property Loss and SBIL combined upon exhaustion of the annual aggregate'.

18. 'Single Business Interruption Loss' is defined, insofar as relevant, as

    'all Business Interruption Loss and Business Interruption Costs & Expenses (excluding Additional Increased Cost of Working, Claims Preparation Costs, Public Relations Crisis Management Costs and Rewards Costs) and any amounts payable under Extensions that arise from, are attributable to or are in connection with a single occurrence …'

19. Under the Policy, the Stonegate Insurers agreed to pay Stonegate 'Additional Increased Costs of Working'. 'Additional Increased Cost of Working' ('AICW') was defined as 'expenditure (other than Increased Cost of Working) reasonably incurred by, or on behalf of, the Insured with the intention of maintaining essential administrative functions and/or avoiding or minimising any Reduction in Turnover which would have taken place during the Indemnity Period and/or avoiding or minimising the interruption or interference to the Insured's Business'. There was a sub-limit applicable to recovery of AICW of £15 million 'in addition to the Limit of Liability'.

20. 'Business Interruption Loss' was defined, insofar as relevant, as Reduction in Turnover and Increased Cost of Working. Reduction in Turnover was defined as the amount by which the Turnover during the Indemnity Period fell short of the Standard Turnover, less any costs normally payable out of the Turnover (excluding depreciation) as might cease or be reduced during the Indemnity Period as a consequence of the Covered Event. The Indemnity Period was defined as the period

of time during which interruption or interference to the Insured's Business occurred as a consequence of the Covered Event beginning with the occurrence of the Covered Event and ending not later than the end of the Maximum Indemnity Period. The Maximum Indemnity Period (or 'MIP') was specified as 36 months.

21. Putting the matter in very general terms, Stonegate contends that it has suffered very significant BIL in consequence of the impact of the Covid-19 pandemic, and the government's and the public's response thereto, upon the business done at its pubs, bars and other locations. Stonegate contends that its losses exceed £1 billion, and that a very considerable amount of those losses is recoverable by it under the Policy. This claim has given rise to a number of issues between Stonegate and the Stonegate Insurers.

The FCA Test Case

22. The nature and scope of the issues between the parties which remain for decision has been confined and to a large extent delimited by the outcome of previous litigation relating to BI insurance claims arising from the pandemic, to which it is helpful to make brief reference at this point.

23. Thus, The Financial Conduct Authority v Arch Insurance (UK) Ltd was a test case ('the FCA Test Case') brought by the Financial Conduct Authority ('FCA'), the regulator of the defendant insurers, to determine issues of principle in relation to policy coverage under various specimen wordings written by a number of insurers in respect of claims by policyholders to be indemnified for BI losses arising from the pandemic and the advice of and restrictions imposed by the UK government as a consequence.

24. One group of issues which arose for decision in the FCA Test Case concerned a number of what were termed 'Disease Clauses'. Each of these clauses, in broad terms, provided cover in respect of BI in consequence of the occurrence of a Notifiable Disease within a specified radius or a defined vicinity of insured premises. The particular question which arose was whether there was cover in respect of a pandemic where it could not be said that the key matters which led to BI, and in particular to the responsive governmental measures, would not have happened even without the occurrence of Covid-19 within the specified radius or vicinity, as a result of its occurrence or feared occurrence elsewhere.

25. In essence, the decision at first instance in the Divisional Court (of which Flaux LJ and I were the members), was that, in most cases, there was cover under 'Disease Clauses' on the basis that the cover was for the BI consequences of a Notifiable Disease which had occurred, and of which there had been at least one instance within the specified radius, ie that the essence of the fortuity covered was the Notifiable Disease which had come near, rather than specific local occurrences of the disease ([2020] EWHC 2448 (Comm), at [102]). Alternatively, each individual occurrence of the disease should be regarded as a separate and effective cause of the governmental action (para. [112]). On either analysis there was cover notwithstanding that the governmental response would still have occurred had there been no cases within the particular radius.

26. On appeal to the Supreme Court, the majority (Lords Hamblen and Leggatt JJSC, with whom Lord Reed PSC agreed) held that the first analysis was incorrect. As it was put, 'it is only an occurrence within the specified area that is an insured peril and not anything that occurs outside that area' ([2021] UKSC 1 at [65]). Furthermore, the term 'occurrence', which was synonymous with 'event', had a widely recognised meaning in insurance law as 'something which happens at a particular time, at a particular place, in a particular way'. As Lords Hamblen and Leggatt continued:

> '[69] A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving different symptoms of greater or less severity. Nor for that matter could an "outbreak" of disease be regarded as one occurrence, unless the individual cases of disease described as an "outbreak" have a sufficient degree of unity in relation to time, locality and cause. If several members of a household were all infected with COVID-19 when a carrier of the disease visited their home on a particular day, that might arguably be described as one occurrence. But the same could not be said of the contraction of the disease by different individuals on different days in different towns and from different sources. Still less could it be said that all the cases of COVID-19 in England (or in the United Kingdom or throughout the world) which had arisen by any given date in March 2020 constituted one occurrence. On any reasonable or realistic view, those cases comprised thousands of separate occurrences of COVID-19. Some of those occurrences of the disease may have been within a radius of 25 miles of the insured premises whereas others undoubtedly will not have been. The interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence. On this basis there is no difficulty in principle and unlikely in most instances to be difficulty in practice in determining whether a particular occurrence was within or outside the specified geographical area.'

27. However, the majority held that there was cover where, as was the case here, each individual case of the disease could be regarded as a separate and equally effective cause of government action and of the public's response to it. The matter was put thus by Lords Hamblen and Leggatt (at [212]):

> '[212] We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it)….'

28. The minority (Lords Briggs and Hodge JJSC), agreed with the conclusions of the majority, but disagreed with parts of the reasoning of the majority. Specifically Lord Briggs, with whom Lord Hodge agreed, said this:

> '[319] In this court the majority have rejected the primary analysis of the court below, but in substance accepted and applied the alternative. They have, in effect, rescued the policyholders from the at first sight sombre consequences of a narrow definition of the insured peril by a principled application of the doctrine of concurrent cause, where (in settled insurance law) the existence of one or more concurrent causes of loss, other than the insured peril itself, does not prevent cover provided that the concurrent causes are not themselves expressly excluded.
> ...
>
> [321] Left to myself I would not have departed from the adoption of both [the] two alternatives by the court below save that, since they both lead to the same conclusion, it is not necessary to prefer one over the other. …
>
> [322] My main reasons for thinking that the alternative construction, which treats COVID-19 as a whole as falling within the insured perils once it spreads within the specified radius, is as persuasive as that of the majority, are as follows. …
>
> [323] Secondly, I would not be confident that the hypothetical reader would necessarily attribute the case by case specificity to the word "occurrence" or its synonyms given to it by the majority. Depending upon context, the word "occurrence" can properly be applied to happenings which do not take place at a single specified time, in a particular way and at a particular location. Thus a hurricane, a storm or a flood may properly be described as an occurrence even though each may take place over a substantial period of time, and over an area which changes over time. It is not in my view an inappropriate word to use about a pandemic disease as a whole, although I accept that it may be a pointer of some weight to an individual case analysis'.

29. One of the policies which was included in the FCA Test Case was what was there called the 'RSA 4' wording. This was a policy on the Marsh Resilience Form, that is to say the same Form as is relevant in this case. Furthermore one of the so-called 'Disease Clauses' considered at first instance in the FCA Test Case was the 'Notifiable Diseases and Other Incidents' cover provided by 2.3(viii) of that Form.

30. That cover was considered at first instance by the Divisional Court at [123]-[147]. As was noted at [124] the structure of the RSA 4 policy was significantly different from that of the other policies considered in the FCA Test Case. Furthermore, RSA 4 was unique amongst the policies being then considered in its definition of 'Vicinity', which was in the same terms as in the Policy in this case. The Divisional Court held that, given its terms, the extent of the 'Vicinity' depended in part on the nature of the event which might occur within it, and that in the case of a disease such as Covid-19 it would reasonably have been expected that a significant outbreak anywhere in the UK would have an impact on the insured or its business; and thus that all occurrences of Covid-19 were within the relevant 'Vicinity' for the purposes of clause 2.3(viii)(d). On that basis, the issues which arose in relation to other policies as to whether there was cover for the consequences of a governmental response which would have been the same even if there had not been the occurrence of cases within a specified radius, did not arise.

31. There was no appeal from the decision of the Divisional Court in relation to its conclusions as to the meaning of Vicinity or as to the application of Insuring Clause 2.3(viii)(d) of the RSA 4 wording, and accordingly these matters were not considered by the Supreme Court. Equally these matters were not in dispute in this case.

32. Consideration was also given in the FCA Test Case to the cover provided under the Marsh Resilience Form by reason of the terms of Definition 69(v), whereby 'enforced closure' of an Insured Location by any governmental authority or agency or competent local authority for health reasons or concerns is one of the Notifiable Diseases & Other Incidents insured under Insuring Clause 2.3(viii).

33. In the FCA Test Case there was no dispute that actions of the UK Government were actions of 'any governmental authority or agency'. At first instance the Divisional Court held that there would only be 'enforced closure' of premises if all or part of the premises was closed under legal compulsion; and that the only 'enforced closures' which had been shown in that case were those of premises pursuant to the 21 and 26 March 2020 Regulations. Those Regulations were undoubtedly imposed for 'health reasons or concerns', and those 'health reasons or concerns' occurred within the Vicinity, especially when that word was given the wide meaning dictated by its terms and the nature of the Covid-19 disease (see paras. [303]-[304]).

34. In the Supreme Court it was held that 'enforced closure' was not confined to cases of the exercise or threatened exercise of legal powers, and could extend to clear, mandatory instructions given by relevant authorities, for example the Prime Minister's instructions of 20 March 2020 (see [2021] UKSC 1, paras. [119]-[122]), but would not extend to 'advice or exhortations, or social distancing and stay at home instructions' (para. [124]). As set out in the Order made by the Supreme Court, 'an instruction given by a public authority may amount to an "enforced closure" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers'.

35. There was also consideration in the FCA Test Case of the cover for Prevention of Access – Non Damage under Insuring Clause 2.3(xii) of the Marsh Resilience Form. In the Divisional Court it was noted that this clause covered cases of both prevention and hindrance of use of or access to Insured Locations; it was not confined to prevention. Further, unlike other so-called 'Prevention of Access' covers, it did not require that actions or advice of government should 'follow' or be 'due to' an 'emergency' or 'danger' in the vicinity or within a specified radius of the insured premises. All that was required was that there should be relevant actions or advice 'in the Vicinity of the Insured Locations'. Even without the extended definition of 'Vicinity' in the wording, the relevant actions of national government were in the vicinity of the insured premises if they led to prevention or hindrance of use of or access to those premises. These conclusions were not appealed to the Supreme Court.

36. A further matter of significance which was the subject of discussion in the FCA Test Case was whether, in the insurances under consideration, business interruption is to be regarded as part of the loss or was a part of the insured peril. The Divisional Court considered that it was the latter (see para [94]). That was held by the Supreme Court to be wrong. At [215] Lords Hamblen and Leggatt said this:

> '… The concept of business interruption in insurance of this kind was in our view correctly analysed by Mr Simon Salzedo QC in his submissions on behalf of Argenta. It is a description of the type of loss or damage covered by the policy, in the same way as the type of loss or damage covered by, for example, a buildings insurance policy is physical destruction or damage. Thus, in a buildings insurance policy, unless the policy otherwise provides, the insurer is liable for the contractual measure of (i) destruction of or physical damage to the insured buildings, which is (ii) proximately caused by (iii) a peril insured against under the policy (such as fire, storm etc). In business interruption insurance an interruption to the policyholder's business or activities is the counterpart of the first of these elements. It describes the nature of the harm to the policyholder's interest in the subject matter of the insurance for which an indemnity is given if it is proximately caused by an insured peril.'

The Parties' Cases in Outline

37. In these proceedings, Stonegate claims that it is entitled to an indemnity in respect of BIL as a result of the three perils I have already identified, namely two perils under Insuring Clause 2.3(viii), the first the so-called 'Disease Peril' of Covid-19 being discovered at an Insured Location or occurring within the Vicinity of an Insured Location, and the second the so-called 'Enforced Closure Peril' being the enforced closure of an Insured Location; and a third peril under Insuring Clause 2.3(xii) namely the so-called 'Prevention of Access Peril' being actions or advice of governmental authority or agency which prevents or hinders the use of or access to the Insured Locations during the Period of Insurance.

38. Stonegate further claims that it is entitled to recover in respect of AICW and that on the proper construction of the Policy: (a) this is subject to a limit of £15 million for each SBIL; and (b) that AICW does not apply only to uneconomic Increased Costs of Working ('ICW') (ie that which exceeds the amount of Reduction in Turnover avoided) but also applies to ICW where the limit applicable to the ICW has been exhausted. Stonegate also claims in respect of Claims Preparation Costs for each SBIL (provided – the loss is equal to or greater than £50,000), but this was not the subject of debate at this Trial.

39. Stonegate contends that the interruption and interference from the Covered Events 'continues to date and will continue into the future, and accordingly losses are recoverable up to April 2023' (ie up to the end of the MIP).

40. Stonegate contends that it has suffered BIL from February 2020 to 13 March 2022 of some £675 million, and AICW during the same period of some £130 million; and in its RAPOC further estimates that the BIL which will be suffered by Stonegate during the remainder of the 36 months of the MIP will be a further £114 million and the AICW during that period will be some £274 million.

41. Stonegate does not give credit against its claim for furlough payments or other Government support which it has received, 'as these do not on the proper construction of the Policy go to reduce the claim'.

42. Stonegate Insurers' position in relation to Stonegate's claim in these proceedings can be summarised as follows:

(1) It is accepted by the Stonegate Insurers that Stonegate's business will have suffered some interruption or interference and BIL proximately caused by Covered Events during the Period of Insurance, but they make no admissions as to its timing, extent or continuity.

(2) Stonegate Insurers deny that they have any further liability in respect of BIL because, as they contend: (a) all BIL alleged by Stonegate arises from, is attributable to, or is in connection with, a single occurrence; (b) that such BIL is to be aggregated as a SBIL subject to a Limit of Liability of £2.5 million; and (c) they discharged their obligations to indemnify BIL by paying Stonegate £2.5 million in December 2020.

(3) If, contrary to their primary case, all BIL alleged by Stonegate does not fall to be aggregated as one SBIL, Stonegate Insurers advance alternative cases as to there being a limited number of SBILs.

(4) Stonegate Insurers deny that the or any MIP will or can continue until April 2023. They contend that there is no basis on which loss proximately caused by the Covered Events relied upon could have occurred and be recoverable for months and years after the end of the Period of Insurance.

(5) Stonegate Insurers contend that Stonegate's permissible recovery in respect of AICW is subject to a single limit of £15 million; and in respect of Claims Preparation Costs a single amount of £175,000.

(6) Stonegate Insurers further contend that governmental support, including furlough payments, is to be taken into account for their benefit when calculating any BIL or other sums recoverable under the Policy.

43. Given their respective positions, outlined above, the parties agreed, and the Court ordered, the trial of the Stage 1 Issues. Those issues are set out in Appendix 1 to the Order of 29 October 2021 of Cockerill J.

The Stage 1 Issues

44. The Stage 1 Issues are as follows:

1. What is the trigger for the relevant Insuring Clauses of the Policy? In particular:

(1) Was Insuring Clause 2.3(viii)(a) and (d) (read with Definition 69(ii)) of the Policy triggered separately for each Insured Location with each occurrence or discovery of COVID-19, alternatively for each Insured Location but not each occurrence or, from 16 March, were there at most three relevant interruptions or interferences and therefore a maximum of three triggers?

(2) Was Insuring Clause 2.3(viii) (read with Definition 69(v)) of the Policy triggered separately for each Insured Location by each enforced closure identified in APOC

45(1) and (2) or were there at most two enforced closures and therefore at most two triggers?

(3) Was Insuring Clause 2.3(xii) of the Policy triggered separately for each of the Insured Locations each time a relevant governmental authority or agency gave advice or took actions relating to COVID-19 which prevented or hindered the use of or access to that Insured Location or were there at most three triggers?

2. Is it the case that the claimed Business Interruption Loss 'arises from, is attributable to, or is in connection with' one or more single occurrences for the purposes of aggregation as one or more SBILes, and if so how many and what are they?

3. Subject to adjustment issues and proof of loss, in respect of each Insured Location in the selected sample of Insured Locations identified by the parties, were the claimed losses in the period from 1 May 2020 until 31 December 2021 proximately caused by Covered Events which occurred in the period from 17 February 2020 to 30 April 2020? If only some of the claimed losses in the period from 1 May 2020 until 31 December 2021 were so caused, what is the date if any after which the losses were no longer proximately caused by such Covered Events?

4. For AICW does the Sub-Limit provided by the Policy (£15 million) apply in the aggregate or does the Sub-Limit apply for each SBIL (as defined in the Policy)?

5. Does AICW apply to economic ICW or only to uneconomic ICW?

6. Are any payments received by Stonegate under the Coronavirus Job Retention Scheme and/or is any business rate relief received by Stonegate to be taken into account for the Stonegate Insurers' benefit when calculating any sums recoverable under the Policy?

The Evidential Basis on which the Stage 1 Trial has proceeded

45. As provided for in Cockerill J's Order of 29 October 2021, supplemented by my Order of 10 December 2021, the Stage 1 Issues Trial has proceeded on the basis of Agreed or Assumed Facts, together with expert evidence in the fields of (a) virology, microbiology and infectious diseases, (b) epidemiology, and (c) consumer behaviour.

46. The Agreed Facts comprised:

(1) Agreed Facts as to the Placement of the Policy, and as to the Chronology of Covid-19 and Government Action in Response. The Schedule of these Agreed Facts runs to over 100 pages.

(2) Agreed Facts as to Government Support (and specifically as to furlough payments under the Coronavirus Job Retention Scheme ('CJRS') and Business Rates Relief ('BRR')).

(3) Agreed Facts as to Covid-19 and its arrival in the UK and numbers and spread of cases.

(4) Certain Agreed Facts as to Public and Consumer Behaviour.

(5) Certain Agreed Facts as to 'Long Covid'.

47. There were further Assumed Facts:

(1) As to Stonegate's Business.

(2) As to 17 Sample Insured Locations (or 'SILs').

(3) As to how the CJRS and BRR applied to Stonegate.

(4) As to Employment Market / Labour Shortages.

(5) Certain Assumed Facts as to 'Long Covid'.

48. The expert evidence which I heard was as follows:

(1) In the area of virology from Dr Michael Kidd, a Consultant Clinical Scientist employed at the UK Health Security Agency, who was called by Stonegate; and from Prof. Julian Hiscox, Chair in Infection and Global Health at the University of Liverpool, who was called by Stonegate Insurers. This evidence was primarily relevant to Stage 1 Issue 2, the Aggregation Issue.

