THE HIGH COURT

COMMERCIAL

[2021] IEHC 279

[No. 2020/3656 P.]

BETWEEN

HYPER TRUST LIMITED TRADING AS THE LEOPARDSTOWN INN

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3658 P.]

BETWEEN

ABERKEN LIMITED TRADING AS SINNOTTS

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3402 P.]

BETWEEN

INN ON HIBERNIAN WAY LIMITED TRADING AS LEMON AND DUKE

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3453 P.]

BETWEEN

LEINSTER OVERVIEW CONCEPTS LIMITED TRADING AS SEÁN'S BAR

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

JUDGMENT (No. 2) of Mr. Justice Denis McDonald delivered on 23rd April, 2021

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Introduction

1. On 5th February, 2021, I gave a written judgment ("*the principal judgment*") in relation to issues of liability which arise in each of the four actions named above. This judgment should be read with the principal judgment. I will use the same abbreviations here as I did in that judgment.

2. This judgment addresses three additional questions which have arisen, namely:-

(a) the interpretation of the word *"closure"* in extension 1 of s. 3 of the FBD Public House Policy;

(b) the territorial dimensions of the relevant counterfactual applicable for the purposes of determining the extent of cover available under extension 1; and

(c) whether the plaintiffs should be entitled to an award of costs on the normal party and party basis or, as claimed by them, on a legal practitioner and client basis.

3. I now deal, in turn, with each of these issues.

The parties' submissions as to the meaning of the word "closure"

4. In the course of the original hearing of these proceedings in October, 2020, no issue was raised by any party as to the meaning of the word *"closure"* as used in the FBD policy. The first time that any issue was raised as to meaning of the word *"closure"* was in written submissions delivered on behalf of the Lemon & Duke plaintiff in January, 2021 following the judgment of the UK Supreme Court in the *FCA* case. In para. 274 of the principal judgment, I indicated that, if the issue as to the meaning of the word *"closure"* were to be debated, it should be the subject of an appropriate application on notice to all of the other parties. I was subsequently

informed on 17th February, 2021 that all parties were agreed that the issue should be debated and it was, therefore, the subject of further submissions (both oral and written) in the course of the additional hearing which took place on 26th February, 2021.

5. The principles applicable to the interpretation of contracts have already been described in the principal judgment and it is unnecessary to repeat that exercise here. The relevant factual and legal context against which the policies were put in place has also been described in that judgment and should be kept in mind in considering the meaning of the language used in the policy and, in particular, in assessing the meaning of the word *"closure"*. The meaning of that word must also be considered in the light of the terms of the FBD policy as a whole.

6. The relevant terms of the extensions to the business interruption cover available under the FDB policy are set out in para. 125 of the principal judgment. It may, nonetheless, be helpful to repeat the terms of the extension 1 here:-

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

7. At the time these proceedings were commenced in May, 2020, the relevant *"closure"* in issue arose on foot of the announcement by the Department of the Taoiseach on 15th March, 2020 that all public houses should close. The announcement on 15th March, 2020 required the complete closure of public houses. The case made by the plaintiffs focused on the business interruption caused by that closure. However, in the period which has intervened since the proceedings were commenced, there have been a number of variations to that position which are helpfully summarised in the written submissions delivered on behalf of FBD. Public houses were unable to carry on any form of trade in the period between 15th March, 2020 and 26th March, 2020. However, with effect from 27th March, 2020, public houses were permitted to undertake a takeaway service. Subsequently, on 29th June, 2020, public houses which were in a position to serve a *"substantial meal"* were permitted to reopen. Thereafter, there were periods during which outdoor service only was permitted subject to a maximum number of fifteen customers at any one time. More recently, all public houses have been required to close with effect from 3.00pm on 24th December, 2020 with only takeaway service permitted (but not encouraged) thereafter.

8. In the case of public houses which were not in a position to serve a *"substantial meal"* ("*wet pubs*"), all such public houses within the Dublin area have been the subject of the imposed closure since 15th March, 2020. Their only ability to carry on any form of business was by way of a takeaway service from 27th March, 2020. In the case of wet pubs outside Dublin, they were the subject of an imposed closure from 15th March, 2020 to 21st September, 2020. They were briefly permitted to reopen in the period between 21st September, 2020 and 21st October, 2020.

9. FBD accepts, for the purposes of these proceedings, that, where customers were not permitted to enter on the premises and where the level of business was *de*

minimis by comparison with the level of trade prior to closure, public houses which were in a position to provide a takeaway service only should be regarded as having been the subject of an imposed closure since 15th March, 2020. However, FBD does not accept that any of the other restrictions on the public house trade (as summarised in paras. 7 and 8 above) can be said to constitute an *"imposed closure"* within the meaning of extension 1 of the policy.

10. The argument now made by the plaintiffs is that, properly construed, the reasonable reader of extension 1 would understand the parties to have agreed that business interruption cover under the policy is triggered where the insured's business is affected by any *"imposed closure"* of any part of the premises or by an imposed closure of the premises for any of the businesses of the insured. In support of this argument, the plaintiffs make the following points:-

(a) They contend that, when read as a whole, the word *"premises"* is used in the policy as a synonym for the business of the insured and the property used in connection with that business. In this context, they highlight that the term *"premises"* is not a defined term in the policy, albeit that it is identified in the policy schedule. Thus, for example, in the Leopardstown Inn proceedings, the premises is described in the schedule as: *"LEOPARDSTOWN INN, BREWERY ROAD, LEOPARDSTOWN, COUNTY DUBLIN"* while the *"Business or Occupation"* is described as *"carrying on or engaged in the Business of Occupation of: Public House, Restaurant & Property Owner including Car Park Area, Function Room And Off Licence"*. That description of the business suggests that the Leopardstown Inn premises has a number of discrete parts including a function room;

(b) The plaintiffs emphasise that the policy was sold in relation to a wide variety of different types of public house trade including city pubs such as Sinnotts or the Lemon & Duke, suburban premises such as the Leopardstown Inn, premises situated in the centre of large provincial towns such as Athlone where Sean's Bar is situated and also rural premises. This submission should be read with that summarised at (e) below;

(c) The plaintiffs draw attention to the fact that the primary cover available under s. 3 of the policy (in which the relevant extensions are to be found) is not contingent on closure of the entire premises. The primary cover arises in respect of losses resulting from the business *"being affected by loss and damage for which liability has been admitted and payment has been made under Section 1 or 2 of the Policy"*. Section 1 of the policy deals with damage to buildings, while s. 2 deals with damage to contents. The plaintiffs argue that loss and damage under ss. 1 and 2 of the policy can arise where only part of the buildings or its interior have been affected. The plaintiffs submit that, accordingly, there is nothing surprising or inconsistent in suggesting that the cover available under extension 1 can likewise be triggered by a partial closure of the premises;

(d) The plaintiffs refer to the opening words of the relevant passage in s. 3 of the policy containing the extensions which, as set out in para. 6 above states that FBD will indemnify the insured *"in respect of (A), (B) or (C) above as a result of the business being affected by…"*. In this context, the plaintiffs emphasise the reference to (B) which

addresses the *"Increase in cost of working"*. This is explained in the policy as meaning the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during the indemnity period (i.e. the period during which the policyholder is entitled to be indemnified for losses arising from an insured peril). This suggests that the policy contemplates that the policyholder may be able to trade to some extent during the indemnity period and thus suggests, in the context of the extensions, that cover will be available where, for example, a part of the premises remains open for business. The plaintiffs also highlight the language used in para. (A) which requires a comparison to be made between the *"gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year"*. The plaintiffs suggest that this language clearly contemplates that some level of business can be operated while the cover is operative. After all, if a comparison is to be made between the previous year and the *"gross profit earned during the indemnity period"*, this must contemplate that the premises can be open to some extent during that period. They argue that the natural reading of the provision is that, in the case of any of the extensions of cover, a situation might arise where the insured peril results only in a partial reduction in the gross profit (while a part of the premises is closed) and where the insured incurs additional costs with the object of diminishing or avoiding that loss. The plaintiffs argue that this demonstrates that cover is available

under the extensions even where there is not a complete closure of the premises;

(e) The plaintiffs highlight the provisions of Regulation 6 of the Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 3) Regulations, 2020 (S.I. No. 234 of 2020) ("*the 2020 Regulations*") which came into operation on 29th June, 2020 initially until 20th July, 2020. Regulation 6(1) requires occupiers of premises to take all reasonable steps to ensure that members of the public are not permitted or otherwise granted access to the premises or to a part of such premises where a business of the type specified in Regulation 6(2) is carried on. Among the types of business specified in Regulation 6(2) is that described in para. (c) in the following terms:-

> *"(c) any… business or service that is selling or supplying intoxicating liquor for consumption on the premises and that, but for this Regulation, is otherwise permitted by law to do so, other than where such intoxicating liquor is –*
>
> *(i) ordered by or on behalf of the member of the public being permitted, or otherwise granted, access to the premises, at the same time as a substantial meal is so ordered, during the meal or after the meal has ended, and*
>
> *(ii) consumed by that member during the meal or after the meal has ended."*

Counsel for the plaintiffs submitted that, save in respect of the exception specified in relation to substantial meals, the effect of Regulation 6 is to prohibit access by members of the public to premises where alcohol is served. Counsel submitted that this was, to all intents and purposes, a form of closure. While it was suggested that this is not something the court has to finally determine at this stage of the proceedings, it was submitted that, for a pub that operates a seven day publicans licence, the publican can no longer operate as a normal pub. It cannot serve alcohol unless it is served in the very restricted manner prescribed by Regulation 6 which, effectively, means that the publican must operate the premises as a restaurant. Counsel for the plaintiffs submitted that the impact of Regulation 6 was of particular relevance to the point summarised in subpara. (b) above namely that many pubs operate both as a restaurant and as a bar. While the issue is likely to require further elaboration and consideration as part of the quantum hearing, counsel submitted that the effect of Regulation 6 was that pubs were unable to open their public bars; they could not have patrons sitting or standing at the bar and they could not have patrons ordering alcohol alone. Counsel submitted that, in this way, a discrete part of the business of such pubs was no longer possible as a consequence of the operation of Regulation 6. In making this submission, counsel recognised that the impact of a provision such as Regulation 6 will involve the consideration of the individual facts relevant to each operator on a case by case basis. In some cases, the closure or partial

closure of the relevant premises or business may be more obvious than others.

(f) The plaintiffs place considerable reliance on the judgment of the UK Supreme Court in the *FCA* case where, in the context of the Hiscox 1-4 policy (which insured losses resulting from *"your inability to use the insured premises due to restrictions imposed by a public authority…"*), the court held that this included an inability to use a part of the premises. At paras. 136 to 137, Lords Hamblen and Leggatt said:-

> *"136. …The reference to "the business premises" is naturally read as including a discrete part of those premises which is capable of being used separately from other parts. Such an interpretation also makes commercial sense, as there may be little difference from a business point of view between the ability to use a small part of the premises for a limited purpose and closure of the whole premises. Furthermore, the language of the clause does not require there to be a complete inability to use the premises for all purposes. The court below appears to have accepted this, as it refers in the passage quoted above to "a complete inability to use the premises <u>for the purposes of the business</u>" (our emphasis). We agree that a qualification of this kind is implicit in the clause but again see no reason why different business purposes should not be distinguished*

if the relevant activities are capable of being conducted separately.

137. We consider that the requirement is satisfied either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities. In both those situations there is a complete inability of use. In the first situation, there is a complete inability to carry on a discrete business activity. In the second situation, there is a complete inability to use a discrete part of the business premises…"

(g) The plaintiff also argued that when one considers each of the causes of closure which may arise under extension 1, such causes will not always result in a complete closure of the premises. The plaintiffs suggest that in the case of murder or suicide, food or drink poisoning, defective sanitary arrangements, vermin or pests, there can be a partial closure of the premises with no requirement for total closure. They suggest, for example, that a murder may take place in an upstairs bar of the premises which might result in its closure whereas a downstairs bar might be permitted to remain open. Likewise, where a premises has two or more kitchens, only the kitchen which is the source of food poisoning might be closed. Vermin or pests might cause part of the premises only to close. Similarly, in the case of an infectious or contagious disease, the occurrence of the disease might require the

imposed closure of the bar part of the premises as opposed to the restaurant and it might involve the closure of the interior of the premises but not outside dining. It was submitted that, if the FBD policy had required there to be a total and complete closure of every part of the premises before cover is available, it would have been necessary that this should be properly notified to the customer in accordance with the regulatory obligations imposed on FBD (as described in paras. 102 to 112 of the principal judgment). In particular, the plaintiffs draw attention to the provisions of Regulation 34(9) of the 2018 Regulations which require that the IPID should contain information as to (*inter alia*) the main risks insured and the main exclusions. It was submitted in the course of oral argument by counsel for the Lemon & Duke plaintiff that the case now made by FBD in relation to partial closure is a *"very dramatic curtailment of cover"* and counsel argued that the regulatory obligation imposed by Regulation 34(9) is such that any lack of cover in respect of partial closure ought to have been specifically identified in the IPID;