(2) In the area of epidemiology from Prof. Michael Tildesley, Professor in the Zeeman Institute for Systems Biology and Infectious Disease Epidemiology Research, who was called by Stonegate; and from Prof. Matthew Baylis, director of the Liverpool University Pandemic Institute and head of the Liverpool University Climate and Infectious Diseases of Animals research group, who was called by Stonegate Insurers. This evidence was primarily relevant to Stage 1 Issue 2, the Aggregation Issue.

(3) In the area of consumer behaviour from Prof. Zachary Estes, Professor of Marketing at the Bayes Business School, City University of London, who was called by Stonegate; and from Prof. Rajesh Bhargave, Associate Professor of Marketing at the Imperial College Business School, who was called by Stonegate Insurers. This evidence was primarily relevant to Stage 1 Issue 3, the Causation Issue.

49. I will consider the expert evidence, and the areas of disagreement between the experts in the three fields, to the extent that these are of significance, in the context of the Stage 1 Issues to which the evidence was relevant.

Principles of Construction

50. The Stage 1 Issues are largely questions which depend on the proper construction of the Policy.

51. There was and could be no dispute as to the essential principles of construction of commercial contracts such as the Policy here. They were set out in the FCA Test

Case in the judgment of the Divisional Court at [62]-[66], by reference in particular to the decision in Wood v Capita Insurance Services Ltd [2017] AC 1173 at [10]-[13]. That summary was approved by the Supreme Court in the FCA Test Case, at [47], where Lords Hamblen and Leggatt added:

> '…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.'

52. At [77] Lords Hamblen and Leggatt further said, in relation to the RSA 3 wording which was in issue in the FCA Test Case:

> '… 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 the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.'

53. One issue which was the subject of some debate in the present case was as to whether the 'ordinary policyholder' should be assumed to have the understanding that might be characteristic of a SME. Stonegate suggested it should, building on the reference to SMEs in paragraph [77] of the judgment of Lords Hamblen and Leggatt in the FCA Test Case, and on what was said in Corbin & King Ltd v Axa Insurance UK Plc [2022] EWHC 409 (Comm) at [178]-[180], [191] and [193] by Cockerill J. In my view it is inappropriate, at least in the present case, to identify the 'ordinary policyholder' with a SME. It is clear that the Marsh Resilience Form was used for a wide spectrum of policyholders, including very large entities such as Stonegate. Moreover, where it was used, the insured used Marsh as broker, and Marsh was clearly familiar with the Resilience Form and could assist the policyholder with its interpretation. I do not see why, in such circumstances, the 'ordinary policyholder' should be assumed to have the understanding to be attributed to a SME if that is said to be different from that which is to be attributed to other reasonable policyholders.

54. Ultimately, I do not regard this point as being of great significance. What is clear is that the question to be asked is what would the language of the policy have been understood to mean to a policyholder, rather than an insurer, who has read through the policy conscientiously, and who has been able to consult with well-informed brokers, but who is not a pedantic lawyer.

Stage 1 Issue 1 ('The Trigger Issue')

55. This issue is first in the list of issues which was ordered to be tried as part of the Stage 1 Issues Trial, and was put first in Stonegate's Skeleton Argument and submissions. As became apparent at the hearing, however, the parties disagreed as to the utility of a decision on this Issue.

56. Thus, in Stonegate Insurers' written opening, the position was put forward that the issue was of no significance. Specifically, they contended that if the answer to the issue was said to pre-empt the question as to aggregation, it did not assist, because aggregation will apply 'regardless of how many times the Insuring Clauses were "triggered" (whatever that might mean)…' As Stonegate Insurers argued, 'If all Stonegate's Business Interruption Loss was in connection with one of Insurers' identified single occurrences, the relevance in the number of 'triggers' is obliterated.' Consistently with this, Stonegate Insurers in their oral submissions continued to contend that the issue was essentially irrelevant; they did not take any detailed issue with Stonegate's case as to the number of 'triggers'; and hardly sought to advance their own pleaded cases as to the maximum number of 'triggers'.

57. For its part, Stonegate accepted that, subject to two specific points, the issue of the number of 'triggers' would not on its own make a difference to the amount of recovery which it could make under the Policy. It maintained, however, that the Trigger Issue was the 'way in' to the Aggregation Issue. Stonegate submitted that, as Stonegate Insurers were unenthusiastic about arguing for their pleaded case on the number of 'triggers', Issue 1 'may not occupy the court much'.

58. Given that there was no agreement between the parties that the Court should not attempt to answer the Trigger Issue, I consider that I should attempt to give answers to Issue 1.

59. The difficulty that has immediately to be confronted is that the concept of a 'trigger' is one which is not used in the Policy itself. It is instead a colloquial shorthand for the matter or matters which give rise to a right to claim under a policy, but it is a term which can be and is used in different senses. In particular, in a case such as the present, it might be used to mean either the occurrence of insured perils, or the sustaining of loss as a result of the occurrence of insured perils. On the pleadings Stonegate Insurers use it in the latter sense (RAD [33]) while Stonegate uses it in the former (RRAR [17]-[18]). The latter is the way in which Zurich in the Greggs Action contends that the term should be used, on the basis that, for there to be a right to an indemnity under an indemnity policy, there must have been loss.

60. I do not consider that the Court can or should seek to say which use of the shorthand term 'trigger' is appropriate. What is important is to be clear as to the sense in which it is being used. Here, given that Stonegate contends that the Court should answer Issue 1, and that it says that the answer, giving the word 'trigger' the meaning which it favours, is of some significance to its case, I consider that the Court should seek to answer the question of what were the 'triggers' in that sense, and, to the extent possible, how many there were.

61. What Stonegate describes as 'triggers' are, as I see it, the same as the underlying Covered Events under the relevant sub-clauses of Insuring Clause 2.3. The following analysis will therefore seek to identify what those Covered Events were and, to the extent possible, how many there were, but will not be concerned with the question of whether such Covered Events gave rise to business interruption or interference, or as to the number of 'triggers' there might have been if the sense in which that word is to be taken were that favoured by Stonegate Insurers in their pleading and by Zurich in the Greggs Action.

62. I therefore turn to the specific issues which arise as sub-issues of Stage 1 Issue 1.

63. Sub-issue (1) relates to the so-called 'Disease Peril'. I consider that, given the terms of the Covered Event in clause 2.3(viii) there would have been as many Covered Events, or 'triggers' in the sense I am using the word, as there were cases of Covid-19 which were either (a) discovered at an Insured Location or (b) occurred within the Vicinity (giving the term 'Vicinity' a wide meaning in accordance with the definition in the Policy and the determination in the FCA Test Case) of one or more Insured Locations, during the Period of Insurance.

64. In the VE Action, Allianz puts forward an argument that there should only be regarded as one Covered Event under the Disease Peril in the Policy in that case. That was not an argument advanced by Stonegate Insurers. I will address that argument in my Judgment in the VE Action.

65. Stonegate Insurers' pleaded case on the number of 'triggers' for the Disease Peril is that there were, after 16 March 2020, at most three, namely (i) the speech of the Prime Minister of 16 March 2020 and the speeches of the First Ministers of Scotland and Wales on 17 March 2020; (ii) the speeches of the Prime Minister and of the First Ministers of Scotland and Wales of 20 March (and of the First Minister of Scotland of 22 March 2020) and the subsequent 21 March 2020 England and Wales Regulations; and (iii) the 23 March 2020 speeches of the Prime Minister and of the First Ministers of Scotland and Wales and UK government guidance of 24 March 2020 and the subsequent England, Wales and Scotland Regulations of 26 March 2020.

66. As I have said, at the Trial the Stonegate Insurers did not advance any significant argument in support of this case. My understanding of the pleaded case is that it was based on an argument that after 16 March 2020 there were only three interruptions or interferences with the Insured's Business and therefore only three 'triggers'. That however, uses the concept of 'trigger' in a different sense from the one I am employing for present purposes.

67. Sub-issue (2) relates to the so-called 'Enforced Closure peril'. The express requirements for there to a Covered Event under Insuring Clause 2.3(viii) in relation to Enforced Closure are: (a) that there should have been 'enforced closure' of an Insured Location (b) by any governmental authority or agency or a competent local authority (c) for health reasons or concerns, which reasons or concerns are applicable within the Vicinity of the Insured Location (see FCA Test Case in the Divisional Court at [304]).

68. Given these terms, I consider that the 'trigger', in the sense I am using that term, for this Insuring Clause is the actual closure of all or part of an Insured Location under relevant compulsion or instruction. On this basis, the Policy is 'triggered' in respect of each such closure, and the number of 'triggers' is the number of Insured Locations so closed.

69. I should, however, clarify that I do not accept Stonegate's case that there would have been multiple 'triggers' in the case of an Insured Location which once closed stayed closed but where the closure was enforced by the reiteration, continuation or renewal

of regulations which were, materially, to the same effect. The 'trigger' is the enforced closure, and in my view there will be one such 'trigger' unless and until the Location opens and is then closed again.

70. Sub-issue (3) relates to the so-called 'Prevention of Access Peril'. The express requirements for there to be cover under Insuring Clause 2.3(xii) are: (a) that actions or advice of a relevant agency in the Vicinity of the Insured Locations (b) should have prevented or hindered the use of or access to Insured Locations during the Period of Insurance.

71. The structure of this sub-clause is that it is the actions of the relevant authority, if they prevent or hinder the use or access to one or more Insured Locations, which are the Covered Event.

72. In the case of this clause, therefore, the number of 'triggers', in the sense I am using it, is properly regarded as the number of such actions or advices. I do not consider that the number of 'triggers' is the number of such advices multiplied by the number of premises, as Stonegate contends. The wording of the clause indicates that there will be a Covered Event if there is advice or actions from a relevant authority which prevents or hinders the use of or access to 'Insured Locations'. While, in accordance with General Condition 7(ii), the plural will include singular, it is nevertheless the case that the clause provides that particular actions or advice by a relevant authority, though affecting more than one Insured Location, will constitute 'Prevention of Access'. In those circumstances, the number of Covered Events under sub-clause (xii) should be regarded as the number of advices or actions rather than that number multiplied by the number of the Insured Locations to which those advices or actions related.

73. I should also add that, in keeping with the submission of Allianz in the VE Action, I consider that the number of Covered Events would be the number of occasions on which there were materially different restrictions imposed or advised by government or a relevant agency which prevented or hindered the use of or access to 'Insured Locations'. Steps taken or advice given by government or a relevant agency which merely repeated or renewed an existing prevention or hindrance of access would, in my view, form part of one set of 'actions or advice', and thus constitute one Covered Event.

74. As to the exact number and identity of the Covered Events falling within sub-clauses (viii) and (xii), this is an issue which I consider should be determined at a later stage, if it is considered necessary to do so given the terms of the whole of this Judgment.

Stage 1 Issue 2 ('The Aggregation Issue')

75. This issue is undoubtedly central to the dispute between the parties and as to the amount for which Stonegate Insurers may be liable under the Policy.

76. I have already referred to the two sides' positions. Stonegate Insurers contend that there is one SBIL, or at most a small number of SBILs, because Stonegate's BIL 'arises from, is attributable to, or is in connection with' one occurrence, or with at most a very small number of occurrences. In their pleadings, Stonegate Insurers put

forward nineteen cases as to what constituted the relevant 'occurrence' for the purpose of the definition of SBIL. In due course I will consider such of those cases as were maintained.

77. Stonegate contends:

(1) In relation to the Disease Peril, (a) there is no single occurrence to which losses can be aggregated; alternatively (b) aggregation to a single occurrence is not possible beyond each individual case of Covid-19 per premises; or, in the further alternative (c) aggregation to a single occurrence is not appropriate beyond a per premises basis.

(2) In relation to the Enforced Closure Peril, (a) aggregation to a single occurrence is not possible beyond a per closure per premises basis; alternatively (b) aggregation to a single occurrence is not possible beyond the specific measures in England, Scotland or Wales (as applicable) requiring the closure of the venues in the relevant jurisdiction.

(3) In relation to the Prevention of Access Peril, (a) aggregation to a single occurrence is not possible beyond a per action or advice per premises basis; alternatively (b) aggregation to a single occurrence is not possible beyond the specific action or advice in England, Scotland or Wales, as applicable, requiring the closure of the venues in the relevant jurisdiction.

Guidance as to Aggregation Clauses

78. What determines this issue is the proper construction of the relevant clauses of the Policy itself. There is, however, a considerable amount of authority relating to aggregating provisions, and to how they should in general be approached, and it is helpful to begin by considering such guidance.

79. The function of aggregation clauses, as was said by Rix LJ in Scott v Copenhagen Reinsurance Co (UK) Ltd [2003] Lloyd's Rep IR 696 at [12] is 'to police the imposition of a limit by treating a plurality of linked losses as if they were one loss'.

80. The application of an aggregation provision can, depending on the nature of the perils and losses which occur, benefit either the insured or the insurer. They are therefore to be construed in a balanced fashion without a predisposition towards a narrow or a broad interpretation: Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd [2003] 4 All ER 43 at [30] per Lord Hobhouse; AIG Europe Ltd v OC320201 LLP sub nom AIG Europe Ltd v Woodman [2017] 1 WLR 1168, at [14] per Lord Toulson JSC; Spire Healthcare Ltd v Royal & Sun Alliance Insurance Ltd [2022] Bus LR 170 at [19] per Andrews LJ.

81. '[T]he choice of language by which the parties designate the unifying factor in an aggregation clause is … of critical importance': Lloyds TSB loc. cit. at [17] per Lord Hoffmann.

82. There are a number of well-known and frequently-encountered types of unifying factors which are used in aggregation clauses. In particular, parties often choose either a 'cause' or 'originating cause' unifying factor, or an 'occurrence' or 'event'

unifying factor. In Axa Reinsurance (UK) plc v Field [1996] 2 Lloyd's Rep 233, Lord Mustill said (at 239), in relation to a provision which aggregated matters 'arising out of one event':

> 'The contrast is between "originating" coupled with "cause" in *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437, and "event" in the present case. In my opinion, these expressions are not at all the same, for two reasons. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. … A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate. To my mind the one expression has a much wider connotation than the other.'

83. The courts have considered that the term 'occurrence' is virtually or entirely synonymous with 'event'. In an aggregating provision where the unifying factor is an 'occurrence', the Court will need to determine whether there was a relevant 'occurrence' to which matters can relate. The meaning of the word 'occurrence' 'must take its meaning finally from the surrounding terms of the policy including the object sought to be achieved': Mann v Lexington Insurance Co [2001] 1 Lloyd's Rep 1 at [36] per Waller LJ.

84. In considering whether there has been a relevant 'occurrence' 'the matter is to be scrutinised from the perspective of an informed observer in the position of the insured'. In making that assessment, an important aspect will be 'the degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible' (as it was put by Michael Kerr QC in the Dawson's Field Award, which is quoted in Kuwait Airways Corp v Kuwait Insurance Co. SAK ('KAC v KIC') [1996] 1 Lloyd's Rep 664 at 685-6).

85. In KAC v KIC Rix J further said at 686, correctly in my judgment:

> 'In assessing the degree of unity regard may be had to such factors as cause, locality and time and the intentions of the human agents. An occurrence is not the same thing as a peril, but in considering the viewpoint or focus of the scrutineer one may properly have regard to the context of the perils insured against.'

86. The so-called 'unities' are not to be applied mechanistically: they are 'merely an aid in determining whether the circumstances of the losses involve such a degree of unity as to justify their being described as "arising out of one occurrence"', Simmonds v Gammell [2016] 2 Lloyd's Rep 631 at [29] per Sir Jeremy Cooke.

87. Whether any and if so what causal link is required between the unifying factor and the losses must depend on the linking words used. Typically aggregation clauses require a significant causal link. In Scott v Copenhagen Re the relevant clause was 'arising from one event'. It was accepted, in line with Caudle v Sharp [1995] 4 Re LR 389, that 'arising from one event' did not necessarily import a requirement of proximate

causation. It nevertheless required a significant causal connection. Rix LJ said this, at [68]:

> '… Nevertheless, it seems to me ultimately to be inherent in the concept of aggregation ("arising out of *one* event") that a significant causal link is required. … A plurality of losses is to be regarded as a single aggregated loss if they can be sufficiently linked to a single unifying event by being causally connected with it. The aggregating function of such a clause is antagonistic to a weak or loose causal relationship between losses and the required unifying single event. This is the more easily seen by acknowledging that, once a merely weak causal connection is required, there is in principle no limit to the theoretical possibility of tracing back to the causes of causes. The question therefore in my judgment becomes: Is there one event which should be regarded as the cause of these losses so as to make it appropriate to regard these losses as constituting for the purposes of aggregation under this policy one loss?'

88. There is also usually a distinct requirement of lack of remoteness between the aggregating event and the losses. Thus in Caudle v Sharp at 394, Evans LJ, with whom Rose and Nourse LJJ agreed, said:

> 'In my judgment, the three requirements of a relevant event are that there was a common factor which can be properly described as an event, which satisfied the test of causation and which was not too remote for the purposes of the clause.'

89. In Scott v Copenhagen Re, Rix LJ referred to the requirement of a lack of remoteness recognised in Caudle v Sharp, and referred to it as a 'tool to limit the otherwise infinite reach of the workings of causation', and 'a legal tool to separate out relevant from irrelevant causes' (at 713). As a result of its use, the court will look for a 'nearer and more relevant cause than for a more distant one' (ibid).

90. The issue of whether losses can properly be aggregated and if so around what event or cause is to be answered by an exercise of judgment based on all the relevant facts and the purpose of the clause. Rix LJ in Scott v Copenhagen Re said, at [81]:

> '… Are the losses to be aggregated as all arising from one event? That question can only be answered by finding and considering all the relevant facts carefully, and then conducting an exercise of judgment. That exercise can be assisted by considering those facts not only globally and intuitively and by reference to the purpose of the clause, but also more analytically, or rather by reference to the various constituent elements of what makes up one single unifying event. It remains an exercise of judgment, not a reformulation of the clause to be construed and applied.'

The correct perspective

91. There were in the present case issues between the parties as to when and on what basis the exercise of assessing whether there was one occurrence is to be treated as conducted which had not been fully considered in any of the previous authorities. It is convenient to consider those now and to set out my conclusions in relation to them.

92. As I have already set out, Rix J in KAC v KIC said that the relevant perspective was that of 'an informed observer placed in the position of the insured'. I agree with that formulation, but there arise two questions.

93. The first is as to when the informed observer is considered as making her assessment. In the Dawson's Field Award, which is referred to by Rix J in KAC v KIC and in other authorities, Mr Kerr QC envisaged that the informed observer was at Dawson's Field on 12th September 1970. That, however, was a case in which the putative event and the damage were simultaneous, and that has also been the case in relation to most of the authorities in this area. In the present case, however, certain of the putative occurrences preceded the insured's sustaining any loss. In the Greggs Action it became, explicitly, common ground that the point at which the question is to be treated as judged is when the BI loss began to be incurred, and not at any point before that.

94. I accept that the relevant time is not before business interruption loss begins to be sustained, but I consider that it is not necessarily the case that the relevant time is the moment at which loss begins to be sustained. The question is whether losses are to be aggregated. It may not make sense to seek to answer that question the moment that a loss begins to be sustained. I would suggest that the relevant point is the earliest time after the commencement of loss at which a reasonable person in the position of the insured would seek to decide whether there was one relevant occurrence. When that would be would depend on the circumstances, including the nature of the losses, of the putative occurrence and of the insurance. In the case of a business interruption insurance, one of whose primary functions is to provide the insured with funds during the interruption, that time would generally be a relatively short period after loss starts to be sustained. In this case, I consider that it would have been in March / April 2020.

95. The issue of the time at which the question is to be asked is connected with a second issue, namely what knowledge the 'scrutineer' is to be taken to have at that time. This was the subject of considerable debate in each of the actions. The insureds, including Stonegate, accused insurers of seeking to rely on matters which had only become known well after the point at which the question of whether there was an aggregating occurrence had fallen to be answered. Indeed, they submitted, in the case of many aspects of insurers' case as to the existence of an aggregating occurrence in what had happened in China in late 2019, or as to the way in which the virus had spread and produced an epidemic here, the knowledge which was being relied on was the product of prolonged and intensive expert examination (virological and epidemiological) which could not possibly have been known to an informed observer in the position of the insured at the time when the question of whether there was an aggregating occurrence fell to be answered.

96. For their part, Stonegate Insurers referred to what was said in KAC v KIC by Rix J, as to the scrutiny having to be performed on the basis of 'the true facts as at that time and not simply on the facts as they may have appeared at the time'. They pointed out that in Aioi Nissay Dowa Insurance Co Ltd v Heraldglen [2013] Lloyd's Rep IR 281, the arbitral tribunal had looked at a US governmental report on the 9/11 attacks, which had been produced in 2004, for the purposes of ascertaining the 'true facts as now known to have been rather than as they might have appeared at the time', and the award had been upheld. The Stonegate Insurers' primary contention was that the

informed observer would be taken to know the true facts as they might be ascertained by way of investigation, if necessary in the course of litigation, which might take a significant period - even up to ten years or so in an appropriate case, as Mr Kealey KC submitted.

97. These arguments revealed complexities in relation to the deemed knowledge of the scrutineer which have not been examined in previous authorities. By way of example, it is, to my mind, very artificial to say that the judgment as to whether there is a relevant occurrence is to take place contemporaneously (either with the initial event(s) as suggested in the Dawson's Field Award or at or soon after the commencement of BI loss), if the knowledge on which that assessment is treated as being made is only available a considerable time, and perhaps years, later.

98. Moreover, and as I have already said, I regard the fact that what is involved here is business interruption insurance to be significant. I was referred to what was said in LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17, in the Full Federal Court of Australia by Derrington and Colvin JJ at [165] as follows:

> 'In the context of business interruption insurance, the ease with which an insured may establish matters relevant to its claim for indemnity may influence questions of construction. The purpose of business interruption insurance is to inject additional funds into a going concern to maintain it as a going concern and, in that respect, to return it to an operational state as soon as possible: *Arbory Group Ltd v West Craven Insurance Services (A Firm)* [2007] Lloyd's Rep IR 491 [48]-[50]; *Adelaide (SA) Pools and Spa Manufacturing and Installation Pty Ltd v Westcourt General Insurance Brokers Pty Ltd (No. 2)* [2021] SASC 123 [990]. That being so, a construction which advances the purpose of the cover is to be preferred to one that hinders it. Here, that approach supports an interpretation that the relevant integer of the insured peril is satisfied when it is shown that the authority has acted upon its belief as to the existence of an outbreak. That can be established relatively quickly by reference to the authority's statements and surrounding existing facts. Not only would an insured encounter substantive difficulties if it were required to establish those matters as actual facts, the extended period of time which it would take may well deprive it of the benefit of the cover.'

I respectfully agree with that reasoning. It seems to me that it applies as much to the question of construction being considered in that case as to what knowledge it is appropriate to consider the informed observer had, which must, in the last resort, also be a matter of what is implicit in the contract of insurance concerned.

99. Accordingly I consider that the knowledge which the informed observer is to be treated as having for the purposes of a business interruption insurance such as that at issue here is, exceptional circumstances apart, all the knowledge which a reasonable person in the position of the insured would have as at the date when the judgment as to whether there is an aggregating occurrence is to be made (as described above). Exceptional circumstances might include where the facts which were thought to exist at that date were the product of fraud, or where there was the subsequent emergence of facts which could not reasonably have been anticipated at the time at which the judgment was considered to be made. By that latter case, I do not have in mind a

situation in which it is apparent that the full facts are not known as at the earlier date, and they emerge subsequently, but rather where the facts appear clear but are then falsified by developments that could not be anticipated.

100. It also seems to me a corollary of Stonegate's own case, and consistent with the need for a business interruption insurance to respond promptly, that the question as to whether there is one occurrence may have to be answered at a time when it is clear that the facts are not fully known. The determination must proceed on the basis of the best material that there is which would be known to the informed observer at that juncture.

The Construction and Application of the SBIL Definition

101. Against that background, it is possible to consider the submissions made by the parties in relation to the proper construction and application of the SBIL provision in the Policy. My analysis of those arguments will be in three parts. First I will consider arguments relating to the context of the aggregating provision, and how it relates to the Limits of the Policy. Secondly I will consider arguments relating to the terms of the SBIL definition itself. Thirdly I will consider the various cases made by the Stonegate Insurers as to what constituted a relevant 'occurrence' for the purposes of aggregation.

The Policy context and the Limits stated

102. As part of its case in favour of there being limited if any aggregation, Stonegate emphasised that the Policy had been placed by reference to a Master Location Schedule which had listed 760 venues, and that the declared values in the Policy, yielding a Total Value of £2,479,788,356, were produced by reference to that Location Schedule. The business was thus made up of many locations, each contributing to the revenue which Stonegate was insuring. Furthermore, each of the venues was different, and could be expected to suffer interruptions at different times and to different extents. Moreover, unless it were recognised that there was limited aggregation by reference to the SBIL definition, then in few circumstances would a claim of anything near the Total Value of nearly £2.5 billion be capable of being made, and this would render that 'headline commercial term' largely meaningless.

103. These arguments did not seem to me greatly to help in determining what should be regarded as a relevant 'occurrence' for the purposes of the SBIL definition, or as to the extent to which there should be aggregation.

104. It is correct that there was a Total Value stated of nearly £2.5 billion. That sum was used as the Limit of Liability per SBIL in various cases (namely Clause 2.1 and Clause 2.3 i, ii, iii, iv and vi). However, it was not adopted in the case of other Covered Events, for which a lower Limit of Liability per SBIL was specified. Those Covered Events included Clause 2.3 (viii) and (xii). In relation to those Covered Events, I do not consider that the 'headline commercial term' was of cover for some £2.5 billion; it was instead cover for the relevant peril up to the amount specified per SBIL (which in the case of Notifiable Diseases & Other Incidents was £2.5 million).

105. What does appear to emerge clearly from the Policy is that, when the parties intended there to be a large Limit of Liability, including one which corresponded to the Total Value, they specified that as the Limit per SBIL. But in other cases they specified a lower limit. There was no evidence as to how any of those limits were decided upon, and one may wonder what was the reason why the Total Value was taken as the SBIL limit for matters such as 'Infestations & Protected Species'. But the relevant question seems to me to be why they did not do so for the perils which are at issue here. The answer to that, judged objectively, must be that they did not want there to be cover up to the Total Value per SBIL for those perils.

106. Stonegate made the further suggestion that the great difference between the SBIL Limits for the various perils was an indication that the parties were using the concept of 'occurrence', as applied to those perils through the SBIL definition, in different senses. The suggestion was that for some perils the lower SBIL Limit was explicable because the parties were envisaging that only matters which might have a limited or localised effect could count as 'occurrences'. As to this, while I accept that different 'occurrences' may be relevant for the different perils, the essential meaning and application of the term, as part of the definition of SBIL, must be the same between the perils. The meaning to be accorded to 'occurrence' cannot be dictated by the level at which the Limit of Liability is set for the particular peril involved.

107. Nor do I consider that there is any support for Stonegate's contention that, in respect of Insuring Clauses 2.3(viii) and (xii) (and perhaps others), there should be aggregation at most on a per premises basis. The fact that there could be one SBIL embracing losses deriving from more than one Insured Location (and could indeed embrace losses deriving from all or almost all Insured Locations) is apparent from the fact that the Total Value is specified as the Limit of Liability per SBIL for Business Interruption – Property Damage. That only makes sense if the parties envisaged that losses arising from different Insured Locations could nevertheless constitute one SBIL. Equally, it is apparent from the Retention provision in the Schedule that it was envisaged that a SBIL, as well as a Single Property Loss, can affect more than one Insured Location. That Item of the Schedule contains the provision:

> 'Where the Insured has made a claim for a Single Property Loss and/or a Single Business Interruption Loss *affecting one or more Insured Locations* that arise from, are attributable to or are in connection with the same single occurrence, only one Retention being the largest applicable will apply to all Single Property Losses and Single Business Interruption Losses combined.' (emphasis added)

108. There was only one Insured under the Policy, namely Stonegate and not any of its subsidiaries, and the Insured's Business was Stonegate's business as operators of pubs, bars etc. The Policy was not a composite one, whereby separate Insured Locations owned or operated by separate insured entities each had, in effect, its own insurance. Instead the Limits of Liability were on the amounts recoverable in respect of the losses to Stonegate's business as a whole, and in the absence of any words to that effect, cannot be read as applying per premises.

The words of the SBIL definition

109. The parties were also at odds as to the construction to be put on the words of the definition of SBIL themselves and extensive arguments were addressed to this.

110. Stonegate contended that the definition of SBIL meant that what was in issue was 'per occurrence aggregation'. It argued that this was in contrast to the wider aggregation dictated by clauses where the unifying factor was a 'cause' or 'originating cause'. Although the definition of SBIL provided that what was required by way of linkage of the losses to the event was that those losses should 'arise from, [be] attributable to or [be] in connection with a single occurrence', that language, including the words 'in connection with', still imported 'a significant and robust' causal test. To treat the words 'in connection with' as meaning either that no causal link was necessary, or a very weak one, would 'stand the [occurrence-based] aggregation provision on its head', and run counter to the concept and function of aggregation as explained by Rix LJ in Scott v Copenhagen Re.

111. Stonegate Insurers contended, for their part, that the Policy did not involve typical 'occurrence' or 'event'-based aggregation wording, because of the width of the linking language, and in particular the use of the words 'in connection with'. In their submission, 'arise from' denotes a significant causal link; 'attributable to', especially in context, requires a weaker causal link than 'arise from'; and 'in connection with' does not require any causal link, or alternatively one 'only of the weakest and most remote kind'. In support of that contention, Stonegate Insurers relied on what was said in Standard Life Assurance v Ace European Group [2012] Lloyd's Rep IR 655, by Eder J. Eder J was considering a deductible clause containing an originating cause aggregation provision, which used the linking phrase 'arising from or in connection with or attributable to'. At [262] Eder J said:

> 'In one respect, the language of the aggregation clause in the present Policy is even wider than that of the clauses considered in the Axa, Municipal Mutual and Countrywide cases. Not only does the clause in the Policy use the expression "originating cause or source", but the description of the link required between the "originating cause or source" and the claims which it is sought to aggregate is worded in the broadest possible terms. … The phrase "in connection with" is extremely broad and indicates that it is not even necessary to show a direct causal relationship between the claims and the state of affairs identified as their "originating cause or source", and that some form of connection between the claims and the unifying factor is all that is required.'

Reference was also made to Campbell v Conoco (UK) Ltd [2003] 1 All ER (Comm) 35 where Rix LJ referred to a clause which had connecting links of ever increasing width, ending with 'in connection with', 'which' as Rix LJ said (at [6]), 'are widely regarded as being as wide a connecting link as one can commonly come across'.

112. Stonegate Insurers thus contended that the SBIL definition contained a 'cascade' of linking phrases of ever-increasing width. They countered the objection that if that was right, 'arising from' and 'attributable to' were mere surplusage by saying that those words served to emphasise the increasing width of the connecting language.

113. To my mind it is clear, as a matter of ordinary language, and without any need to refer to authority, that the words 'in connection with' are wide linking words. I doubt,

however, that a reasonable policyholder would understand there to be much if any distinction between 'arising from' and 'attributable to', or perceive a 'cascade' of provisions. I nevertheless consider that a reasonable policyholder would understand the use of the three phrases, and in particular the words 'in connection with' to denote that only a relatively loose link was required, and thus that a wide range of losses might potentially fall to be aggregated as being at least 'connected with' an occurrence.

114. I am not persuaded, however, that a reasonable policyholder would understand the linkage, albeit broad, to extend to a relationship which was not causal in any sense. The fact that 'in connection with' appears alongside 'arising from' and 'attributable to' indicates, to my mind, that the parties were contemplating a causal linkage. Moreover, I find it difficult to think why parties would agree to treat losses which were simply 'connected with' an event in an entirely non-causal way as being one loss for the purposes of the Policy. Unless there were some causal relationship the types of 'connection' might be very wide indeed, and the definition might be of highly uncertain application. Thus, on such an approach it might be possible to say that there was a 'connection' between losses which had been sustained and a *subsequent* occurrence. That would be a surprising basis for aggregation.

115. Stonegate Insurers sought to answer the objection that if 'in connection with' was understood to include an entirely non-causal link it was unrealistically wide, by contending that their case was not that <u>any</u> connection might suffice. They submitted that the limitation was that the occurrence had to be a 'meaningful explanation' of the loss. I accept that the parties must have contemplated that the occurrence should be a meaningful explanation of the losses to be aggregated. But to my mind, an occurrence would only be a meaningful explanation of losses for the purposes of an aggregation provision in an insurance policy if it had some causal relationship to them; and, as I have said, the context indicates that the parties were concerned with causal linkages. 'In connection with' can, in context and by reference to the purpose of the provision in question, denote a causal connection, as was found to be the case in the decision of the New Zealand Court of Appeal in <u>AMI Insurance Ltd v Legg</u> [2018] Lloyd's Rep IR 1. I consider that it was used in such a sense here.

116. I do accept, nevertheless, that what is required can be a relatively weak causal linkage. The words used do not require that the occurrence be the proximate, or sole, or main cause of the losses, and could embrace indirect causation.

The Stonegate Insurers' aggregation cases

117. I thus turn to consider the various aggregation cases made by the Stonegate Insurers against the background both of the guidance from the authorities and a detailed consideration of the SBIL definition and its context. I have already said that there were 19 cases pleaded by Stonegate Insurers. One of those cases, namely what has been called 'Option 6' (ie aggregation by reference to the initial outbreak or arrival of SARS-CoV-2 in the UK by 31 January 2020) was expressly abandoned. 'Options 14-15' (ie aggregation by reference to whether UK governmental action was likely or inevitable) were not, as I understood it, pursued. Nothing was said in support of them.

118. Those cases which were pursued were put forward in the following order, as primary case, alternative case, and so on:

(1) That the relevant occurrence was any one single case of Covid-19 within the Vicinity. This was what was referred to as pleaded 'Option 7';

(2) That the relevant occurrence was the initial outbreak of Covid-19 in Wuhan in late 2019. This was what was referred to as pleaded 'Option 5';

(3) That the relevant occurrence was one of (a) the first coming into existence of the earliest SARS-CoV-2 viral genome in a single host animal; (b) the single viral infection of a single host with the 'most recent common ancestor' ('MRCA') virus of all known SARS-CoV-2 genomes; (c) the single viral infection of a single host with the MRCA of all lineage B SARS-CoV-2 genomes; or (d) the single viral infection of a single host with the MRCA of all lineage B.1 SARS-CoV-2 genomes. These may be described as pleaded 'Options 1-4'. They were sometimes referred to at trial as the 'virology options'.

(4) That the relevant occurrence was one of: (a) the UK Government's decision that people should not visit pubs, bars, restaurants etc, made on or before 16 March 2020; (b) the implementation of that decision; (c) the UK government's decision to order the closing of pubs, bars, restaurants and other social venues on 20, 21, 23, 24 and 26 March 2020; or (d) the implementation of the decision in (c). These may be described as pleaded 'Options16-19', or the 'Government action' options.

(5) That the relevant occurrence was one of: (a) the numbers / spread of SARS CoV-2 in the UK reaching a level that an epidemic was likely, which was either by 31 January 2020 or 17 February 2020; (b) the numbers / spread of SARS CoV-2 in the UK reaching a level that an epidemic was inevitable; (c) the numbers / spread of SARS-CoV-2 in the UK reaching a level that an epidemic had occurred; (d) the numbers / spread of SARS-CoV-2 globally reaching a level that a pandemic was likely; (e) the numbers / spread of SARS-CoV-2 globally reaching a level that a pandemic was inevitable; and (f) the numbers / spread of SARS-CoV-2 globally reaching a level that a pandemic had occurred. These may be described as pleaded 'Options 8-13', and were referred to by Stonegate Insurers as the 'tipping point' cases.

119. I am going to consider these cases in the order above, save that I will consider the cases in (5), namely the 'tipping point' cases before those in (4), which are the options relating to Government action. Before doing so, however, it is convenient to refer to the agreed facts and the expert evidence which were germane, in particular, to the cases in (2) and (3) ('Options 5 and 1-4'), and to set out my findings in relation to the issues between the experts to the extent to which there was dispute.

The Evidence as to Virology and the Origins of the Pandemic

120. Insurers' case was that the initial outbreak occurred in Wuhan, Hubei Province, China in late 2019, and furthermore can be more precisely traced to the Huanan Seafood Wholesale Market, where two or at most a few humans were infected with SARS CoV-2 by infected animals at that Market over a period of one or more days in

a narrow window between late November to late December 2019. This case was supported by the evidence of Prof. Hiscox.

121. Only certain parts of the case made in this regard were controversial. Thus there was no dispute as to the following:

(1) That SARS-CoV-2 is a zoonotic coronavirus, ie a coronavirus that originated in animals and was subsequently transmitted from animals to humans.

(2) That SARS-CoV-2 is likely to have descended from viruses in bats, but it is unlikely that humans were first infected with SARS-CoV-2 directly by bats.

(3) Instead, infection of humans with SARS-CoV-2 is likely first to have occurred through intermediate animal hosts (such as raccoon dogs).

(4) SARS-CoV-2 is also unlikely to have been introduced into the human population through the cold food chain, or as a result of a laboratory incident.

(5) In the genetic sequences obtained from the earliest known human cases infected with SARS-CoV-2, only two lineages were observed and no others. These have been designated lineage A and lineage B.

(6) These lineages were virtually identical at the start: they differed by only two nucleotides (out of a genome of approximately 30,000 nucleotides).

(7) Lineage A is closer in its genetic sequence to bat coronaviruses.

(8) Lineages A and B were probably introduced separately into the human population from the animal population.

(9) The infected intermediate host animals from which SARS-CoV-2 spilled over into the human population were probably infected with genetically identical viruses to those observed in the earliest human cases (ie they were infected with lineages A and B).