(h) The plaintiffs placed some emphasis on the argument made by the FCA before the UK Courts (as recorded in para. 133 of the judgment of the UK Supreme Court) by reference to the example of a bookshop which is required to close with the loss of all of its walk-in customer business, representing, for argument sake, 80% of its income. The FCA argued, in the context of the Hiscox 1-4 policy mentioned at (f) above, that the fact that the bookshop can continue to use the premises for telephone orders (representing 20% of its income) does not alter the

fact that there is an inability to use its premises for a discrete part of its business activity. The FCA argued that to hold that there is no cover available in such circumstances is *"unrealistic and uncommercial"*. This argument was accepted by the UK Supreme Court which said at paras. 138 to 140:-

> *"138. Whilst all cases will be fact dependent, the FCA's bookshop example would potentially be a case of inability to use the premises for the discrete business activity of selling books to walk-in customers. A department store which had to close all parts of the store except its pharmacy would potentially be a case of inability to use a discrete part of its business premises.*
>
> *139. The department store example also shows that* [the Divisional Court] *was not correct to state that the other fortuities covered in sub-clauses (a) to (e) necessarily involve complete inability of use if by that it is meant inability to use any part of the premises for any purpose. A flood or a drains problem in a department store may well only affect a discrete part of that store.*
>
> *140. An example which potentially covers both cases would be a golf course which is allowed to remain open but with its clubhouse closed so that there is an inability to use a discrete part of the golf club for a discrete but*

important part of its business, namely the provision of food and drink and the hosting of functions."

(i) Further reliance was placed by the plaintiffs on the manner in which the UK Supreme Court in the *FCA* case addressed a *"prevention of access"* clause in an Arch policy which provided cover in respect of a reduction in turnover resulting from *"Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life…"*. At first instance, the Divisional Court had held that anything short of complete closure would not constitute *"prevention of access"* to the premises. The Divisional Court had considered, in that context, the position of a restaurant which, in addition to its in-restaurant dining, offers a takeaway collection or delivery service. The relevant UK Regulations required the closure of premises or part of a premises in which food or drink were sold for consumption on those premises but did not require the premises to close to the extent that they were used for the purposes of providing a takeaway service. The Divisional Court had considered that, while it could be said that the restaurant owner and the employees were impeded or hindered in their use of the premises because they could not operate the restaurant for in-house dining, the regulations did not prevent access for the purposes of carrying on that part of the existing business which involved the provision of a takeaway service. In contrast, the Divisional Court had accepted that, if the restaurant did not previously offer a takeaway service but started one during lockdown, the position would be

different. In such circumstances, the Divisional Court accepted that there would be prevention of access for the purposes of the business as it had existed when the policy was issued. The UK Supreme Court rejected that approach. In para. 149, Lords Hamblen and Leggatt referred to the argument made by counsel for Arch, suggesting that there was a *"significant difference"* between the Arch clause and the public authority clause in the Hiscox policy. That suggestion was made in circumstances where the Arch policy focused on access to the premises rather than use of the premises. This argument was, however, rejected by Lords Hamblen & Leggatt who said at para. 150:-

> *"150. In the present context we do not… consider that this provides a material distinction between the two wordings. As* [counsel for Arch] *accepts, the prevention of access does not have to be physical so that if, for example, the policyholder was able to and did enter the premises to carry out essential maintenance, that would not mean that the clause does not apply if access was prevented by law for the purposes of carrying on the business. Once, however, it is conceded – as is inevitable – that continued access to the premises for some purposes is compatible with there being cover, the question becomes: for what purposes?* ***Furthermore, there is again no good reason to construe "the premises" as referring only to the entire premises rather than as encompassing part of the premises****.*

> *151. In our view, for essentially the same reasons as given in relation to Hiscox…, the Arch wording may, depending on the facts, cover prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities. We agree with Arch that prevention means stopping something from happening or making an intended act impossible and is different from mere hindrance. In both the situations contemplated, however, access to a discrete part of the premises or access to the premises for a discrete purpose will have been completely stopped from happening."*
>
> (emphasis added)

11. In response to the plaintiffs' case as to the meaning of *"closure"*, FBD notes that the position now taken by the plaintiffs is not consistent with earlier submissions where the re-opening of pubs serving food occurred on 29th June, 2020. In particular, FBD notes that in the chronology attached to the submissions delivered on behalf of the plaintiffs in the Sinnotts and Leopardstown Inn proceedings, it was expressly stated that on 29th June, 2020:-

> *"Pubs serving food are permitted to reopen, subject to various restrictions. Both the Leopardstown Inn and Sinnotts reopen."*

FBD also notes a similar observation made in the submissions delivered on behalf of Sean's Bar. FBD further argues that the term *"closure"* is, on any ordinary interpretation, different to *"part closure"* and entirely different in concept from

"restrictions" which is the word used in some other policies available on the Irish market. According to FBD, it is also different to *"inability to use"* which featured, for example, in the Hiscox 1-4 policy wordings in the *FCA* case. FBD submits that the composite peril which is covered under extension 1(d) of the policy arises only where there is an imposed closure of the premises and that this requires a complete cessation of the business of the insured at the premises. Strictly in the alternative, even if the court were to accept that *"closure"* is to be interpreted as encompassing closure of part of the premises only, the plaintiffs go too far in suggesting that *"imposed closure"* encompasses every restriction on or adjustment to trading conditions arising from the presence of COVID-19 in Ireland. FBD submits that such a contention on the part of the plaintiffs is *"fundamentally inconsistent with the indemnity"* given by FBD in the policy and involves a re-writing of extension 1(d). FBD also argues that, where an insured voluntarily closes a premises, or voluntarily keeps a premises closed, the premises cannot be considered to be subject to *"an imposed closure"* within the meaning of extension 1(d). In making its case, FBD made the following submissions:-