(10) Lineage B is the dominant lineage globally. Virtually all cases of SARS-CoV-2 in the UK are lineage B cases, and specifically lineage B.1 cases.

122. The matters on which there was, to some extent, dispute, were four-fold.

123. The first was whether the initial cross-overs had occurred in Wuhan. It was Prof. Hiscox's evidence that this was likely the case. It was agreed by Dr Kidd that this was probably so. In the Virology Experts' Joint Report it was stated (at [6]) that:

> 'We agree that the origin of the outbreak of COVID-19 was China. We agree that the origin of the pandemic was in Wuhan, as suggested by virological analysis and also the epidemiological evidence …'

124. Prof. Tildesley considered that it was possible that the earliest spillovers had occurred other than in Wuhan, but probably within Hubei Province.

125. Insofar as there was a dispute between the parties on this I accepted the agreed evidence of the virological experts that the origin of the pandemic was probably in Wuhan. This, as Prof. Pybus said in his report in the VE Action, is the prevailing view in the scientific community.

126. The second was as to whether the first zoonotic transfers were in the Huanan Market. It was the evidence of Prof. Hiscox that this was likely to be so. Dr Kidd was not convinced that the evidence demonstrated that this was likely. I am nevertheless satisfied that on the basis of the evidence presented to me it is more likely than not that it was so. This is a matter on which, unsurprisingly, there has been a great deal of work done, and there have been some recent contributions to the scientific literature which have shed considerable further light on it, in particular the articles *Worobey* (2021), *Worobey et al* (2022, pre-print), and *Pekar et al* (2022, pre-print). Those papers and Prof. Hiscox's evidence reveal the following points as to why the Huanan Market was probably (ie was more likely than not) the sole epicentre of the emergence of SARS-CoV-2:

(1) The Huanan Market (i) is a wet market which sold live animals, (ii) which included mammals known to be susceptible to and capable of transmitting SARS-CoV-2, (iii) in the months of November and December 2019.

(2) Vendors known to have sold live animals in 2019 yielded a large number of SARS-CoV-2 positive environmental samples, including several objects clearly associated with animals.

(3) Positive environmental samples in Huanan Market were concentrated in the southwest corner of the western section of the market, which is the area where most live animals were traded. I accept, as Dr Kidd said, that sampling may not have been even throughout the market, but this point nevertheless retains some force given its consistency with other points.

(4) The positive environmental samples included samples which tested positive for both lineages A and B of SARS-CoV-2.

(5) Most human cases in Huanan Market occurred in the western section where live mammals were sold.

(6) A considerable proportion of the earliest known cases (including the index case) were identifiable as individuals who worked at, visited or were linked to somebody who visited the Huanan Market. Moreover, as Dr Kidd accepted, the presence of cases unlinked to Huanan Market was to be expected in a developing outbreak given the high rate of asymptomatic spread, which meant that symptomatic cases would inevitably soon lack a direct link to Huanan Market.

(7) There were no epidemiological links of significance to other markets or other areas in Wuhan. While Dr Kidd referred to a cluster of three cases potentially linked to Yangchahu Normative Vegetable Market, it is not known that that market sold live mammals, and this cluster appears, on the present evidence, more likely to have been infected through community transmission.

(8) Lineages A and B viruses were circulating near to and centred on the Huanan Market in the early stages of the outbreak. There was no other market or area in Wuhan which showed such clustering of early cases.

(9) The spatial pattern of cases in December being so close to and centred on Huanan Market cannot be explained as arising by chance, given population density patterns in Wuhan.

(10) This spatial pattern holds good when considering cases with no history of exposure to the Huanan Market. This tends to indicate that community transmission began in the immediate vicinity of the Market.

(11) Only in January or February 2020 did the spatial pattern of cases reflect that of the population density of Wuhan, this indicating that there had not been an earlier period of general transmission.

(12) The evidence is inconsistent with zoonotic spillovers having occurred elsewhere than, and prior to, Huanan Market. This evidence includes (i) the tight spatial clustering around the Huanan Market in December 2019, (ii) the absence of any consistent epidemiological links to any other potential site of spillover, (iii) the absence of any human cases of infection with SARS-CoV-2 identified prior to early December 2019, in spite of serological and other retrospective testing and analysis in China, and (iv) the lack of genetic diversity in the earliest human cases which tends to indicate that the virus had not been circulating for any length of time in the human population prior to detection.

127. The third was as to the number of spillovers. It is clear that there were at least two successful spillovers (ie spillovers that did not go extinct and generated sustained chains of transmission), because of the existence of lineages A and B.

128. Prof. Hiscox's evidence was to the effect that there had been, at most, a few successful spillovers. His evidence as to the number had to some extent shifted over the course of the proceedings, to at most a few, or a handful. Dr Kidd's evidence was that lineage A probably represented a cluster of zoonotic transfers and lineage B a second, independent, cluster of zoonotic transfers. In cross examination he said that he considered that there were 'at least two, probably five, but a range of up to 15' successful spillovers.

129. In the VE Action Prof. Pybus expressed the view that there was a reasonable chance that lineages A and B were each created by more than one cross-species transmission event. In the Greggs Action, the Hiscox / Wertheim joint statement recognised that 'we both agreed that there were two successful, likely many failed, and possibly a handful of additional successful jumps that we were not able to distinguish by sequence analysis'.

130. Ultimately, I did not understand Prof. Hiscox to dissent from the view that the upper bound of the 95% confidence interval as to the number of successful spillovers was 15, and so the range was between 2 and 15.

131. On the basis of the foregoing I find that the evidence indicates that there were at least two and possibly up to 15 successful spillovers.

132. The final matter was the time over which the spillovers had occurred. Prof. Hiscox gave evidence, in particular by reference to the *Pekar et al* (2022, pre-print) that the likely infection date of the lineage B primary case was 25 November, with a range of 4 November to 8 December; and the infection date of the lineage A primary case to be 2 December, with a range of 12 November to 13 December. He gave further evidence that 'even if there were more than two successful spillovers, they are likely to … have taken place within the late November to end December 2019 window'.

133. In cross-examination it was put to Prof. Hiscox that, taking Prof. Wertheim's preferred doubling time of 3.5 days, that produced an estimate of the first jump of lineage B to humans of 18 November, with a range from 23 October to 8 December, and of lineage A shortly thereafter, with a range from 29 October to 14 December. Prof. Hiscox accepted that those were the dates produced on that assumption. He commented, 'So I think most, pretty much all the studies are in agreement between a November and December zoonotic jump'.

134. On the basis of this evidence, I conclude that the first zoonotic spillovers probably occurred in a period between very late October and mid December 2019, and that it is more probable than not that they occurred in the period between 18 November and early December 2019.

Stonegate Insurers' Case ('Option 7'): Any one single case of Covid-19 within the Vicinity

135. Stonegate Insurers' primary case was that the occurrence of any one single case within the Vicinity (given its extended definition) was a relevant 'occurrence' for the purpose of the aggregating provision in the definition of SBIL. All Stonegate's losses could be aggregated as a SBIL by reference to one such case. Stonegate Insurers contended that this was a necessary consequence of Stonegate's own case, which was intended to reflect the Supreme Court's decision in the FCA Test Case, that each and every case of Covid-19 in the Vicinity was a separate and effective cause of loss, including loss as a result of public reaction to Covid-19 or as a result of the reaction of the government.

136. The point was put succinctly by Stonegate Insurers as follows: 'To the extent that Stonegate can bring itself within the scope of [paragraph 212 of the judgment of Lords Hamblen and Leggatt in the FCA Test Case] and prove that its losses were proximately caused by any one case of Covid-19 in the Vicinity of its Insured Locations, it necessarily and logically follows that, to that same extent, its losses were also (at the very least) 'in connection with' that one case of Covid-19, which is unarguably a "single occurrence"'.

137. Stonegate Insurers described as seeking to have its cake and eat it too, Stonegate's case that any one case of Covid-19 in the Vicinity was a separate and effective cause of loss but that it was not an occurrence with which losses were (at least) connected.

138. Stonegate, for its part, contended that Stonegate Insurers' attempt to transplant the causation analysis in the Supreme Court in the FCA Test Case was misconceived. There was no basis for saying that the aggregation clause could apply to any of the millions of individual cases of Covid-19 which occurred within the Vicinity simply because the analysis of the Supreme Court was that each of those cases was to be regarded as a concurrent proximate cause of the government's actions and of the public's response to the pandemic.

139. While this argument of Stonegate Insurers has an initial plausibility, I am unable to accept it. The basis of the Supreme Court's reasoning in the FCA Test Case was that there were very many individual cases of Covid-19, none of which individually caused the government response, but which together caused that response. In those circumstances, each case was to be regarded as a concurrent proximate cause of the response.

140. In the case of aggregation, however, what the parties agreed was that there should be one SBIL when losses arose from, were attributable or were in connection with 'a *single* occurrence' (my emphasis). What is envisaged is that there should be a meaningful connection between the losses and a particular, unitary and identifiable occurrence, such that it made sense to regard all losses connected with that occurrence as one loss. In the case of occurrences of Covid-19 in the Vicinity, however, no particular case had more significance as a unifying factor than any other. It was only by reason of there being very many that they had the relevant causative effect, and because there were many and they together had that causative effect, it was appropriate to regard each as an equally efficient cause. To my mind, however, the fact that each is regarded as being such a cause for those purposes does not qualify it as the type of single occurrence referred to in the SBIL definition.

141. Previous cases have not considered an argument such as the present. However, if one applies the test of the reasonable observer in the position of the insured, I do not consider that that observer would identify any one case of the disease in the Vicinity as being a 'single occurrence' for the purposes of the SBIL definition. No individual case would stand out.

Stonegate Insurers' Case ('Option 5'): The initial outbreak of Covid-19 in Wuhan

142. In Stonegate Insurers' pleadings, this case was simply pleaded as 'the initial outbreak of Covid-19 I in Wuhan in late 2019'. Conscious, no doubt, of what was said by Lords Hamblen and Leggatt in the FCA Test Case at [69], Stonegate Insurers sought to identify a number of features of the outbreak, in particular by seeking to identify 'unities' as to the way in which the virus had transferred to humans, to support their contention that this was a relevant 'occurrence'. This involved a consideration of the virological evidence, which I have summarised above.

143. The first question, for reasons I have already given, is whether an informed observer in the position of the insured, making her assessment in March or April 2020, would have considered the initial outbreak to be an occurrence. In my judgment, such an informed observer would have considered the initial human infection(s) to be a single occurrence. On the other hand, I do not consider that such

an observer would have considered that the outbreak of the disease in Wuhan thereafter, during which human to human transfer was established, to be a single occurrence. I consider that both these conclusions apply whether regard is had only to the knowledge which an informed observer would have had as at March/April 2020, which I consider to be the correct question, or based on the true facts as they now appear to be.

144. In relation to the former (ie the knowledge which an informed observer would have had in March/April 2020), I was persuaded, as Stonegate Insurers submitted, that the informed observer was to be taken as knowing of the matters: (a) which had been communicated to SAGE on 28 January 2020, (b) which were contained in an article published online by *Lu et al* on 29 January 2020, and (c) which were contained in a World Health Organisation ('WHO') Bulletin of 26 March 2020. By this I do not mean that the informed observer would necessarily have known the source or precise terms of all these communications or documents, but would have known the substance of the information contained in them.

145. What those materials indicated was that SARS-CoV-2 was a zoonotically transmitted virus, which had its ecological origins in bats, but had probably been transmitted to humans via an unidentified intermediate species. As it was stated in the WHO Bulletin, 'All the published genetic sequences of SARS CoV-2 isolated from human cases are very similar, suggesting that the start of the outbreak resulted from a single point introduction in the human population around the time that the virus was first reported in humans in Wuhan, China. The analyses of the published genetic sequences further suggest that the spillover from an animal source to humans happened during the last quarter of 2019.' *Lu et al*, and the WHO Bulletin had also pointed out the link with the Huanan Market, the latter stating:

> 'A large proportion of the initial cases in late December 2019 and early January 2020 had a direct link to the Huanan Wholesale Seafood Market in Wuhan City, where seafood, wild, and farmed animal species were sold. Many of the initial patients were either stall owners, market employees, or regular visitors to this market. Environmental samples taken from this market in December 2019 tested positive for SARS-CoV-2, further suggesting that the market in Wuhan City was the source of this outbreak or played a role in the initial amplification of the outbreak.'

146. *Lu et al* had further said:

> 'It is, therefore, striking that the sequences of 2019-nCoV from different patients described here were almost identical, with greater than 99·9% sequence identity. This finding suggests that 2019-nCoV originated from one source within a very short period and was detected relatively rapidly.'

147. Stonegate denied that an informed observer in its position would have known even the substance of the matters contained in the communications or documents to which I have referred, but I was not convinced by this. The WHO Bulletin (which was itself based on the material in Lu et al, as was what SAGE had been told) was a widely-distributed statement from an authoritative international source. An observer in March / April who was taking reasonable steps to inform herself of the facts with a

view to saying whether there was an aggregating occurrence could be expected to know of the WHO's position. Other than by way of assertion, Stonegate did not explain why that was not to be expected of a reasonable observer in its (Stonegate's) position. Stonegate is a large organisation, which had the means and motive to investigate what could be said about the origin of the pandemic.

148. I therefore consider that the informed observer would have known that there had been a transfer of a virus to the human population on one, or perhaps a limited number of occasions in a very short period, which had apparently occurred at a place in Wuhan shortly before the first cases were reported. Given that the perspective is an informed observer in the position of the insured making the assessment in March / April 2020, and not of someone in Wuhan in November / December 2019, I consider that this is to be characterised as an 'occurrence'. It satisfied the unities. Furthermore, taking into account the nature of the Covered Events under the Policy, which include such matters as the occurrence of a case of a disease at particular premises, it is reasonable to regard what had happened as itself an occurrence.

149. The position is not materially different if the correct approach is to attribute to the informed observer knowledge of the true facts, as they now appear and as I have found them to be. The picture is essentially the same as that which was painted in the WHO Bulletin. It is true that it is now clear that there were at least two zoonotic spillovers. It now seems that there may have been transmission of the SARS-CoV-2 virus between the animal initially infected with it and another animal or animals in whom a slightly modified strain of the virus emerged, and that at least two of those animals passed the different strains to at least two humans. But it seems likely that this occurred within a short period of time, in the southwest corner of the Huanan Market. I consider that on the basis of those facts, this is still to be regarded as an occurrence.

150. By contrast I do not consider that the outbreak of the disease more generally, by which I mean the way in which it became established in the human population in Wuhan, can be regarded as a single occurrence. That was a matter of the infection of a number of individuals, which will have occurred over a period of time (probably weeks), and at various places in Wuhan, which is a city of some 11-12 million which covers an area some four times the size of London. Considering the perspective from which this is to be addressed, and the nature of the Covered Events under the Policy, this was, in my judgment, not a single occurrence, but a number of occurrences.

151. The next question is whether the occurrence which I have identified satisfied the linking requirement with Stonegate's losses specified in the definition of SBIL. Given that I have found that that required, by the words 'in connection with', only a relatively weak causal connection, I consider that the transfer of the virus to the human population did satisfy that test. But for that occurrence, the pandemic would not have occurred, or at least not at the time and in the manner that it did, and the losses would not have occurred as they did.

152. The final question is whether this occurrence is too remote from the losses to be regarded as being a relevant occurrence for the purpose of the aggregating provision. In my clear view it was too remote.

153. The purpose of the requirement of an absence of remoteness, recognised in Caudle v Sharp, is to eliminate some matters which may satisfy whatever requirements of causation may be specified in the clause, but which are too removed from the losses to be treated as an aggregating factor. It is a recognition that almost any causal (and *a fortiori* non-causal) linking language is likely to be over-inclusive as to matters which could be said to fall within its terms, and to extend to matters which fall outside the bounds which the parties must have intended should lead to aggregation. It is, as Rix LJ put it in Scott v Copenhagen Re, a tool to limit the otherwise infinite reach of the workings of causation and to separate out relevant from irrelevant causes.

154. Here, that which I have accepted was an occurrence was remote from the losses in a significant number of respects. It was geographically remote. While it can of course be said that, modern communications being what they are, there is the possibility of rapid spread of a disease internationally, nevertheless the occurrence was very distant from the Territorial Limits of the Policy. It was temporally remote. The relevant losses only started to be incurred some months after the occurrence. It was also causally remote. It depended on a very large number of intermediate events and occurrences, involving first the establishment of the disease in the human population in China, secondly the spread of the virus to the UK, and thirdly the governmental and public response to the virus, to have an effect on Stonegate's business. The 'nearer and more relevant causes', to use Rix LJ's language in Scott v Copenhagen Re were those which more directly occasioned the losses, in particular the governmental response to the arrival and threat of spread of the virus in the UK.

155. These matters, taken together, point to the conclusion that the initial transfer of the virus to humans was too far removed from the losses to be a relevant aggregating occurrence.

156. I do not regard as counting against this conclusion the fact that the Policy provides, in the definition of Notifiable Diseases & Other Incidents, that where a disease occurs and is subsequently classified under the Health Protection Regulations it is deemed to be notifiable 'from its initial outbreak'. That provision not concerned with the question of what constitutes a relevant occurrence for the purposes of the SBIL definition. In any event, that part of the definition of Notifiable Diseases does not refer to the initial 'occurrence' of the disease, but to its 'initial outbreak'. The 'initial outbreak' there referred to has been held not to be the first occurrence of the disease in a human, but to a point at which the first cases in Wuhan were confirmed, dated to 31 December 2019 (FCA Test Case in the Divisional Court at [136]). The initial occurrence of the disease in humans, which is the relevant occurrence for present purposes, was thus a matter more temporally and causally remote than even the 'initial outbreak' contemplated in the definition of Notifiable Diseases.

157. My conclusion is, therefore, that the initial transfer of the virus to humans was too remote to count as a relevant 'occurrence'; and that the 'initial outbreak' more generally cannot be said to have been a single occurrence at all.

Stonegate Insurers' Case ('Options 1-4'): The Virology Options

158. Stonegate Insurers' case in relation to the virology options, was that it was clear that (1) the earliest SARS-CoV-2 genome came into existence for the first time in a single animal at a single point in time as a result of a final mutation or set of mutations of an immediate ancestor virus in a single cell; (2) the MRCA infection giving rise to all lineage B SARS-CoV-2 infections that form part of the pandemic occurred at a defined moment (in late November to mid December 2019), at a defined place (in or around Wuhan); (3) that the MRCA infection from which all lineage B.1 infections occurred in a human, at a defined moment in January 2020 and at a defined place in China; and (4) that this was the result of mutations, particularly the D614G and/or P323L mutations, in a single human host at a single point in time, probably in January 2020 in China. Each of those was a single occurrence, which was connected with the losses, and indeed had a causal link.