(a) In the first place, FBD submitted that the word *"premises"* as ordinarily understood means the physical premises rather than the business carried on in the premises. In each case, the relevant premises is identified in the policy schedule by reference to a physical premises;

(b) In relation to the word *"closure"*, it was submitted that a reasonable person would have understood that an imposed closure involves a complete closure of the premises. Thus, in the period subsequent to 29th June, 2020, when public houses which were in a position to serve a *"substantial meal"* were permitted to reopen, it was submitted that it was wholly implausible to suggest that such pubs were closed when

the premises were fully open and persons were in a position to attend indoors. It was submitted that any reasonable person looking at the terms of the FBD policy would not have understood such an arrangement to constitute an imposed closure of the premises;

(c) It was submitted that the meaning of the words *"closed"* and *"closure"* entail a cessation, a stopping, an end or a conclusion. This is supported by a range of dictionary definitions. In the case of a business, such dictionary definitions envisage that a cessation could be temporary (e.g. where the business is closed for the day or some other defined period of time) or permanent (e.g. where a factory closes down for good). It was urged that, none of the dictionary definitions treat *"closure"* as a continuation of business subject to restrictions or a continuation of part of a business;

(d) In the course of her very helpful oral argument, counsel for FBD suggested that the plaintiffs were attempting to give a meaning to the word *"closure"* which equated, in effect, to a change in trading conditions. Counsel also submitted that, once policyholders were entitled to open for the provision of service indoors (provided that alcohol was served alongside a *"substantial meal"*), the premises could not reasonably be considered to be the subject of an imposed closure. In this context, counsel highlighted that a large number of businesses have been affected in different ways since March, 2020 in the way in which they trade due to social distancing requirements, capacity requirements or other limitations on how they operate their business. Counsel submitted, for example, that no reasonable person

would regard supermarkets as having been the subject of an imposed closure even while there were limitations on the number of customers in their premises at any one time;

(e) The point was made on behalf of FBD that it is an important part of the relevant factual and commercial context (against which the policy should be construed) that an imposed closure of a public house is only likely to arise (in the context of a disease outbreak which does not occur on the premises itself) where the outbreak is sufficiently severe to induce the relevant local or Government authority to impose a complete closure of the premises. The force of this point is, however, diluted by the fact that Regulation 6 of the 2020 Regulations expressly envisages a public house remaining open even during the currency of a pandemic provided that the conditions imposed by that Regulation are complied with;

(f) It was further submitted on behalf of FBD that, to interpret the premises as including a part of the premises, would introduce a substantial element of uncertainty. If the extension is to be interpreted as extending to an imposed closure of part of the premises, that begs the question as to which part. Does it have to be a material part? Is it any part of the premises? For example, if there was a defect in some sanitary arrangement that led to a closure of a toilet, is that closure of part of the premises sufficient to constitute an imposed closure?

(g) FBD argued that there is a significant difference between a partial closure of the kind outlined in sub-para. (b) above and the concession made by FBD, for the purposes of this hearing, that, as summarised in

para. 9 above, a *de minimis* use of the premises to serve drinks on a takeaway basis would not deprive the insured of cover. Counsel submitted that there is a distinction between such a *de minimis* use for an activity that is not, on any reasonable understanding of the normal business of a public house, a part of that business and use of the premises to serve drinks to persons seated within the premises or outside the premises;

(h) According to FBD, limitations on the length of time a customer could be within the premises, limitations on how many hours a premises can be open and requirements to eat a substantial meal or to maintain social distancing are all properly characterised as restrictions on trading and would not be understood by the ordinary reasonable person as an imposed closure within the meaning of the FBD policy. Unlike some other policies available on the Irish market, the FBD policy does not provide cover in respect of restrictions on trading arising from an outbreak of disease *per se*. The FBD policy does not provide cover in respect of an outbreak of disease within the 25-mile radius unless that outbreak causes an imposed closure of the premises;

(i) FBD also highlighted that, in contrast, other policies available on the market do not require that there should be a complete closure of the premises. In the case of some policies, restrictions on the use of premises is sufficient to trigger cover. FBD cited in this context, the AIG Commercial Combined Policy which provides damage in respect of the occurrence of a notifiable disease which *"causes restrictions on the use of the Premises on the order or advice of the competent local*

authority". In some policies a partial closure will trigger cover. By way of example, FBD cited the Travelers Property Owners policy which provides cover for loss of rent in consequence of an infectious disease which results in *"closure of the whole **or part** of the Business Premises"* (emphasis added). Counsel also referred to the Allianz Business policy which provides business interruption cover on similar terms to that available under the AIG policy in respect of interference with the business as a consequence of the occurrence of a notifiable disease at the premises which causes *"restrictions on the use of the Premises on the order or advice of the competent authority"*. Counsel for FBD also cited the RSA combined policy which provides business interruption cover in respect of *"closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer… as a result of a notifiable human disease manifesting itself at the Premises"* and in respect of the *"closing of the whole **or part** of the Premises by order of the Public Authority… consequent upon defects in the drains and other sanitary arrangements at the Premises"* (emphasis added);

(j) With regard to the decision of the UK Supreme Court in the *FCA* case, counsel for FBD argued that the conclusion reached in that case that references to *"the premises"* could properly be interpreted as *"part of the premises"* should be treated with caution in circumstances where, firstly, the existence of other policies (which specifically refer to part of the premises) was not drawn to the attention of the UK Courts and, secondly, where there was no factual evidence presented in the course

of the proceedings in that case which would have assisted the court in understanding the relevant factual context in which the policies were put in place. In addition, counsel for FBD emphasised the way in which the UK Supreme Court drew a distinction between an inability to use a discrete part of the premises, on the one hand, and mere impairment or hindrance on use of the premises, on the other. Counsel also argued that, insofar as the UK Supreme Court used the term *"closed"* (as in the example of the golf clubhouse cited in the judgment), it appeared to use that term to mean the complete cessation of that part of the business that was closed. For completeness, it should be noted that, at para. 140 of the majority judgment in the *FCA* case Lords Hamblen and Leggatt, in the context of the Hiscox 1-4 *"inability to use"* policy wording, referred to the closure of a golf clubhouse (where the surrounding course remained open) as an example of *" an inability to use a discrete part of a golf club for a discrete but important part of its business, namely the provision of food and drink and the hosting of functions"*;

(k) FBD accepted that the quantification provisions contained in paras. (A) to (C) of the business interruption section of the policy explicitly envisage that a business might be the subject of a business interruption but might nevertheless be earning some gross profits during the indemnity period. However, FBD submitted that this is intended to cover a scenario where the premises is closed for a period that is less than the indemnity period. FBD further submitted that the relevant quantification provisions governing the business interruption section of

the policy must be seen against a backdrop of all of the perils to which they apply including interruption of the business as a consequence of physical damage to the premises or its contents i.e. the principal perils under ss. 1 and 2 of the policy. Thus, the quantification provisions must cater for a wide variety of different circumstances potentially covered ranging from a broken window, at one end of the scale, all the way to complete destruction of the premises by fire, at the other end. The level of interruption to the business is, therefore, variable and the fact that the policy explicitly caters for that variability is appropriate. FBD further emphasised, in this context, special condition 2 of the business interruption section of the policy which explicitly envisages that the business of the policyholder might be carried on, during the period of indemnity, from different premises.

12. In reply, counsel for the plaintiffs argued that it was misconceived for FBD to suggest that its interpretation of the word *"closure"* gave rise to greater certainty. Counsel submitted that such an approach was impermissible in the context of contractual interpretation. The test to be applied in interpreting the words used in a contract is not based on achieving the greatest level of certainty but on the way in which the words used would be understood by a reasonable person. In this context, counsel referred to the observations made by Lords Hamblen and Leggatt at para. 121 of the judgment in the *FCA* case where they rejected an argument by an insurer that its interpretation of the words *"restrictions imposed"* gave rise to greater certainty than the construction urged by the FCA. At para. 121, they said:-

> *"121. We agree with Hiscox that there would be greater certainty in the operation of the clause if "restrictions imposed" were required in*

> *every case to have the force of law. The line between what is permitted and what is legally prohibited is, in general, clear… Nevertheless, the test in interpreting the words used is how they would be understood by a reasonable person and we do not consider that a reasonable policyholder would understand the word "imposed", without more, as making cover conditional on the existence or immediate prospect of a valid legal basis for the restriction."*

13. Counsel for the plaintiffs also stressed that, if FBD were pitching for certainty in the context of the words used in extension 1, then FBD could have used language such as *"complete closure of the premises"* or *"closure of the entirety of the premises"*. Counsel reiterated that, having regard to the approach taken by the UK Supreme Court in the *FCA* case, the word *"closure"* embraces both a partial and a total closure. With regard to the point made by counsel for FBD by reference to the existence of other policies which refer to *"closing of the whole or part of the premises…"*, counsel for the plaintiff suggested that this argument worked both ways. No doubt, the policy could have said *"partially closed"* but equally it could have said *"completely closed"*.

14. In response to the argument made by FBD in relation to the quantification provisions of s. 3 of the policy, counsel acknowledged that, if one were to consider special condition 2 on p. 17 of the policy on its own, there might be some force in the submission made by FBD. However, counsel argued that, when the policy is read as a whole (and, in particular, when s. 3 of the policy is read as a whole), the reasonable reader of the policy would not construe the policy in the manner suggested by FBD. Counsel sought to characterise the construction urged by FBD as a *"strained interpretation"*. Counsel drew a parallel between the argument made by FBD here

and the argument made by Hiscox in the *FCA* case in relation to the meaning of the word *"interruption"*. Hiscox, in that case, had argued that interruption required a complete cessation of business. This contention was rejected by the UK Supreme Court which referred, in this context, to the quantification provisions of the Hiscox 1-4 policies which were in somewhat similar terms to the quantification provisions of the FBD policy. At para. 158, they said:-

> *"158. We reject these arguments. The ordinary meaning of "interruption" is quite capable of encompassing interference or disruption which does not bring about a complete cessation of business or activities, and which may even be slight (although it will only be relevant if it has a material effect on the financial performance of the business). Furthermore, the possibility that interruption* ***may be partial is inherent in the policy provisions which deal with the calculation of loss*** *and which envisage that the business may continue operating during a period of interruption but with reduced income or increased costs of working. In addition… the policies contain a number of heads of cover for perils causing "interruption to your activities" which are plainly intended to apply in circumstances where there is only limited interruption and not a complete cessation of activities. Examples given included clauses covering interruption caused by loss of attraction by reason of damage in the vicinity of the premises and interruption caused by damage at the premises of a particular customer or supplier."* (emphasis added).

15. With reference to the last point made by the UK Supreme Court, in that extract, it should be noted that the extensions to the business interruption section of

the FBD policy similarly include clauses covering interruption caused by prevention of access or use of the premises following damage to property in its vicinity (extension 3) and also interruption caused by damage at the premises of a supplier (extension 5). While neither of those extensions require a complete closure of the premises, there is nothing in the opening words of the extensions (which expressly apply the quantification provisions set out in paras. (A) to (C) to each of extensions 1 to 5) which suggests that the quantification provisions are applicable to only some but not all of the extensions listed in extensions 1 to 5 thereafter.

16. Counsel for the plaintiffs also referred to the Features & Benefits document which, insofar as it addresses the business interruption cover, makes no distinction between the causes of business interruption. The relevant section of the Features & Benefits document is in the following terms:-

> *"**Consequential Loss (Business Interruption)***
>
> *This section provides protection against interruption to your business following a fire or other insured property loss occurring to your buildings, fixtures and fittings and stock.*
>
> *A number of options are available under Consequential Loss including loss of gross profit… and increased cost of working…*
>
> *Standard extensions*
>
> - *Human notifiable disease, murder or suicide.*
> - *Explosion or collapse of steam pipes and or vessels.*
> - *Prevention of access.*

- *Damage to public utilities.*
- *Unspecified supplier."*

17. Counsel submitted that it would be completely arbitrary to isolate imposed closure as uniquely requiring not just interruption but complete cessation whereas everything else clearly contemplates an interruption to activities. Counsel submitted that this is how it would be reasonably understood by the reasonable reader.

18. Counsel for the plaintiffs also responded to the argument made on behalf of FBD that extension 1(d) is intended to address outbreaks of disease which are sufficiently severe to require a complete closure of premises. Counsel submitted that this argument on behalf of FBD ignores that the *"stem words"* at the commencement of extension 1 of the policy apply *"imposed closure"* to each of sub-paras. (a) to (d). Thus, the words *"imposed closure"* apply in the case of each of murder/suicide, food or drink poisoning, defective sanitary arrangements, vermin or pests and disease. As previously recorded in para. 10(g) above, it is the plaintiffs' case that murder/suicide and some of the other extensions would not necessarily give rise to a complete closure of the premises.