159. I accept that each of these matters can be said to have happened, albeit unbeknownst to anyone at the point at which they occurred; and that they happened at particular times and in particular places, although these cannot even now be identified with precision and may well never be identified. It follows from the nature of the concept of a MRCA, as explained in the virology expert evidence, that there will have been a point at which there came into existence a single ancestor for a set of organisms that are being compared and from which ancestor all the organisms in that set are descended. In the case of a virus like SARS-CoV-2 a common ancestor of a set of viral genomes is a single viral genome from which all the other genomes in the set have arisen. All the viral genomes in the relevant set will have arisen, through a series of infections, from the infection of a specific cell in a specific host with the common ancestor virus. The MRCA is that which is latest in time. The coming into existence of that ancestor necessarily occurs at a particular point in time and space.

160. But in relation to these Options, in contrast with the position in relation to the, comparatively simple, facts about where and roughly when the first human infections had occurred, I do not consider that Stonegate Insurers have shown that an informed observer in the position of Stonegate, with the knowledge which was reasonably available in March/April 2020, would have known that the relevant matters had or must have occurred. Specifically, at least items (2), (3) and (4) as referred to in paragraph 158 above, appear to depend on knowledge of the existence of a lineage B or B.1 (as opposed to lineage A) MRCA, and (4) to depend on knowledge of particular mutations. This is highly specialised information, which Stonegate Insurers have not shown would have been known to an informed observer in March/April 2020.

161. Item (1) is in a slightly different position, in that it can be said that it must have occurred, simply for there to be a novel coronavirus. I do not think, however, that a mutation in the cell of an animal, which will have been one of many mutations of the ancestor virus, which was unobserved, and occurred at an unknown point of time or space, is to be regarded as an occurrence for the purpose of the clause. To my mind it is a matter too uncertain as to location, timing and effect, and of too commonplace a nature to count as an 'occurrence'.

162. In relation to the question of causation, I would accept that, if any of these matters can be said to be an occurrence, the loose causation requirement in the SBIL

definition was satisfied. They were 'but for' causes of the infections which constituted the epidemic in the UK.

163. However, again, I am clearly of the view that these matters are too remote from the losses to be relevant for the purposes of aggregation. In the case of item (1) this was clearly a pre-zoonotic transfer. In the case of (2) it is uncertain whether the MRCA infection for all lineage B infections was in an animal or a human. If the former, then it was a pre-zoonotic transfer. Pre-zoonotic transfers are more temporally and causally remote than the spillovers I have considered as part of the Stonegate Insurers' 'outbreak' case above. In relation to all four matters, in any event, I consider that they are properly regarded as part of the historical context, too remote in place, time and causative significance for the purposes of aggregation. The nearer and more relevant matters were, again, those which more directly occasioned the losses.

Stonegate Insurers' Case ('Options 8-13'): The 'tipping point' cases

164. In support of these cases, Stonegate Insurers relied on epidemiological evidence. As I have said, two expert epidemiologists gave evidence. There was limited disagreement between them as to the relevant facts.

165. Thus:

(1) Prof. Baylis considered that the pandemic became inevitable at a very early stage, while Prof. Tildesley did not believe that it was inevitable at that stage, since it was possible that intervention measures reducing R below 1 could have been introduced in multiple countries. But Profs. Baylis and Tildesley agreed that at the point that community transmission was occurring in multiple countries only significant measures, such as lockdowns, would have guaranteed elimination of transmission.

(2) Prof. Baylis considered that a pandemic was occurring at least by 31 January 2020. Prof. Tildesley considered that there was a pandemic only after there was evidence of sustained transmission in multiple countries, and that this was not until early March 2020.

(3) Profs. Baylis and Tildesley agreed that the epidemic in the UK was inevitable when the pandemic was inevitable. However, Prof. Baylis considered that an epidemic in the UK was inevitable shortly after the first cases entered the UK, at which point only a lockdown could have prevented an epidemic; Prof. Tildesley considered that a UK epidemic was not inevitable at that stage.

(4) Thus, Prof. Baylis considered that there was an epidemic in early February 2020, as community transmission in the UK was occurring by then, and though the rate of growth of cases was low it was nonetheless exponential. Prof. Tildesley considered that an epidemic was only apparent from the data in early March 2020.

166. The differences between the two experts were largely a matter of definitional disagreement, and as to what the threshold for an epidemic or for a pandemic was.

167. I do not consider that it is necessary to resolve these differences. What they demonstrated was that when a 'tipping point' was reached would depend on how epidemics and pandemics were defined, and also on what could or would be likely to have been done by way of counter-measures at any given point.

168. I do not consider these 'tipping points' constitute 'occurrences' for the purposes of the SBIL definition. No one could at the time, or can now, point to the single case of Covid-19 which amounted to a 'tipping point'. It is not something which happened at any identifiable time or place. And it depends on what realistically could have been expected by way of counter-measures. The notion lacks, in my view, the particularity and concreteness of an occurrence.

169. In Scott v Copenhagen Re Rix LJ said (at [71]), about 'the inevitability of war', that this 'does not sound like an "event" in Lord Mustill's terms, but more like a state of affairs, or even, as I would venture to put it, a judgement about a state of affairs.' I consider that the tipping point of a virus is similarly a judgment as to multiple cases of a disease, and not of itself an occurrence.

Stonegate Insurers' Case ('Options 16-19'): The 'Government response' case

170. The final case which needs consideration is Stonegate Insurers' case that there was one 'single occurrence', or a few 'single occurrences', in the government response to the pandemic, in the period after 16 March 2020.

171. Stonegate Insurers accepted that this case does not lead to the aggregation of all Stonegate's BIL, but only such loss from the date of the relevant single occurrence up to the end of the first lockdown period in the UK, when pubs and other venues were allowed to reopen.

172. Stonegate Insurers' case in relation to government action was put in a number of ways. The first way was to argue that there was a collective decision taken jointly by the four UK governments on 16 March 2020, which was then implemented at the same time in the Vicinity, and in a consistent manner across the Vicinity. Alternatively, that the implementing government measures in the period 16 to 26 March 2020 were part of one continuum and constituted a single occurrence. Alternatively, the 20 March 2020 instruction to all pubs, bars, and similar venues to close was a single occurrence.

173. Stonegate challenged each of these ways of putting the case. It contended that any decision on 16 March 2020 was not an occurrence. It further argued that the measures between 16 and 26 March were not one occurrence but an evolving response of the authorities. In relation to particular measures, Stonegate contended that they could not lead to aggregation beyond a per premises basis; or alternatively the number of occurrences should include, for each of the nations separately, the initial passage of the measure, and its review every 21 days.

The case as to 16 March 2020

174. In relation to the first of Stonegate Insurers' analyses, it is apparent that there was a COBR meeting on 16 March 2020, which was attended by the Prime Minister and

the First Ministers for Wales and Scotland. No minutes are publicly available. It nevertheless emerges from the speeches and statements made after that meeting by each of the three governments relevant to this case (which does not involve locations in Northern Ireland) that it was decided that (i) based on scientific advice, non-essential social contact should stop, and (ii) people should be advised not to visit crowded areas such as pubs, restaurants and clubs. Thus in his statement of 16 March 2020, the Prime Minister said:

> 'I wanted to bring everyone up to date with the national fight back against the new coronavirus and the decisions that we've just taken in COBR for the whole of the UK … now is the time for everyone to stop non-essential contact with others … you should avoid pubs, clubs, theatres and other such social venues …'

On 17 March 2020, the First Minister of Wales said:

> 'Members here will know that at the COBRA on Monday of this week the Welsh Government agreed with the other three national Governments across the UK to advise the public to take further extraordinary measures … we've also asked people across the wider population to reduce social contact. That includes …not going by choice into crowded areas such as pubs or restaurants …'

Equally, on 17 March 2020 the Scottish First Minister referred to the scientific advice that all four governments in the UK had received, which had led to new advice being given to the public, which included three new recommendations, applicable as from the day before [ie 16 March 2020], including that 'people should as far as possible avoid crowded areas and gatherings – that includes bars, restaurants and cinemas…'

175. Stonegate contended that even if a decision was taken at COBR on 16 March 2020, it cannot be an occurrence. It argued that 'a decision is not an occurrence, and a decision or plan cannot make something an occurrence which is not otherwise an occurrence.' It relied on what was said in Midland Mainline Ltd v Eagle Star Insurance Co Ltd [2003] EWHC 1771 (Comm), in particular at [97] where David Steel J said:

> 'A decision or a plan cannot constitute an event or occurrence. It is the promulgation and application of the programme that might.'

176. For my part, I do not consider that there can be any general rule that the taking of a decision cannot be an occurrence. It might be that in a particular insurance policy the context and wording indicates that a decision will not count as an occurrence. Furthermore, in any event, whether a decision is an occurrence would depend on the facts, and in particular the nature of the decision and the way it was made. But it seems to me that there may be little difficulty in describing some decisions as occurrences. I would consider that to be the case, for example, in relation to a resolution of a Board of Directors of a company. I do not see, equally, why a decision taken in a Cabinet meeting (or a COBR meeting) cannot be an occurrence. These are matters which happen at a particular time, at a particular place, in a particular way, and as a matter of ordinary speech can be said to have been occurrences.

177. It is clearly the case that losses will not, at least usually, flow from a decision unless it is in some way implemented or carried into effect. But if it is, then the resulting losses may, depending on the facts, be sufficiently related to that decision to satisfy the linking language of the relevant aggregation clause (whether it be 'arising from', 'attributable to' 'connected with' or whatever). That is a matter which would depend on the facts and the precise linking language which is relevant.

178. In Midland Mainline David Steel J had found that there was in fact no single decision at all: see at [90]. What had happened was that there had simply been a range of measures incrementally brought into play in reaction and response to the derailment. Furthermore, what was said at [97] was in the specific context of the construction of the Denial of Access extension, and not the construction of an aggregation clause (as David Steel J pointed out at [73]). I do not read what was said in the first sentence of paragraph [97] as seeking to make any general statement as to what might constitute an occurrence for the purposes of aggregation provisions. If it was, it was *obiter dicta*, which, with respect, I do not consider to be correct.

179. In the present case, I regard the decision taken at the COBR meeting on 16 March 2020 that the public should be advised to avoid pubs, restaurants and clubs as being an occurrence. It satisfied the unities. There is to my mind nothing in the context of the Policy which indicates that such a decision cannot count as an occurrence. Judging the matter from the perspective of an informed observer in the position of the insured, it is to be regarded as a single occurrence.

180. I do not consider that Stonegate's case that there can be no aggregation based on this occurrence beyond a per premises basis to be correct. I have already given my main reasons for this conclusion. There is no warrant in the Policy wording for limiting a SBIL as confined to the effect on individual premises. Furthermore, in judging whether there is a single occurrence, the perspective of the insured is that of an operator of pubs and clubs across the country. It is not the perspective of the operator of any single venue. To use the analogy deployed by Mr Kerr QC in the Dawson's Field Award, Stonegate's position was rather that of the Admiral at Naval Headquarters than the crew of a particular submarine. From that perspective a reasonable person would regard the decision of the three governments to be a unitary matter which would have an effect on its business throughout the country, rather than as having significance only at a local level in terms of its impact on each venue individually.

181. For completeness, I should record that if I am wrong in saying that there was a single occurrence in the decision of COBR on 16 March 2020, I would have regarded each of the announcements of the new advice to the public by the Prime Minister on 16 March 2020, and the First Ministers of Wales and Scotland on 17 March 2020 as being a single occurrence (ie, on this view, that there were three occurrences).

182. I did not understand it to be disputed by Stonegate that, if there was a relevant occurrence constituted by the COBR meeting and the decisions made at it (or alternatively by the three announcements by the Prime Minister and the First Ministers of Wales and Scotland), there was a sufficient causal link between such occurrence(s) and its alleged losses as to satisfy any causal requirement implicit in the SBIL definition. Nor did Stonegate contend that such an occurrence (or occurrences)

would be too remote. In my judgment it (or they) would clearly not be too remote. They were near in time, place and causation to the losses.

183. The Court is not, at this Trial, being asked to determine what losses were actually sustained by Stonegate. It cannot therefore determine what losses are as a matter of fact to be aggregated by reference to the occurrence (or occurrences) which I have found there to have been. That will, if necessary, have to be the subject of further evidence and argument.

The 'continuum' between 16-26 March 2020

184. Stonegate Insurers' second way of putting their case on governmental action is that the measures adopted by the UK governments in the period 16 to 26 March 2020 were 'part of a single continuum and constitute a single occurrence'.

185. The period 16 to 26 March 2020 saw a number of measures and announcements, as set out in the Agreed Facts. These involved a progression from (i) the recommendations decided upon on 16 March 2020, implemented in the way I have described, to (ii) the decision announced on 20 March 2020 to tell cafes, bars and restaurants to close and not to reopen on the next day and its implementation by Regulations of 21 March in England and in Wales, to (iii) the announcement of the first UK-wide lockdown on 23 March, with statements by the Prime Minister, and each of the First Ministers of Scotland and Wales, to (iv) the 26 March Regulations in each of England, Scotland and Wales putting in place the full regulatory framework for the first lockdown.

186. In my view, there was not here a single occurrence, but a number of occurrences albeit in quick succession. In arguing that there was one occurrence, Stonegate Insurers placed particular reliance on the decision at first instance in IF P&C Insurance Ltd v Silversea Cruises Ltd [2004] Lloyd's Rep IR 217. In that case, on a point which was not appealed, Tomlinson J held that multiple State Department Advisories or similar warnings at different times after the 9/11 attacks, over a period of six months or more, constituted a single occurrence for the purposes of a deductible provision in a business interruption insurance policy taken out by owners and operators of ultra-luxury cruise ships. He reasoned as follows ([66]):

> '… It would be wholly absurd to regard each State Department Advisory or similar warning by a competent authority as a separate occurrence for the purposes of the deductible. That would mean that if, for example, the Attorney General gave two separate Press conferences or Press briefings on the same day each reiterating the theme to which I have already referred it would be necessary either to attempt to distinguish between the two warnings in terms of their causal effect on bookings, which is obviously impossible, and/or to apply two deductibles possibly for no better reason than that there were two warnings notwithstanding it is impossible to attribute the deterioration in bookings to the one rather than to the other. The per occurrence deductible must also be read in the light of the maximum indemnity period of six months per event which is stipulated in the cover. At any rate in the context of and for the purposes of this claim it seems to me necessary here to equate occurrence with event. Where there are multiple warnings arising out of a single defining event, at any rate one

> of the magnitude of 11 September, it seems to me to accord with common sense and what the parties' intention must have been to regard those warnings, or at any rate those within the immediate six months after the event where it is that six months in respect of which the claim is brought, as a single occurrence, since they all arise out of the same set of circumstances, both actual and threatened. Any other approach would be likely to render the cover unworkable, although it might not be too difficult … to attribute to reaction or response to the very first post 11 September warning … a very significant proportion of the overall negative impact on Silversea's bookings felt within the ensuing six months.'

187. The Silversea case dealt with facts significantly different from the present. In that case there were repeated but consistent warnings given in response to a single event. In the present case, there were a number of measures of increasing severity taken in response to the evolving situation in the pandemic. They were matters which had an individual importance in their own right that specific Advisories in the Silversea case did not. I would accept that questions such as the difficulty of deciding between the causal effect of two matters can be relevant to an assessment of whether, viewed from the correct perspective, they constitute one or two occurrences, but I would not accept that there is any general principle that, simply because there will be that difficulty, there must be one occurrence. Difficult questions of attribution of losses to different causes frequently arise in the adjustment of insurance claims.

188. Accordingly I am not persuaded that there was a single occurrence consisting of the governmental measures and response in the three nations in the period 16 to 26 March 2020.

The case as to 20 March 2020

189. My rejection of the second of Stonegate Insurers' ways of putting their case may not, however, be of great significance. This is because I would accept, in relation to their third way of putting their case, that the instructions given to all pubs, bars and restaurants to close on 20 March and not to reopen the next day was a single occurrence. This had itself been the subject of an agreement between the four nations, as the Prime Minister said in his announcement on 20 March 2020, and as the First Minister of Wales referred to on the same day ('… COBRA therefore considered and agreed a series of further measures…). That decision was then relayed in England, Wales and Scotland, on the same day. True it was announced, as it had to be, in the three nations, but they were all within the Territorial Limits of the Policy, and the Vicinity for the purposes of relevant insuring clauses. The Prime Minister himself described it as a 'collective' action.

190. If I am wrong, however, as to there being one occurrence on 20 March, then I consider that there were three: one each for England, Scotland and Wales.

191. Again, furthermore, I did not understand there to be any dispute that the requirements of causation and lack of remoteness were met, if the relevant occurrence(s) were the decision or announcements of 20 March 2020. As in relation to the case relating to 16 March 2020, the Court cannot determine at this stage which losses can in fact be said to arise from, be attributable to or connected with the occurrence on 20 March 2020.

192. For the purposes of completeness, I should make three matters clear. The first is that it may be that many losses which might be said to arise from, be attributable to or to be connected with the 20 March 2020 occurrence which I have found also arose from, were attributable to or were connected with the 16 March 2020 occurrence. In that case, all those losses will form part of a SBIL by reference to the 16 March 2020 occurrence. The second is that, while I have accepted one of Stonegate Insurers' cases, to the effect that there were two relevant occurrences in the period 16-26 March (which may be called the 16 and 20 March occurrences), I have reservations as to whether those were the only matters which could be characterised as 'occurrences' in that period. Although I would not consider the implementation of already-announced measures by the Regulations of 21 and 26 March to be separate occurrences, it seems to me at least possible that the announcement of the lockdown on 23 March 2020 was a further occurrence. I did not, however, understand that to be a case positively advanced by either side in this action. The third is that I would not regard the review and renewal of the 26 March Regulations in England, Wales and Scotland which occurred in April, May and June 2020 as having been separate occurrences, for the reasons given in paragraph [86] of my Judgment in the Greggs Action.

Stage 1 Issue 3 (the Causation Issue)

193. Issue 3 is expressed in the Order of 29 October 2021 as follows:

> Subject to adjustment issues and proof of loss, in respect of each Insured Location in the selected sample of Insured Locations identified by the parties, were the claimed losses in the period from 1 May 2020 until 31 December 2021 proximately caused by Covered Events which occurred in the period from 17 February 2020 to 30 April 2020? If only some of the claimed losses in the period from 1 May 2020 until 31 December 2021 were so caused, what is the date if any after which the losses were no longer proximately caused by such Covered Events?

194. As became common ground at the hearing, this issue cannot be answered with the specificity which it seems to demand. This is because the parties have not agreed how Stonegate's losses, even at the SILs, break down in terms of what loss of business was attributable to what numbers or categories of customers not attending. By way of an obvious example, it was essentially common ground that insofar as customers of a particular location had contracted 'Long Covid' as a result of an initial infection during the Period of Insurance, and that kept them away from Stonegate's venues up to 31 December 2021, then that loss of business was proximately caused by a Covered Event. But there were no agreed facts as to how many such persons there were for each Insured Location.

195. Nevertheless, there were broad issues between the parties which Issue 3 seeks to have resolved, to which the Court can give answers, and I seek to do that below. As discussed with the parties, what answers can be given at this stage may leave further issues to be addressed by way of evidence and argument at a later stage, and these may not be fully or accurately described simply as issues of 'adjustment and proof of loss'.