Discussion and decision in relation to the meaning of the word "closure"

19. In considering the meaning of the word *"closure"*, it is crucial to keep in mind that, as Lord Hoffmann explained in the *Investor Compensation* case, a distinction is to be made between the usual meaning of individual words that happen to be used in a contractual document and the meaning which those words would convey to a reasonable person when the words are read in the context of the contract as a whole construed against the relevant factual and legal background. Thus, it would be wrong to commence a consideration of the meaning of the word *"closure"* by reaching for a dictionary or immediately seeking to apply the common understanding of the meaning

of that word as used in ordinary speech. Like any contractual provision, the words used in extension 1(d) must be read in the context of the policy as a whole (in particular, in the context of s. 3 of the policy dealing with business interruption) and in the wider factual and legal context. I have come to the conclusion that, when read in that way, a reasonable person would understand that the word *"closure"* is not confined to a total shutdown of the insured's premises but also extends to a closure of part of the premises. I have come to that conclusion for the following reasons:-

(a) The word *"closure"* is used not solely in the context of extension 1(d) but also in the context of each of extensions 1(a) to 1(c). As counsel for the plaintiffs have submitted, one can readily see that those extensions are capable of applying not just where there is a complete closure of the premises but also where there has been a closure of part of the premises. For example, the presence of vermin in a kitchen might well lead to the closure of the kitchen and to food service within the premises but that would not necessarily mean that the entire of the premises would have to close. Similarly, a suicide in an upstairs eating area might lead to the closure of that area for a period of time but leave the bar downstairs unaffected;

(b) It is important, in this context, to recall the wide range of types of public houses which have been insured by FBD under this policy. They are not all single room bars. As the facts of these four cases demonstrate, there are a wide variety of shapes and sizes of pubs insured, many of them with several distinct areas as the schedule to the Leopardstown Inn policy (quoted in para. 10(a) above) illustrates. In the case of the Leopardstown Inn, one could well imagine, for

example, that a problem of the kind specified in extension 1(c) might arise in respect of the function room which would require its closure while the public bar and restaurant sections of the premises would remain open for business. In such a case, there is, as the UK Supreme Court made clear in para. 151 of its judgment in the *FCA* case, no reason in principle why the word *"premises"* should be construed as referring only to the entire premises. Echoing the approach taken by Lords Hamblen and Leggatt suggested in para. 136 of their judgment in that case, it makes commercial sense in the context of a bar with the characteristics of the Leopardstown Inn to interpret the word *"premises"* as including a discrete part of the premises. If the word *"premises"* is interpreted in that way, it follows that an *"imposed closure of the premises"* extends to an imposed closure of a part of the premises;

(c) Importantly, the provisions of paras. (A), (B) and (C) dealing with the quantification of the insured's losses are expressly applied by the opening words of the extensions to each of the individual extensions 1(a) to 1(d). As summarised in para. 10(d) above, the language of paras. (A) and (B) envisages that the insured premises can be open to some extent during the relevant indemnity period. This strongly suggests that the policy envisages that a complete closure of the insured premises is not a precondition to cover. As noted in para. 14 above, this was one of the factors that induced the UK Supreme Court in the *FCA* case to conclude, in para. 158 of its judgment, that *"interruption"* as used in the Hiscox policy does not require a

complete cessation of the insured's business. I should make clear that I have not lost sight, in this context, of the argument made by FBD (noted in para. 11(k) above) that the calculation provisions contained in paras. (A) and (B) are intended to address a scenario where the premises is closed for less than the indemnity period. However, there is nothing in the language of paras. (A) or (B) which suggests that the calculation provisions contained in those paragraphs are intended to be confined to such a scenario. Nor have I overlooked FBD's submission that the calculation provisions must also be seen against the backdrop of all of the perils that apply (including business interruption following physical damage to the premises or damage to the contents insured under ss. 1 and 2 of the policy respectively). FBD makes the point (and this chimes with the argument of the plaintiffs summarised in para. 10(c) above) that a business interruption claim can be made under s. 3 of the policy in respect of interruption to the business caused by physical damage to the premises or to its contents where that damage might not be sufficient to bring about a complete closure of the premises. The frailty in that submission is that paras. (A) to (C) dealing with calculation of loss are expressly applied by s. 3 of the policy not only to claims of business interruption of that kind but also to claims for cover under extensions 1(a) to (d). As noted above, the opening words of the extensions make this very clear. In the circumstances, I do not believe that the reference to the calculation provisions can be explained away in the manner suggested by FBD;

(d) It is true that special condition (2) to s. 3 of the policy (which appears on p. 17 of the policy) contemplates that, during the indemnity period, the business of the policyholder might be carried on from a different premises. Special condition (2) provides as follows:-

> *"If during the indemnity period goods shall be sold or services rendered elsewhere than at the insured premises for the benefit of the business, either by the Insured or others on his behalf the monies paid or payable in respect of such sales or services shall be brought into account in arriving at the gross profit earned during the indemnity period."*

I fully accept that special condition (2) envisages trading during the indemnity period from an alternative premises and that the calculation machinery contained in paras. (A) to (C) of s. 3 of the policy is clearly capable of being operated in the specific context of such trading. However, I can see nothing in the terms of the policy to suggest that trading from another premises is the only circumstance in which the policy envisages that trading might continue notwithstanding the occurrence of some form of business interruption within the meaning of s. 3 of the policy. Subject to the additional consideration outlined at (f) below, I agree with the submission made by counsel for the plaintiff (recorded in para. 14 above) that this argument on the part of FBD might carry some force if special condition 2 on p. 17 of the policy were considered on its own. However, when it is considered in the context of s. 3 of the policy as a whole and when it is read against the relevant factual backdrop described in sub-para. (a) above and the legal

background (in particular the licensing and planning hurdles that would have to be overcome in the event of any attempt to transfer the business to a new premises), I do not believe that the argument made by FBD based on special condition (2) supports the interpretation of the policy urged by FBD.

(e) Further support for this conclusion can be found in the Features & Benefits document. As noted in the principal judgment, the Features & Benefits document is significant in the regulatory context against which the policy must be construed. The relevant section of the Features & Benefits document dealing with business interruption is quoted in para. 16 above. It is clear from the language used in that section of the document that no distinction is made between the way in which a business interruption claim would be addressed in the case of physical damage to the insured premises or the contents on the one hand and the extensions (including extension 1(d)) on the other.

(f) One further point needs to be kept in mind with regard to special condition (2). While it envisages that the trade might be carried on from alternative premises, there is nothing in the language of the special condition which suggests that this is treated as a likely scenario in the context of a business interruption claim. It is important to recall that the FBD policy was specifically designed for the public house trade. It is by no means a straightforward matter for a public house business to be transferred to another premises. As noted in sub-para. (d) above, any such transfer could only be accomplished if all necessary licensing and planning law requirements were satisfied. It is

unsurprising, in those circumstances, that special condition (2) is framed in the way that it is. The clause appears to be designed simply to address the possibility of a transfer of the business to a new premises rather than to presuppose that such a transfer is likely to occur. In such circumstances, it seems to me that special condition (2) is of no more than marginal relevance.

(g) As noted in para. 11(e) above, FBD also contended that it is an important part of the relevant factual and commercial context that an imposed closure of a public house is only likely to arise (in the context of a disease outbreak which does not occur on the premises itself) where the outbreak is sufficiently severe to induce the relevant authorities to impose a complete closure of the premises. That argument might well carry weight if the only form of imposed closure which gave rise to a business interruption claim was based on an outbreak of disease. As counsel for the plaintiffs have highlighted, business interruption cover is available not only in respect of an imposed closure arising out of an outbreak of disease (as covered by extension 1(d) of the policy) but also in respect of imposed closures for any of the reasons set out in extensions 1(a) to 1(c). As previously explained, it is clear that there can be an imposed closure of part of the premises for events which fall within the ambit of extension 1(a) and 1(c). Similarly, in the case of extension 1(b), if there was an outbreak of food poisoning arising out of a food service provided at a bar, it is conceivable that only part of the premises would be closed (namely, the kitchen and food preparation area) leaving the remainder of the

premises open. In these circumstances, I do not believe that this aspect of FBD's argument can be sustained. Moreover, as discussed further below, it appears to me that, even in the case of very serious outbreaks of COVID-19, the 2020 Regulations envisage that a public house business can continue (albeit with modifications and restrictions on the extent to which it can operate) even during the subsistence of a pandemic.

(h) Finally, I have not overlooked the argument made by FBD (summarised in para. 11(i) above) that, in contrast to the terms of the FBD policy, several other policies available on the market expressly provide cover in respect not only of a closure of the whole premises but a part of the premises. This does not, however, appear to me to be decisive. While it is a very straightforward exercise, in the case of such policies, to conclude that closure of part of the premises is covered, the fact remains that, when the FBD policy is construed as a whole and construed as against the relevant factual background, it too, in my view, provides cover in respect of a closure of part of the premises.

20. For the reasons explained in para. 19 above, I have come to the conclusion that the word *"closure"* in extension 1(d) should be interpreted as extending to both a closure of the entire premises and also a closure of part of the premises. I do not believe that this conclusion gives rise to the difficulties suggested by FBD as summarised in para. 11(f) above. In this regard, it will be recalled that FBD raised questions as to whether, in the case of a closure of part of the premises, that could extend to any part of the premises or only a material part. By way of example, FBD questioned whether the closure of a toilet by reason of a defect in the sanitary

arrangements would be sufficient. I do not believe that there is any substance to this concern. As noted in para. 158 of the majority judgment in the *FCA* case, the policy will only respond where the insured can show that the business has been interrupted to a material extent. That is the essence of business interruption insurance. Absent a measurable interference with the business carried on in the premises, there will be no cover. The closure of a toilet is, therefore, unlikely to give rise to a claim unless that closure is shown to have a material impact on the business in some way.

21. Nonetheless, having regard to the use of the word *"closure"*, there must, in my view, be a shutting down of the premises or of a part of the premises before cover under extension 1(d) is triggered. That is the natural meaning of the word *"closure"* and there is nothing in the language of the policy or any feature of the relevant factual context that would suggest that a different meaning should be given to the word. Unlike some other policy wordings available on the market, extensions 1(a) to (d) do not purport to provide cover where access to the premises is *"hindered"* or *"restricted"*. Plainly, those words do not require a shutting down of the premises or of a part of the premises. In my view, *"closure"* is different and could not plausibly be considered to be a synonym of either *"hindered"* or *"restricted"*. Thus, extension 1(d) is not triggered by every restriction on trading that may be imposed on publicans. For example, the FBD policy would not respond in the event that the business of the insured is restricted by new licensing laws which prohibit the sale of alcohol to persons under the age of 25. While such laws (if ever enacted) could have an appreciable impact on the business of a publican, it is not a risk which is covered under the FBD policy. For extension 1(d) of the FBD policy to apply, there must be an imposed closure of the premises or a part of the premises.

22. In this context, I do not agree with the argument made on behalf of the plaintiffs that the references to the *"premises"* in the policy should be construed as synonyms for the business of the insured. While the word *"premises"* is not defined in the policy, the premises is plainly identified in the policy schedule in each case. The policy and the schedule are designed to be read together. Accordingly, when the policy refers to the *"premises"*, it is the premises described in the schedule which is relevant. Crucially, extension 1(d) is only triggered by a closure of the premises or, for the reasons discussed above, a part of the premises. It would have been a straightforward matter for the policy to use the word *"business"* in defining the perils insured under each of extensions 1(a) to 1(d) but the policy does not do that. Instead, in the case of these extensions, the policy draws a distinction between the impact on the business, on the one hand, and the perils covered under the policy, on the other hand, each of which is defined by reference to the premises. The premises is, of course, the place where the business is carried on and s. 3 of the FBD policy provides cover for a range of defined risks which may affect the business carried on at the premises. Crucially, cover is not available for a loss of business *per se*. Cover is available in respect of losses to the business only where the business suffers a material interruption which is caused by a peril specified in the policy. Most of those perils are defined by reference to events which occur at the premises such as physical damage to the premises itself or the contents. Such physical damage can range from a fire which burns the premises to the ground to much less destructive events. If such an event has a material impact on the business, there is cover under s. 3. Similarly, the risks which are covered under extensions 1(a) to 1(d) are those which may cause an interruption to the business as a consequence, for the most part, of events that affect the premises such as, for example, an imposed closure following murder or suicide on the premises

or an outbreak of an infectious disease on the premises. It is true that extension 1(d) also applies where the business is affected by an imposed closure following an outbreak of infectious disease off the premises but, even in that case, the relevant peril is defined by reference to the premises. The peril is confined to outbreaks which occur within 25 miles of the premises. By delineating the peril in that way, the policy plainly had in mind the physical premises from which the relevant 25-mile radius can be measured. In contrast, extensions 4 and 5 do not depend on anything happening by reference to the premises. In those cases, cover is triggered where the business is interrupted by events which are not related in any way to the premises. But they are the only circumstances where cover is provided under s. 3 of the FBD policy in respect of a risk which is not defined by reference to the premises or its contents.