196. The essential issue is that Stonegate contends that all its business interruption losses in the period up to the end of the 36 month Indemnity Period were caused by Covered Events which occurred in the Period of Insurance ending on 30 April 2020. While the Issue refers to losses up to 31 December 2021, Stonegate made clear that its case would be that losses up to April 2023 were also caused by Covered Events.

197. Causation requirements are introduced by Clause 2.3 and by the definition of the Indemnity Period in the Policy. Clause 2.3 refers to 'resulting' BIL, and the definition refers to interruption or interference 'as a consequence of' a Covered Event. It was common ground that these provisions imported a requirement of proximate causation.

198. Stonegate's case on causation concentrated on the Disease Peril, ie the Covered Events consisting of the occurrence within the Vicinity, and within the Period of Insurance, of cases of the disease. There was little emphasis on the Enforced Closure or Prevention of Access Perils, for the obvious reasons that the causative effect of the occurrence of the cases of the disease (coupled with the governmental and public response thereto) was likely to be more or at least no less extensive than that of the incidence of the Enforced Closure or Prevention of Access Perils, as well as the fact that the Indemnity Period for the Prevention of Access Peril was specified as 6 rather than 36 months.

199. Stonegate Insurers contended that Stonegate's case on causation was fundamentally unsound. They said that it was obvious that cases of the disease occurring after the end of the Period of Insurance were not Covered Events, and that business interruption resulting from those cases was not insured. Yet that was what Stonegate was seeking to recover.

200. Stonegate put its case on causation in a number of ways. As I understood them, they may be summarised as follows:

(1) That the FCA Test Case had established that all cases of Covid-19 had an equal causative effect, and that this precluded an argument that the cases within the Period of Insurance were not causative of governmental action or consumer behaviour during the Indemnity Period or the losses flowing from such action/behaviour.

(2) That, in any event, governmental action in the Indemnity Period was caused by the cases within the Period of Insurance.

(3) That consumer behaviour in the Indemnity Period was affected by the cases within the Period of Insurance, causing recoverable BIL.

(4) That insofar as either governmental action or consumer behaviour in the Indemnity Period was caused by cases of the disease occurring after the Period of Insurance, those cases were themselves caused by cases occurring within the Period of Insurance, and were therefore not an independent cause.

(5) That, given the number of cases of the virus at the end of the Period of Insurance, Stonegate was in the grip of the peril, or the subject matter of the insurance had received a 'death blow'.

I will consider these arguments in turn.

The reliance on the FCA Test Case in relation to the Causation Issue

201. The first aspect of Stonegate's case was the contention that the decisions in the FCA Test Case, and in particular of the Supreme Court, established its case as to the causative effect of the cases of the disease which had occurred in the Period of Insurance on the governmental action and consumer response in the Indemnity Period. Its argument was that the decision of the Supreme Court in the FCA Test Case had held that business interruption at any given point in time was caused concurrently and equally by all of the occurrences of the disease up to that point; and, given that, it was impossible to take the occurrences of the disease before that point of time and to divide them up into different periods and compare the causative potency of cases from one period of time to cases from another period of time. Thus the occurrences of disease within the Period of Insurance were concurrent proximate causes with the occurrences of the disease in the Indemnity Period; and as the Policy did not exclude interruption resulting from post-Period of Insurance cases, which were simply not covered, there was cover for the business interruption due to Covid-19 and the reaction thereto throughout the Indemnity Period.

202. In my judgment this argument represents a fundamental misunderstanding and misapplication of the decisions in the FCA Test Case. The FCA Test Case was formulated and decided by reference to the imposition of the first lockdown. The reasoning of the Supreme Court, in relevant respects, was as follows:

(1) For two or more causes to be regarded as proximate causes of the loss they must be of equal efficacy or roughly equal efficacy (paras. [171]-[173]);

(2) On the facts of the case, each and every case had been shown to be an equal cause of the imposition of the national measures which were under consideration. This had been a finding of the Divisional Court, and the Supreme Court held that it was the correct way of considering the matter (paras. [176], [179]);

(3) Against that background, the Court rejected an approach of weighing different groups of the cases of the disease which combined together to cause the loss, on the basis that such an approach negated the effect of covered cases through the medium of non-covered cases which had been equally effective in leading the government to impose the lockdown (para. [203]);

(4) Insured and uninsured cases of the disease were not indivisible, but what was indivisible was their effect, via the actions of the UK government which were under consideration, on the business of the insureds (para. [201]).

203. The FCA Test Case thus depended on a finding of fact that all the cases occurring up to the time of the governmental measures there under consideration had been equally effective in causing the government response. There was no holding as a matter of law that each case of Covid-19 was equally the cause of governmental (or consumer) response over a prolonged period of time. The FCA Test Case simply did not consider questions as to whether cases of the disease could be relevantly divided

by reference to when they had occurred, as opposed to issues as to where they occurred, and in particular did not consider any issues as to the effect of early cases on governmental measures or consumer reaction in the period after 4 July 2020 (which was the latest date considered in the Divisional Court's review of the facts, para. [60]).

204. I consider that Stonegate Insurers are correct to submit that, for Stonegate to rely on the principle recognised by the Supreme Court in the FCA Test Case it would be necessary for it to show that all cases of the disease occurring within the Period of Insurance were equally or approximately equal causes of the various governmental measures adopted at different stages during the Indemnity Period, and of consumer behaviour at the different times during that period. That is not a matter which is established by the FCA Test Case.

Was governmental action in the Indemnity Period proximately caused by cases in the Period of Insurance?

205. I turn to consider the evidence as to whether the cases in the Period of Insurance were equal or approximately equal as causes of the governmental measures during the Indemnity Period with the cases of the disease occurring after the Period of Insurance.

206. As a matter of first impression, this appears implausible. It is not only established by the evidence, but it is a matter of the most common knowledge, that the incidence of cases of the disease varied over time, and with that variation, there were changes in governmental (and consumer) response. In the very broadest of terms, and concentrating on England for the purposes of simplicity, the number of confirmed cases fell in June and July 2020, and the first national lockdown was lifted on 4 July 2020. From September 2020 the number of cases was rapidly increasing, and the eventual response was the second national lockdown in November 2020. That was then somewhat relaxed but the growth in cases associated with the Alpha Variant led to the imposition of the third national lockdown in January 2021, which was then replaced with progressively less stringent constraints until, notwithstanding increasing numbers of cases associated with the Delta Variant and then the Omicron Variant, major restrictions were removed and not re-applied, in large part due to the increasing reach and effectiveness of the vaccination programme.

207. That is not a pattern which is suggestive of the early cases of the disease being equally causative of the governmental responses to the disease at all times during the Indemnity Period. It rather suggests that those responses depended on the actual and projected incidence of cases (and their severity of effect) from time to time.

208. This is borne out by a more detailed consideration of the response of the governments.

(1) Of significance is that under the Public Health (Control of Disease) Act 1984, health protection regulations under s. 45C(4)(d) could only impose restrictions or requirements if they were made 'in response to a serious and imminent threat to public health' (s. 45D(4)(a)). Further, the 26 March 2020 Regulations provided that the Secretary of State had to review the need for restrictions and requirements at least once every 21 days; and that as soon as the Secretary of State considered that any

restrictions or requirements were no longer necessary to prevent, protect against, or provide a public health response to Covid-19, then he had to publish a direction terminating that restriction or requirement. These provisions establish that the government had a duty to respond to imminent threats, and to remove restrictions or requirements as soon as no longer necessary. The government's response necessarily had to be driven by the severity of the disease and corresponding threat at the time the restrictions were to be imposed.

(2) When restrictions in England were lifted on 4 July 2020, and hospitality venues were permitted to reopen, it was, as the government said, because the incidence of new cases and therefore the degree of threat posed by the disease had decreased. Thus in his statements on 23 June 2020 announcing that restrictions would be lifted, the Prime Minister reported that hospitalisations, deaths and case rates were falling, with SAGE estimating that (i) cases were shrinking between 4% to 2% daily, and (ii) the five tests for altering measures were being met.

(3) When the Prime Minister justified increasing restrictions in his speech on 22 September 2020, he did so by reference to the 'rising number of Coronavirus cases'. He said that at every stage of the pandemic the government had struck 'a delicate balance between saving lives by protecting our NHS and minimising the wider impact of our restrictions'; but that at that point in time 'we have reached a perilous turning point', with daily cases having almost quadrupled over the last month, and the evidence pointing to the spread of the virus, more hospitalisations and more deaths. 'So this', he said, 'is the moment when we must act.'

(4) In announcing a three-tier system for England on 12 October 2020, the Prime Minister spoke of 'the stark reality of the second wave of this virus', and of the number of cases having quadrupled over the previous three weeks.

(5) On 4 November 2020, introducing a new 28-day lockdown from the following day, the Prime Minister said that the new restrictions were necessary to 'contain the Autumn surge of the virus', and emphasised 'Of course, this is not something that any of us wanted to do.'

(6) On 4 January 2021 the Prime Minister announced a new national lockdown, by reference to the spread of the Alpha Variant. He said 'in fighting the old variant of the virus, our collective efforts were working and would have continued to work' but 'we now have a new variant of the virus', and so '[i]n England, we must therefore go into a national lockdown which is tough enough to contain this variant.'

209. These are only examples, and concentrate on England, but I consider that they accurately represent the full picture for all the nations. At least after 4 July 2020 (or 6 July 2020 for Scotland and 13 July for Wales), when hospitality venues reopened, the government response, as I find from its nature and from what was said, was principally in response to the subsequent developments of the disease and the threat it posed from time to time. Those responses were not equally caused by the cases before the end of the Period of Insurance, but rather were predominantly caused by more recent cases, and the threat of future cases, at the time of the adoption of the measure in question.

Consumer Behaviour

210. Stonegate made the further case that the cases occurring during the Period of Insurance affected consumer behaviour. Thus it contended that even in those periods during the Indemnity Period when it was permissible for people to use Stonegate's venues, they did so less than they would otherwise have done by reason of the impact upon them of the cases of disease within the Policy Period. The essential argument here was that the onset of the pandemic had had a very significant effect upon people's attitudes and willingness to use hospitality venues, even when they reopened.

211. Stonegate Insurers accepted that there might be some particular types of effect on consumers of the early cases of the disease (ie those within the Period of Insurance) which would have had an ongoing impact on Stonegate's business. I will return to those particular categories below. What Stonegate Insurers did not accept was that, outside those categories, it had been shown that the early cases had had any net adverse effect on the number or expenditure of customers.

212. In relation to this, each side relied upon expert evidence. While both Prof. Estes and Dr Bhargave gave thoughtful evidence, I found Dr Bhargave's evidence of more assistance in resolving the issue before me. Prof. Estes' evidence concentrated on explaining why, if there had been a decrease in the extent to which customers had patronised Stonegate's venues during the Indemnity Period as a result of the early cases of the disease, that had come about. Dr Bhargave focused on addressing the issue of whether there was evidence that the early cases of the disease had had such an effect.

213. I found persuasive Dr Bhargave's evidence to the effect that there was no good evidence that the early cases of the disease had had a negative impact on the amount that consumers as a whole spent at hospitality venues such as those run by Stonegate in the periods when they could have done so during the Indemnity Period. As he summarised it, his opinion was that 'the preponderance of evidence and relevant factors most supports a null effect of the pandemic onset on spending and trade at hospitality venues during the period in question [by which he was referring to the period 1 May 2020 to 31 December 2021]'. While Dr Bhargave considered it possible that the onset of the pandemic had had residual effects which increased spending by consumers as a whole in the period after 1 May 2020, in particular because of pent up demand, he recognised that the duration and extent of such an effect was uncertain. On the other hand he considered that a negative residual effect of the early cases was 'very improbable and can be effectively ruled out'. That view was supported by the following points, which I considered well-founded:

(1) The pattern of actual spending in the period after 1 May 2020 was not consistent with any pronounced residual effect of the initial onset cases (as opposed to the effect of the continuing pandemic and of the various restrictions which remained). Specifically, data which Dr Bhargave assembled indicated that spending approached pre-pandemic levels in summer 2020 or exceeded it in the summer of 2021. While it appears that for the SILs the figures, especially in summer 2020, were more depressed than those indicated by the data sources referred to by Dr Bhargave, in particular the CGA Coffer Business Tracker and the ONS's Monthly Business Survey ('MBS') for

businesses involved in 'beverage serving activities', as the SILs were not chosen to be statistically representative I do not think that this is a point of any great significance.

(2) Equally, the data, in particular from the ONS MBS, indicate that spending oscillated at least broadly in line with then current restrictions and levels of disease.

(3) Dr Bhargave produced evidence that the public accessed news in relation to Covid-19, including as to cases and deaths, regularly. Thus the public was highly engaged in developments relating to the pandemic, and it is reasonable to infer that this was, in large part, in order to regulate their behaviour.

(4) Dr Bhargave gave convincing evidence that pre-pandemic experiences created positive attitudes towards hospitality venues, which were persistent and difficult to alter.

(5) A disproportionate amount of spending on hospitality venues is concentrated in a relatively small proportion of consumers. These high value customers tended to be less affected by the negative psychological factors which Prof. Estes identified might affect consumers as a result of the onset of the disease.

(6) The affluent young, who were amongst the high-value customers, were amongst the least likely to be affected by financial uncertainty, and were likely to have maintained or increased spending on hospitality venues as a result of pent up demand and savings in periods of lockdown.

214. For these reasons, and subject to the specific exceptions I will refer to below, I conclude that it has not been shown that the cases of the disease in the Period of Insurance had a material negative impact on consumer behaviour in the Indemnity Period.

'Cases make cases'

215. Stonegate put forward a further argument. This was that the occurrences of the disease during the Period of Insurance had caused occurrences of disease after the Period of Insurance. The later cases of the disease, it argued, were as much the consequence of occurrences of disease during the Period of Insurance as they were causes of interruption and loss. Occurrences of disease during the Period of Insurance were 'sufficiently numerous, and sustained transmission sufficiently well-established, during the Period of Insurance that continued cases of disease were inevitable in the ordinary course of events.' Therefore, it was wrong to set up the cases of Covid-19 occurring after the end of the Period of Insurance as distinct causes of governmental measures (or consumer behaviour) in the Indemnity Period, because those cases themselves arose out of occurrences of disease which were Covered Events. This was referred to, by way of shorthand, as the 'cases make cases' argument.

216. I considered that this argument, while ingenious, was unsound. It would mean that cases within the Period of Insurance were regarded as proximately causative of loss which occurred as a result of the occurrence of different cases, many generations of infection later, simply because those other cases would not have existed without the earlier cases. This would mean that a very indirect and distant cause (the earlier

cases) was regarded as a proximate cause of the loss. I consider that this means supplanting the contractually agreed causation test with what is, in effect, a test of 'but for' causation. That, in my view, is inconsistent with what the parties agreed.

217. Stonegate's argument can be tested by considering what would have been the position if different insurers had insured for different years (ie if there had been new insurers for the year commencing 1 May 2020, who insured on materially the same terms as expiring). The insurers on the first year could not be taken to cover the effects of occurrences of illness in the subsequent year just because the virus which affected those subsequent sufferers was descended from that which had infected people in the first period.

218. Stonegate submitted that its position was supported by authority. It relied on the case of Manchikalapati v Zurich Insurance PLC [2020] Lloyd's Rep IR 77, and contended that that case established that the question of two or more concurrent causes cannot arise where the second 'cause' results in the ordinary course of events from the previous cause, rather than being independent of it. That was a case, however, in which there was only one proximate cause, namely the absence of the Vapour Control Layer and poor ventilation (as Coulson LJ said at [182]). Those defects themselves led to condensation but that did not mean that the exclusion for loss caused by condensation was applicable, because the proximate cause of such loss was still the defects. Cases relating to two concurrent proximate causes were inapplicable, as Coulson LJ said (at [183]):

> '… that analysis simply does not apply because there were not two concurrent causes.'

Here, as I have said, the proximate cause of government action after 4/6/13 July 2020 must be regarded as the recently occurring cases and the current threat, not the cases in the initial period.

219. Furthermore, Stonegate's argument in this regard depends on the contention that any subsequent cause which arises in the 'ordinary course of events' from the first cause cannot be regarded as an independent proximate cause of the loss. That would give rise, in many cases, to an over-extensive scope of cover. Moreover, in the present case, I consider that it cannot be said that the subsequent cases which caused the governmental responses in the Indemnity Period arose 'in the ordinary course of events' from the early cases, or rather that to say that they did stretches the phrase beyond meaningful or helpful use.

220. In this regard, the incidence of subsequent cases of the disease depended, not just on the transmissibility of the initial variant of the virus, but on what restrictions and other social distancing measures were put in place. Thus if, for example, the initial lockdown had been maintained, and there had been severe restrictions on foreign travel, then it is quite possible that the increase in cases in summer 2020, which was driven by lineage B.1.177 introduced to the UK multiple times from European countries and associated with summer holiday travel, would not have occurred. To say that the 'ordinary course of events' was that involving the lifting of restrictions in early July and easing of limitations on foreign travel appears to me to be artificial. That governmental response was itself an abnormal one, to an abnormal situation; and

it was only one of various possible courses which the governments could have pursued. Other countries pursued tighter restrictions for longer.

221. As I have said, the late summer 2020 wave was largely driven by cases of lineage B.1.177 coming from Europe. Those cases will probably not have descended from cases in the UK before 1 May 2020. As to the Alpha Variant (B.1.1.7), which was first observed in Kent, I am prepared to assume, on the basis of the paper of Hill et al (2022), that this variant probably arose from a person who had been chronically infected with SARS-CoV-2 over the course of months, providing an evolutionary environment conducive to the virus making adaptive jumps. But even on this assumption, there is no evidence that this person had been infected in the UK, or by a person whose infection itself had an ancestor in the cases of Covid-19 in the UK prior to 1 May 2020. Moreover, and in any event, I would not regard the occurrence and spread of the Alpha Variant as arising 'in the ordinary course of things'. It depended on the occurrence of particular mutations of the virus. While it could be predicted in advance that the virus would mutate, the specific mutations were unpredictable. Further, it depended on the relevant individual being infected and infecting others. Either or both might not have happened had restrictions been more stringent at the relevant time(s). Equally, the Alpha Variant might not have been as much of a problem as it was, or have occasioned the same governmental response, had the vaccine rollout occurred a little earlier. The enormously complex set of chances and contingencies, in an unprecedented situation, which led to the government response to the Alpha Variant, does not seem to me usefully described as arising 'in the ordinary course of events' from the cases in the country before the end of April.

'Grip of the Peril' or 'Death Blow'

222. A further, related, way in which Stonegate put its causation case was to argue that the prevalence of the disease in the UK at the end of the Period of Insurance meant that the subject matter of the insurance had sustained its 'death blow' or that the insured was 'in the grip of the peril'. Reference was made to KAC v KIC where (at [1996] 1 Lloyd's Rep 664, 690) Rix J had indicated that the 'death blow' principle recognised in Knight v Faith (1850) 15 QB 649, and Fooks v Smith [1924] 2 KB 508 had been potentially applicable. I agree with Stonegate Insurers, however, that to argue that this principle applies in the present case seeks to extend it to a situation in which it has no application.

223. In *Arnould: Law of Marine Insurance* (20th ed), the principle is described in this way (at 28-05):

> 'If the subject matter of the insurance has already received its death blow when the risk expires, the fact that the damage has not yet reached such proportions as to make the ship or goods already an actual total loss cannot prevent the assured from claiming for an actual total loss when the work of destruction has been completed.
> Similarly, if the assured is deprived of possession or control of the insured property prior to the expiry of the risk by an insured peril, the fact that at the date when the policy expired it could not be said that the assured was irretrievably deprived of his ship or goods, or that their recovery was unlikely, will not prevent him from afterwards claiming for an actual total loss if as the result of a sequence

> of events following in the ordinary course upon the peril insured against the loss develops into an actual total loss.'

224. While I would accept that the 'death blow' principle may be capable of application in cases beyond those involving physical deprivation of or damage to property it does not appear to me to be applicable to a case in which there are losses caused by Covered Events within the Period of Insurance, and then further losses caused by different occurrences of the illness after the Period of Insurance and which are not Covered Events. In the present case, the later losses cannot simply be regarded as the playing out of the effect of the Covered Events; they depended instead on new governmental reactions, in new economic and political circumstances, to new cases. Equally, for reasons which I have already given, I do not consider that the present case involves 'a sequence of events following in the ordinary course upon the peril insured against' of the type referred to by *Arnould*. That is a reference, in my view, to a shorter, more direct, and more precisely predictable chain of events than is involved here.

The first lockdown after the end of the Period of Insurance

225. Thus far I have not considered the specific issue of whether cases in the Period of Insurance can be said to have caused the losses due to the continuation of the first lockdown to 4 July 2020 in England (or 6 July 2020 in Scotland and 13 July in Wales), when most hospitality venues were allowed to reopen for outdoor eating and drinking (and indoor eating and drinking in the case of England). Stonegate contends that it is clear that they did. Stonegate Insurers contended that they could not be regarded as having caused the first lockdown after the third review of that lockdown on 28 May 2020.

226. I was not convinced by Stonegate Insurers' case in this regard. I considered that it gave too little weight to the fact that, once imposed, there was an understandable caution in relaxing the first lockdown, and that as a result it was clear, well before the third review, that the closure of hospitality venues would not be lifted until July 2020. Thus, on 10 May 2020 the Prime Minister announced:

> 'We are taking the first careful steps to modify our measures…
> And step three – at the earliest by July – and subject to all these conditions and further scientific advice: if and only if the numbers support it, we will hope to re-open at least some of the hospitality industry and other public places, provided they are safe and enforce social distancing…'

227. The governments of Wales and Scotland did not at the time make a similar announcement of a 'not before' date for the reopening of hospitality venues, but they made clear that they also were adopting a very cautious approach to the lifting of restrictions. The Welsh government's press release of 8 May 2020 had quoted the First Minister as saying that the virus '… remains a very serious threat to us all and we cannot be complacent in any way.' On 10 May 2020 the First Minister of Scotland announced:

> 'That means we must be very cautious and very careful where we proceed to from here … we must not squander our progress by easing up too soon …'

228. In my judgment, because of these matters, the realistic view of what happened is that the extension of the lockdown beyond the third review was equally proximately caused by the cases of the disease within the Period of Insurance, which had led to its imposition and to an attitude of caution on the part of the governments, and to the incidence and threat of further cases in the period up to the third review. As a result I accept Stonegate's case that it can be said that the cases of Covid-19 which constituted Covered Events were equal proximate causes of the closure of hospitality venues, including Stonegate's, up to 4 July 2020 for England, 6 July 2020 for Scotland, and 13 July 2020 for Wales.

Particular categories of causal linkage

229. Stonegate Insurers accepted that in relation to certain particular categories of case, Stonegate might be able to show that occurrences of Covid-19 in the Vicinity during the Period of Insurance had caused loss during the Indemnity Period. Those categories were as follows:

(1) Deaths of customers during the Period of Insurance. This category should also include, presumably, customers who died on or after 1 May 2020 from Covid-19 contracted before that date.

(2) Customers who were infected with Covid-19 during the Period of Insurance and thereafter suffered from Long Covid, or who had underlying health conditions which were exacerbated as a result of having been infected with Covid-19 during the Period of Insurance. The Assumed Facts include that some Stonegate customers will have fallen into those two categories, and that for a proportion of such customers their ability or inclination to socialise outside the home after hospitality venues were permitted to reopen in July 2020 will have been affected.

(3) A cancellation of events (such as weddings and celebrations) which had already been organised to occur on a date after what proved to be the end of the first lockdown, by reason of uncertainty as to whether they would be able to go ahead, due to cases within the Period of Insurance.

(4) In relation to certain cases (including and possibly limited to SILs Nos. 1, 2 and 6), there may have been a loss of momentum, which arose because a relaunch or refurbishment which commenced before 30 April 2020 was delayed or interrupted by Covered Events, and that led to permanently lost momentum.

(5) Certain of the costs incurred in starting up venues after the end of the first lockdown might have been proximately caused by Covered Events.

230. In relation to these categories, whether and what loss can be established will be a matter for further investigation and if necessary resolution hereafter.

Stage 1 Issues 4 and 5: AICW

231. The Fourth and Fifth Stage1 Issues concern AICW. They are as follows:

'4. For Additional Increased Cost of Working (as defined in the Policy) ("AICW") does the Sub-Limit provided by the Policy (£15 million) apply in the aggregate or does the Sub-Limit apply for each SBIL?

5. Does AICW apply to economic Increased Cost of Working (as defined in the Policy) ("ICW") or only to uneconomic ICW?'

I will consider them in turn.

232. The Fourth Issue raises a short point of construction of the Policy. The relevant terms, which are quoted in Annexes 1 and 2 are General Conditions Clause 8(i), the Limits of Liability in the Schedule, and the Sub-Limits Schedule, which states, in relation to AICW, that this is 'Included **GBP** 15,000,000 in addition to the **Limit of Liability**'.

233. Stonegate contends that the sub-limit for AICW applies for each and every SBIL. Stonegate Insurers contend that it applies in the aggregate.

234. I consider that Stonegate is correct in relation to this point. The sub-limit is expressed to be 'in addition to the Limit of Liability'. The 'Limit of Liability' for BIL is expressed in terms of an amount 'any one SBIL'. Thus, the simplest, and I consider, correct reading of the Policy is that, when the Limit is stated as per SBIL, the AICW sub-limit applies in addition to the Limit per SBIL.

235. This is supported by the opening provisions of the Sub-Limits Schedule. These state that the sub-limits specified 'will operate as part of the Limit of Liability applicable to a SBIL unless the individual sub-limit is expressed as "in addition to the Limit of Liability"'. The natural reading of that is that, unless specified as in addition to the Limit of Liability, in which case it is in addition to the SBIL Limit, the sub-limit is included in the SBIL Limit. Furthermore, the preamble also envisages that if a sub-limit is to apply in the aggregate, that would be specified in the Schedule. In relation to AICW, it was not.

236. Stonegate Insurers' case rests in large measure on the fact that the Sub-Limits Schedule does contain a reference to SBIL, specifying limits 'for a [SBIL]' in relation to Claims Preparation Costs. This was relied upon to argue that the failure of the Sub-Limit Schedule to refer to AICW being in the aggregate is not inconsistent with its being so, in that the Schedule equally does not specify, as it could, that it applies on a SBIL basis. I consider that this argument overlooks that there is a particular reason for the different wording used in relation to Claims Preparation Costs, namely that the sub-limit is calculated in a specific way, not exactly replicated for the other sub-limits, which is dependent on the size of SBIL. It would have been impossible to have explained how that sub-limit was to work without express reference to the SBIL.

237. Stonegate Insurers also suggested that the £15 million limit for AICW would be very generous 'in the BI context', if applied per SBIL. This suggestion depends for any apparent force on comparing the £15 million for AICW in addition to a SBIL Limit of (for example) £2.5 million (as it is for Notifiable Diseases). But the £15 million for AICW is also applicable to other covers, including BI – Property Damage, and BI – Specified Causes (i), (ii), (iii), (iv) and (vi), where the SBIL Limit was

almost £2.5 billion. There might be several very large BI-Property Damage claims, where £15 million AICW was a small proportion of the SBIL limit claimed. The parties could have, but did not, specify different sub-limits for AICW which depended on which was the relevant insuring clause.

238. The Fifth Issue raises an issue as to the relationship of economic and uneconomic ICW. It is again a short point of construction of the Policy.

239. The most relevant terms are quoted in Annexe [2], and are the definitions of ICW and of AICW, as well as the definition of Reduction in Turnover.

240. Stonegate contends that AICW can apply to 'economic' ICW, ie increased costs and expenses if and to the extent that they have the effect of diminishing or avoiding Reduction in Turnover, and the AICW sub-limit can act as a 'top-up' cover once ICW is exhausted. Stonegate Insurers contend that the AICW sub-limit is available only for amounts which do not fall within the definition of ICW, and thus is not available in respect of extra costs and expenses to the extent that they have diminished or avoided Reduction in Turnover.

241. To put this debate in context, it is of assistance to refer to certain passages in Riley on Business Interruption Insurance (11th ed). At para. 2.71, the authors explain:

> 'It is in an insured's interest to restore a business to normal trading conditions as quickly as possible after an incident and, moreover, there is a duty to do so imposed by the policy claims conditions. This, however, may involve considerable expense in undertaking special measures to reduce the loss of turnover during the indemnity period and to hasten the resumption of normal trading. But action on these lines is also of benefit to the insurers as its effect is to reduce the amount which would otherwise be payable for loss of gross profit. Therefore [a typical BI policy] compensates the insured for the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover which would otherwise have taken place. No sum insured is stated in respect of this benefit nor is anything to be added to the amount insured on gross profit to provide for it because it is an alternative to loss which would otherwise be payable as loss of gross profit. An exception to this arises, however, when it is anticipated that the amount which may have to be expended on increase in cost of working in the event of a claim will exceed the amount of the gross profit which will be conserved by such expenditure. Specific insurance is then required in respect of the excess amount as described at para. 2.78.'

242. Paragraph 2.78 there referred to is to this effect:

> 'As the foregoing paragraphs have indicated there may be occasions where additional expenditure has been incurred as a result of an incident but may not be recoverable because it either does not meet the criteria to qualify as an increase in cost of working, or because the expenditure has not, or cannot be shown to have been economic. There may be occasions where there was good reason to incur such expenditure. To deal with that, an extension of cover termed "Additional Increase in Cost of Working" is available.

> As explained [above], under [a typical insurance of gross profit] a policyholder is indemnified … for additional expenditure necessarily and reasonably incurred to minimise or avoid altogether the potential loss of turnover. The amount provided for this is, however, limited to the sum which would otherwise have been payable for loss of gross profit had such additional expenditure not been incurred. In other words, the insurer will not pay in respect of additional expenditure more than £x per £x of gross profit saved. This limit is calculated by applying the rate of gross profit to the amount of the turnover that has been achieved as a result of the additional expenditure.
> Although this "economic limit" is normally sufficient to provide fully for an insured's loss there are businesses in which the circumstances are such that it may be inadequate. Some insured (sic) must try to continue their production or services without a break whatever the cost to maintain what are public services. Others may wish to prevent competitors from gaining a foothold with their customers. Some will see continuation of supply as a reputational issue. In these two latter categories the difficulty lies in establishing whether the expenditure is protecting turnover within the maximum indemnity period, or whether it has a longer-term objective, when additional increase cost of working cover would be advisable.
> This additional cover is readily available, although some insurers may be reluctant to offer it if the maximum indemnity period on the gross profit items is less than 12 months. It provides an indemnity for additional expenditure beyond that recoverable [under a typical loss of gross profit cover] by means of a supplementary item under the heading on additional increase in cost of working.'

243. In addition the following further passages are illuminating:

> [Para. 6.67]: '… Given that additional increase in cost of working cover is relatively inexpensive, most businesses would be wise to consider the additional cover that it provides. …
> … some businesses will rely on increase in cost of working cover only, i.e. with no cover for gross profit or gross revenue. Some policyholders or their advisers confuse increase in cost of working only, with additional increase in cost of working (which sits alongside gross revenue or gross profit cover) and it is not unknown for cover to be granted on this latter basis alone. This is to be regretted because the additional increase in cost of working cover is all but useless in the absence of cover for increase in cost of working, since the former will only cover the uneconomic element of additional expenditure, leaving the insured to bear the economic element. …'

> [Para. 11.23] '… additional increase in cost of working provides cover for that element of any additional expenditure which does not meet the test of the economic limit. Likewise, additional increase in cost of working cover will not pick up the economic element of any additional expenditure, i.e. the two covers are effectively mutually exclusive….
> … From the underwriter's perspective, the premium differential is significant between gross profit and additional increase in cost of working, so again it is unlikely to be their intention that underinsurance [of gross profit] could be bought back cheaply.'

244. Stonegate Insurers contended that what may be said to be the normal position, as described by Riley, applies under the Policy. ICW and AICW are, they contended, mutually exclusive, and AICW cover is only available for expenditure which is not 'economic'. They argued that this is made express in the Policy because the definition of AICW says that it 'means expenditure (other than **Increased Cost of Working**) reasonably incurred [etc]' (underlining added).

245. Stonegate argued that on the particular terms of the Policy, ICW and AICW are not intended to be mutually exclusive, and that economic expenditure is recoverable as AICW if there is not sufficient cover left for it to be recovered as ICW. That, Stonegate argued, can be seen from the fact that the definitions of both ICW and AICW refer to expenditure incurred 'with the intention of maintaining essential administrative functions'. In the definition of ICW, such expenditure is included even if it is not incurred with the intention or effect of avoiding or diminishing Reduction in Turnover (hence the use of the words 'and/or' after 'functions'). Stonegate contended that this shows that the 'other than [ICW]' words in parentheses in the AICW definition cannot mean 'other than expenditure falling within the definition of ICW', because that would mean that there could never be cover under the AICW provision for expenditure incurred with the intention of maintaining essential administrative functions; and that this in turn shows that the right reading of the 'other than [ICW]' sub-clause is 'other than as recovered as ICW'. Stonegate argued that this interpretation, furthermore, would avoid the unsatisfactory and paradoxical situation in which the insured has positively to argue that its expenditure did not reduce Reduction in Turnover, with insurers arguing that it did.

246. In my judgment, Stonegate Insurers are correct in relation to this issue. The words 'other than **Increased Cost of Working**' in the definition of AICW naturally mean, 'other than falling within the definition of Increased Cost of Working'. They do not say, nor in my judgment can they be read, as saying 'other than recovered as ICW'.

247. This is in keeping with the way in which AICW cover normally works, and in which it is expected to work. Riley suggests that AICW cover is comparatively cheap, and if that is right the parties would not expect it to respond simply because the limit for ICW (which itself is recoverable *instead of* the Reduction in Turnover which it avoids and is included as part of the limit per SBIL) is exhausted. If that is, in a particular case (as it might be here), a problem for the insured, that is because the limit for Reduction in Turnover has been set too low for full recovery of the loss in question. But, in the Policy itself, there are covers where the insured can recover very substantial sums by way of ICW. Thus, in relation to BI – Property Damage, the Limit of Liability is almost £2.5 billion per SBIL, and this would cover ICW up to that amount. In that context a £15 million sub-limit for AICW, embracing only expenditure which is 'uneconomic' is entirely comprehensible. Further in that situation, the insured would have little incentive to argue that its expenditure was uneconomic (and thus subject to the cap of £15 million) rather than economic, and thus subject to the limit of £2.5 billion, and what Stonegate points to as an unsatisfactory positioning of the two parties on this issue would not occur.

248. As to Stonegate's reliance on the inclusion in the definition of ICW of expenditure incurred with the intention of maintaining essential administrative

functions, I agree with Stonegate Insurers that the parties must be taken to have intended, and would have been understood by a reasonable person to have meant, that such expenditure would only form part of ICW if 'economic'. This was awkwardly expressed, perhaps because the implications of the words 'and/or' were not fully appreciated. Were the position as Stonegate contends, then the insured would have no incentive to ensure that costs incurred with the intention of maintaining essential administrative functions had the effect of avoiding Reduction in Turnover. Furthermore, there is no reasonableness requirement in sub-clause i of the definition of ICW. Thus if all that were required were an intention to maintain essential administrative functions for there to be recovery as ICW, and there was no requirement that it should have saved money, then that would mean that unreasonable expenditure, which did not benefit insurers, would be recoverable. I do not consider that the parties would be understood to have been agreeing that by the language which they used.

249. But if I am wrong in relation to how expenditure incurred with the intention of maintaining essential administrative functions is dealt with, and it can be recovered both as ICW and as AICW even if 'uneconomic', I consider that it would be the only category of expenditure which could be so recovered. The words 'other than Increased Costs of Working' would exclude all economic ICW, but expenditure on maintaining essential administrative functions would not be excluded from AICW by them, because such expenditure is expressly referred to in the definition of AICW itself. On this basis, expenditure incurred with that intention, even if uneconomic, would be recoverable as ICW up to the relevant limit, and then as AICW.

Stage 1 Issue 6: Government Support

250. The Sixth Stage 1 Issue is in these terms:

> Are any payments received by the Claimant under the Coronavirus Job Retention Scheme and/or is any business rates relief received by the Claimant to be taken into account for the Defendants' benefit when calculating any sums recoverable under the Policy?

251. Stonegate Insurers contended that, either as a matter of the express terms of the Policy, or as a matter of the application of the ordinary principles of subrogation, they were entitled to the benefit of both CJRS and BRR payments. Stonegate contended that this was not the case.

252. The parties dealt with the cases as to the Policy provisions and the general law in different orders in their submissions. I intend to consider first the case in relation to the Policy provisions and then the general law as, if the Policy can be said to make express provision for the treatment of the relevant payments, an examination of the general law of subrogation will not be determinative.

253. The most relevant Policy term is the definition of Reduction in Turnover, and in particular, the following words

> '**Reduction in Turnover** means:

> i. The amount by which the **Turnover** during the **Indemnity Period** falls short of the **Standard Turnover**
> LESS
> ii. Any costs normally payable out of **Turnover** (excluding depreciation) as may cease or be reduced during the **Indemnity Period** as a consequence of the **Covered Event**…'
>
> The provision commencing 'LESS' was referred to in argument as the 'savings clause'.

254. Stonegate Insurers' case is that, as a result of CJRS and BRR, costs which would normally have been payable out of Stonegate's Turnover (viz. wages and Business Rates respectively) ceased or were reduced, and that this was as a result of Covered Event(s) because CJRS and BRR were introduced to deal with the effects of the pandemic.

255. There are three matters to consider in relation to each of CJRS and BRR: namely (1) would the relevant costs normally have been payable out of Turnover; (2) did those costs cease or were they reduced; and (3) was this as a consequence of Covered Event(s). I will take the two forms of Government Support in turn.

256. In relation to CJRS, Stonegate accepted as an Assumed Fact point (1): namely that employment costs (including employees' gross earnings, national insurance contributions and pension contributions) were 'costs normally payable out of Turnover'. Equally, by the end of the hearing, Stonegate accepted point (3), namely that CJRS grants had been a consequence of a Covered Event.

257. The sole issue therefore was whether CJRS grants had caused the relevant employment costs to 'cease or be reduced.' Stonegate contended that they had not, because it was integral to the CJRS that the employer should continue to have a liability to meet those employment costs, which were not reduced. As it contended, Stonegate continued to pay wages, and it had to in order to benefit from the CJRS at all.

258. In my judgment, employment costs were at least 'reduced' *pro tanto* by reason of the payment of corresponding amounts under the CJRS. I consider that the natural meaning of the definition, including its savings clause, is that it is referring to costs to the business. Insofar as such costs were defrayed by the government, I consider that they were 'reduced'. That, in my view, reflects the net financial effect of payments under the CJRS and the commercial reality.

259. This conclusion is supported by three further considerations. The first of these is that it is consistent with the accounting standards relevant to Stonegate.

260. There is, it emerged, a difference in the ways in which different accounting standards require such payments to be shown in accounts. Riley at para. 13.39 explains:

> '… furlough receipts will not be netted off the wage expense under UK Generally Accepted Accounting Principles (GAAP) but will be shown in

> annual accounts as "other income", whereas US GAAP, which might be followed for UK subsidiaries of US companies, would allow the offset of furlough receipts from the wage expense (neither US GAAP nor International Financial Reporting Standards are prescriptive of the treatment of such receipts).'

261. Stonegate, a Cayman Islands company, elected to have its consolidated accounts prepared in accordance with International Financial Reporting Standards ('IFRS') as adopted by the EU. In those IFRS, the relevant standard is IAS 20. It provides that 'Grants related to income are presented as part of profit or loss, either separately or under a general heading such as "Other Income"; alternatively, they are deducted in reporting the related expense.'

262. Stonegate chose to show CJRS grants as 'Other Income', and not to net them off against employment costs but, as IAS 20 provides, it could have done so.

263. This is not to say that the treatment of CJRS grants for the purposes of the Policy or similar BI policies will depend on the financial reporting standards adopted by the policyholder. I entirely agree with the comment in Riley (11th ed) para. 13.39, that 'it would seem to be inappropriate for the disclosure / income classification required in sets of accounts … to dictate the indemnity provided by the policy'. Nevertheless, it does seem to me to enhance the lack of reality in Stonegate's position on the issue, that the Reporting Standards it itself adopted permitted the presentation of such payments as an offset against employment expenses.

264. The second consideration is that any apparent force in the case that CJRS payments did not cause employment costs to be 'reduced', appears to me to rest on the notion that Stonegate had to pay employment costs for which it was then reimbursed, and thus that the costs had not been reduced, but had been subsequently made good (up to the limits of the scheme) by CJRS grants. If payments had already been made by the government before the relevant wages were paid, then to my mind it would be almost impossible convincingly to argue that the wage costs to the business had not been at least 'reduced'.

265. Yet, as Mr Kealey KC submitted, the CJRS did indeed cater for payments being made to the employer before payment to the employee. The Treasury Direction of 15 April 2020, by para. 8.1 specified that CJRS payments might reimburse 'the gross amount of earnings paid **or reasonably expected to be paid** by the employer to an employee' (my emphasis). There is similar wording in para. 8.6; para. 8.1(b) refers to national insurance contributions 'liable to be paid'; and para. 12 refers to 'earnings paid or payable' by employers to furloughed employees. Consistently with this, the Assumed Facts include that Stonegate used furlough payments received 'for reimbursement of expenditure incurred **or to be incurred** by it in respect of the employee to which the CJRS claim related' (my emphasis). Mr Lynch KC also told me on instructions that Stonegate had received CJRS both in respect of amounts already paid and amounts to be paid.

266. The question of whether CJRS payments fall to be taken into account under the savings clause cannot depend on whether payments were received before or after the payment to the employee. I consider, however, that it is significant that the scheme

itself allowed for payments before as well as after payment to the employee. It enhances, to my mind, the artificiality of a contention that CJRS payments did not reduce employment costs.

267. The third consideration is that the relevant provision should be construed, if there is any room for argument, to accord with the basic principle that the Policy was a contract of indemnity. The principle was stated by Brett LJ in Castellain v Preston (1883) 11 QBD 380, at 386, as follows:

> 'In order to give my opinion upon this case, I feel obliged to revert to the foundation of every rule which has been promulgated and acted upon by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.'

268. In Synergy Health v CGU Insurance [2011] Lloyd's Rep IR 500, in the context of BI insurance, and specifically in relation to a savings provision, Flaux J considered that it was the interpretation which best accorded with this principle which should be given to the policy, even though, in that case, it involved a somewhat stretched meaning of the word payable. At [258] Flaux J said:

> 'Although the defendants' construction stretches the word "payable" somewhat, it seems to me that it is to be preferred to Synergy's construction, which leaves the saving in respect of depreciation out of account. My principal reason for that conclusion is that it seems to me that, as a matter of principle, a policy should be interpreted as providing an indemnity for the loss suffered not for more than such an indemnity. Of course if the wording is incapable of any other construction, a court might be driven to the conclusion that something in excess of a full indemnity was intended, but given the unlikelihood and unreasonableness of such a conclusion, the court should not arrive at it unless no other conclusion is possible.'

269. The precise issue in Synergy Health was different from that here, in that it concerned a saving of depreciation. Nevertheless I consider that the approach in that case is one which I should adopt in this case as well. The CJRS payments were in respect of an expense of the business, and resulted, in reality, in a saving of cost. For the clause to be construed so as to mean that those payments were not counted as savings would, in my view, mean that the insured would receive more than an indemnity. It should, if possible – and in my view it clearly is possible – be construed so that those payments are taken into account under the savings clause.

270. Thus I hold that the CJRS payments did reduce costs payable out of Turnover and are to be taken into account under the savings clause.

271. In the circumstances it is not strictly necessary for me to consider the position under the general law. For myself, I doubt that, if the relevant savings are not within the savings clause, they fall to be taken into account as a matter of the general law, because the parties have agreed that there should be recovery of BIL and have agreed how this should be calculated, and it would appear to me that the general law could not be relied on to produce a result different from that specifically provided for. But if I am wrong about that, and the general law is potentially applicable, my view is that it would produce the same result as I have found to be the case by application of the clause.

272. I was referred to a number of authorities. Those which appeared to me of direct relevance were those relating to the doctrine of subrogation in contracts of indemnity and in particular of insurance. Cases from other areas involving the rather less precise principle of *res inter alios acta* appeared to me to be of much less relevance.

273. The principal cases to which I was referred are well known. The first which requires mention is Burnand v Rodocanachi (1882) 7 App Cas 333. That case was concerned with a valued cargo insurance policy. The cargo was destroyed by a Confederate cruiser. The United States government set up a compensation fund under an Act of Congress, out of which the insured was paid the difference between the true total loss and the sum received from the insurers. The Act of Congress specifically provided (as can be seen from the report of the decision in the Court of Appeal at (1881) 6 QBD 633, 634):

> 'that no compensation is to be given by the commissioners on account of loss which has been insured against or covered by insurance, and secondly that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to any claimant must be given to compensate him for any loss either from want of insurance or from being under-insured.'

274. The decision of the House of Lords was that underwriters were not entitled to recover the amount paid out of the fund. Lord Selborne LC said, at 336:

> 'Here it is admitted that there is in the Act of Congress everything said and done which a supreme legislature could possibly say or do for the purpose of excluding the present claim and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued but to the unvalued part of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress. It was a true and bona fide valuation but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid.'

275. Lord Blackburn was of the same view. He distinguished the earlier case of Randal v Cockran (1748) 1 Ves Sen 98, where a fund had been set up by the government to compensate English shipowners for losses caused by Spanish raids, but which made no mention of insurance, as follows (at 340):

> 'I think that that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify … It was not because the King was bound to pay the money – he was not … It was because de facto there was a payment which prevented, or diminished pro tanto, the loss against which the insurers were bound to indemnify the assured.'

But, as Lord Blackburn said at 341, in the case before him, the United States had made it clear that it was not paying for the purpose of reducing the loss against which the insurers had indemnified, but for a different purpose.

276. In Castellain v Preston (1883) 11 QBD 380, a vendor contracted with a purchaser for the sale for a specified sum of a house which had been insured by the vendor against fire. The contract contained no reference to insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire and the vendor received the insurance money from the insurance company. The purchase was afterwards completed, and the purchase money agreed upon without any abatement on account of the damage by fire was paid to the vendor. The Court of Appeal held that the insurer was entitled to recover from the vendor a sum equal to the insurance money. I have already quoted from the judgment of Brett LJ. At 388 he said this about the ambit of the doctrine of subrogation:

> 'Is [subrogation] to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? … Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.'

277. Cotton LJ agreed that the insurers were entitled to succeed. He said, at 393:

> 'I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into

account which is received by and comes to the hand of the assured, and which diminishes that loss.'

278. In Stearns v Village Main Reef Gold Mining Co (1905) 10 Com Cas 89, the facts were that the Government of the South African Republic had, immediately before the outbreak of the Second Boer War, seized a quantity of gold belonging to the defendants, who recovered for the loss from their underwriters. The Government had then, at the request of the defendants, and as a matter of grace, returned a large portion of the gold to the defendants. The Court of Appeal held that the underwriters were entitled to the value of the restored gold.

279. In the course of his judgment, Romer LJ said, at 95-96:

> 'The question of whether the Transvaal Government, in returning this money, were thinking of the insurers appears to me to be immaterial, if they imposed no condition or trust or obligation upon the money as between themselves and the defendants when it was returned. Probably the Transvaal Government were not thinking of the insurers at all. But on the facts I have stated, it appears to me that the money having come back as part of the commandeered gold, so as to diminish the loss, in the absence of circumstances negativing that view, the insurers would be able to say: "We are entitled to avail ourselves of that diminution of the loss which we insured against."'

280. In Merrett v Capitol Indemnity [1991] 1 Lloyd's Rep 169, a broker made an *ex gratia* payment to a reinsured to cover part of the reinsured loss. As found by the arbitrators, (a) the broker made the payment to retain the goodwill of the reinsured and (b) it expected to be reimbursed by the reinsurer (171 RHC). As Steyn J said: 'It follows inexorably that the payment was made solely for the benefit of the assured and not for the benefit of the reinsurer.'

281. These authorities were reviewed in Colonia Versicherung AG v Amoco Oil Co. [1997] 1 Lloyd's Rep 261. At 270 Hirst LJ said:

> 'In Burnand v Rodocanachi, as the judgments show, the critical factor was the clearly expressed intention of the US Congress to compensate the beneficiaries for their uninsured losses, together with the express exclusion of any claim by the insurers in their own right or that of the assured. In Merrett's case the findings of fact by the arbitrators led inexorably, as Mr Justice Steyn held, to a conclusion in conformity with Burnand v Rodocanachi. In Castellain v Preston, on the other hand, no such intention to exclude the insurers could be derived from the purchaser's payment of the purchase price without abatement on account of the fire damage.'

282. In Colonia itself, the 'crucial question' as Hirst LJ put it, 'is whether … it was the intention of Amoco [in effect, the third party] to benefit ICI [the insured] to the exclusion of the Colonia [insurers]'. This was a question of construction of the settlement deeds by which Amoco had paid ICI and, as a matter of construction of those deeds, it had not been Amoco's intention to benefit ICI to the exclusion of insurers.

283. Finally, reference was made to Talbot Underwriting Ltd v Nausch, Hogan & Murray Inc. (The 'Jascon 5') [2006] 2 Lloyd's Rep 195. At [66] Moore-Bick LJ said:

> 'In both Burnand v Rodocanachi and Merrett v Capitol Indemnity, as also in the example of the brother's gift given by Bowen LJ in Castellain v Preston, it is possible to see that the payment was not intended to make good the loss against which the underwriters were obliged to indemnify the insured. The settlement payment in Colonia Versicherung AG v Amoco Oil Co can be seen to fall on the other side of the line. In the present case there is nothing to suggest that Sembawang carried out the repairs to the vessel with any intention other than to complete the work under contract and obtain payment of the price. In those circumstances it is impossible in my view to say that Sembawang did not intend to make good the loss in respect of which CPL was entitled to claim on the insurers. … by the time a claim was made CPL had not incurred a loss that could be recovered from the insurers.'

284. From these cases, I take the position to be as follows:

(1) If a third party has made a payment which has eliminated or reduced the loss to the insured against which it had insurance, then, subject to the exception below, the insurers are entitled to the benefit of that payment, either in reducing any payment that they might have to make under the policy or, if they have already paid, by claiming the amount from the insured.

(2) This will not be the case, however, if it can be established that the third party, in making the payment, intended to benefit only the insured to the exclusion of the insurers. That might be established if, for example, the third party acted from benevolence towards the insured, as in the case of the brother in Bowen LJ's example in Castellain v Preston; or if that had been expressly stipulated by the third party; or if the third party had paid the money to retain the insured's goodwill and expected to be paid an equivalent amount by the insured's insurer.

(3) In assessing the intentions of the third party payor, it does not matter whether that payor gave any thought to the position of insurers. A payment can still diminish the loss even if no such thought is given.

285. In the present case, the CJRS payments were ones which, prima facie, did diminish the insured loss. They were payments made in respect of employment costs which Stonegate would otherwise have borne itself, either as wages, if staff were kept on the payroll, or by way of redundancy payments, if staff had been let go. In either case, they would have contributed to the financial loss arising from the interruption or interference to Stonegate's business.

286. As to the intention of the Government in paying, Stonegate has not shown that this was with the intention of benefiting Stonegate alone to the exclusion of insurers. There is no express statement by the Government to that effect. The Government did not indicate that the payment was being made only in respect of uninsured losses. This is notwithstanding that, unsurprisingly, the Government was aware that some companies had BI insurance, as evidenced by the Treasury's Fact Sheet of 18 March 2020.

287. Accordingly I would have concluded that, even if it had not been the result of the savings clause in the Policy, Stonegate Insurers would have been subrogated to the CJRS payments, as a matter of the general law.

288. I should clarify that, if there were such subrogation, the result in my view would be the same as if the savings clause applied. By that I mean that the CJRS payments would be taken into account in assessing Stonegate's loss, before there was an application of the SBIL limit, not that there would be an assessment of the SBIL limit, and then a reduction of that by the amount of the CJRS payments. This was explicitly confirmed in the Greggs Action on behalf of Zurich, which of course is also one of the Stonegate Insurers.

289. The other matter to which reference should be made is that the decision I have reached in relation to CJRS is different from the conclusion of the Full Federal Court of Australia in Star Entertainment Group v Chubb in relation to JobKeeper payments (see in particular paras. [451]-[463]). The relevant clause in that case was, however, in materially different terms from that in the Policy. In that case, the 'sum saved' provision required that the sum saved had to be 'in consequence of the interruption or interference' as a result of an outbreak of the disease within a 20 km radius of the Situation. The Full Court held that that causation requirement was not fulfilled in the case of JobKeeper payments at issue in that case. Here, however, the causation requirement (that the CJRS should have been received in consequence of Covered Events, viz. the occurrence of Covid-19 in the Vicinity) is made out; indeed, it was conceded by Stonegate.

290. I turn to the question of BRR and whether the Policy terms and in particular the savings clause provides an answer as to how this is to be treated.

291. The same three questions fall for consideration as I set out in relation to CJRS.

292. As to the first, there is no agreement, and no Assumed Fact, that Business Rates would be payable out of Turnover. As I understand it, that is because Stonegate's position is that it is not the case for each site that Business Rates would be paid out of Turnover. That is not a matter which I have been asked to or can resolve. It appears, therefore, that I must deal with this point on two alternative assumptions: one that the relevant Business Rates would, and the other that they would not, be paid out of Turnover.

293. As to the second question, there was no dispute that Business Rates were reduced during the Indemnity Period. Accordingly, as I understood it, there was no dispute that, if they would have been payable out of Turnover, then they were a cost which 'ceased or was reduced' for the purposes of the savings clause.

294. As to the third question, Stonegate did not accept that the BRR had been in consequence of a Covered Event, or Events. Stonegate Insurers contended that it had been.

295. It is necessary to clarify, as a preliminary matter, that what is in issue here is the increases in BRR which were announced and implemented in March 2020, first in the

Budget on 11 March 2020, then in the Chancellor's statement on 17 March 2020, and by the removal of some exclusions for BRR on 23 March 2020. The Government had already announced a business rates retail discount in the October 2018 Budget. Stonegate Insurers accept that, to the extent that Stonegate already benefited from that discount prior to the changes in BRR in March 2020, no issue arises as to its being a relevant saving for the purposes of the savings clause.

296. In relation to the BRR changes which were announced by the Chancellor in March 2020, as well as the measures announced for Scotland and Wales to match or mirror those announced by the Chancellor, it appears to me quite clear that they were in consequence of a Covered Event or Events, namely the occurrence of a case or cases of Covid-19 in the Vicinity. Their timing was no coincidence. In the Budget on 11 March 2020, it was stated that the measures, including the increase in BRR, were 'to provide support to businesses during this temporary period by either reducing their costs or bridging cashflow problems arising from the outbreak [sc. of Covid-19]'. Further, in the Chancellor's announcement of 17 March 2020, he specifically said that it was in response to changed medical advice of the previous day, and the concerns as to the impact on pubs, clubs and other hospitality venues, that he was extending the Business Rates holiday to all businesses in that sector. It appears to me to be artificial to say, as Stonegate does, that the BRR was only in pursuance of the Government's economic policy rather than in consequence of the pandemic. It was in consequence of the pandemic, but aimed at supporting the economy as well.

297. On this basis, if Business Rates would have been paid out of Turnover, then in my view the BRR clearly produced a saving of costs as a consequence of a Covered Event, and thus fell within the savings clause in the Policy. I would also consider that, even if this had not been the case as a matter of the terms of the savings clause, a similar result would have been produced as a matter of the general law.

298. On the other hand, if the position is that Business Rates were not normally payable out of Turnover, then the position is different. The savings clause would not be applicable. Whether as a matter of the general law in relation to subrogation the position would be as Stonegate Insurers contend appears to me to be a difficult question. Ex hypothesi, the relevant savings are not within the savings clause. It would appear questionable as to whether the general law would produce a result whereby insurers could take the benefit of savings to costs which were not paid out of Turnover, bearing in mind that the basic measure of indemnity is Reduction in Turnover, and when they had contracted to have the benefit only of savings of costs which were normally paid out of Turnover. There was no detailed argument on this point, and it appears to me that it will need to be addressed in more detail if the point continues to matter, which will depend in part on what the actual position is as to what Business Rates were paid out of Turnover.

Conclusion

299. I will make orders reflecting the above conclusions. I will receive further submissions as to the precise form that those orders should take.