23. Having regard to the considerations outlined in paras. 19-22 above, it is now necessary to consider a number of different potential factual scenarios. In the first place, it is necessary to consider the position where a public house is only permitted to carry on a takeaway service. In my view, extension 1(d) of the FBD policy clearly responds where, under the terms of a Government imposed measure, the only form of business permitted is such a takeaway service. In such cases, there is undoubtedly a shutting down or closure of the premises or, at minimum, a part of the premises. In my view, a reasonable person would regard a public house premises restricted to carrying on a takeaway service as closed. Even if one could enter a door of the premises for the purposes of placing a takeaway order, the premises would, in my opinion, be regarded by a reasonable person as closed. At minimum, it would be regarded as the closure of a substantial part of the premises.

24. Similarly, where the only additional form of service permitted under the terms of a Government imposed measure is to serve patrons seated outside the premises, it

seems to me that, at minimum, a substantial part of the premises (i.e. the indoor premises) would also be regarded by a reasonable person as closed.

25. The position becomes less straightforward where indoor service is permitted but only on a restricted basis. Depending on the facts, it may be difficult to draw the line between a restriction on the insured's business (which is not *per se* covered) and a requirement to close a part of the premises (which is covered where it has a material impact on the ability of the plaintiff to carry on business). The plaintiffs argued that the effect of Regulation 6 of the 2020 Regulations is to close their premises for the purposes of a bar trade as opposed to a restaurant trade. If the plaintiffs are correct in suggesting that, in order to comply with Regulation 6, it is necessary to close a part of their premises (such as the public bar area), I can see that, depending on the evidence, this could give rise to cover at least in those cases where there is an identifiable area of the premises which has been shut down. As noted above, counsel for FBD strongly argued against this proposition. Counsel cited the example of a supermarket. She submitted that no one would regard a supermarket as closed even during periods when COVID-19 precautions required supermarkets to limit the number of customers inside the store at any one time. On reflection, I do not believe that this is a good analogy. The fact is that during the current Level 5 restrictions, supermarkets have not been able to sell certain categories of goods (in particular, non-essential items) and those parts of their premises devoted to the sale of such items have been railed off or otherwise made inaccessible to customers. From my own experience as a shopper, I can see, for example, that in my local Dunnes Stores branch, the clothing section of the shop has been railed off. Similarly, in the nearby Tesco Extra store, the area of the store earmarked for the sale of the in-house F&F Clothing range has likewise been railed off. In both cases, I believe that any reasonable person would regard those areas

of the stores as *"closed"*. Likewise, if a discrete area of a pub is closed to patrons as a consequence of the impact of the Regulations or any other conditions imposed by the Government, it seems to me that, subject to the evidence that will be led at the next phase of these proceedings, such a part of the premises would be regarded as closed for the purposes of extension 1(d).

26. The position is less clear cut where a closure of a discrete part of the premises cannot be identified. A question may nonetheless arise as to whether, if the premises cannot be used for a discrete part of the insured's business, that should be treated as a part closure of the premises. In the *FCA* case, the UK Supreme Court, in para. 137 of the majority judgment (quoted in para. 10 (f) above), took the view, in the context of the Hiscox *"inability to use the premises"* clause that cover is available both where there is an inability to use a discrete part of the premises for the business activities of the insured and also where there is an inability to use the premises for a discrete part of the insured's business activity.

27. The plaintiffs urge that the effect of extension 1(d) in the FBD policy is broadly the same as the Hiscox clause considered by the UK Supreme Court. I have reservations about this submission. The risk insured under the relevant Hiscox clause was expressly linked to the ability of the insured to use the premises. Inability to use the premises seems to me to give rise to different considerations to a closure of the premises. In my view, in the context of an *"inability to use"* clause, once one accepts that inability to use can be either complete or partial, one can more readily conclude that there is an inability to use the premises where only one of several aspects of a business is capable of being carried on. Thus, in the case of a gastropub business (which involves the service of alcohol either with or without food in the same room), there can be an inability to use the premises for the service of alcohol unaccompanied

by food even where the premises can still be used either for serving food alone or for serving food with alcohol. It seems to me to be conceptually more difficult to make that case, in the context of extension 1(d) of the FBD policy, where the risk is expressed solely in terms of a closure of the premises (which, for the reasons previously explained, extends to a closure of a part of the premises). In the case of extension 1 (d), the focus is not on *"use"* but on closure. If there is no closure of any part of the premises, it becomes difficult to say that the relevant risk insured under extension 1(d) has eventuated. As of now, I believe that I would not be justified in holding that an inability to carry on a part of the business which is not linked to the closure of at least a part of the premises could be said to be covered under extension 1 (d). Nonetheless, rather than reaching a final determination on that issue now in the absence of any evidence as to the position on the ground, I believe that it would be prudent to first hear evidence in relation to how the various forms of restrictions that have been in place since March 2020 have affected the business of each of the plaintiffs. That evidence will have to be led in the quantum hearing which is due to take place later this year. It seems to me that it would be preferable to defer making a final determination as to the ambit of cover under extension 1(d) until it is possible to make definitive findings of fact as to how the business of each of the plaintiffs has been affected as a consequence of the restrictions imposed by the Government. At that point, the court will be in a much more informed position to make findings as to where the dividing line should be drawn between mere restrictions on the way in which the business of the plaintiffs is conducted, on one side of the line, and a closure (in whole or in part) of the insured premises, on the other side of the line.

28. In taking this approach, I am mindful that the plaintiffs have identified that the UK Supreme Court, in the *FCA* case, applied the same reasoning to a *"prevention of*

access" clause in the Arch policy as the court did to the *"inability to use"* clause in the Hiscox policies. Arguably, a prevention of access clause is closer in concept to the closure requirement contained in extension 1(d) of the FBD policy. I am also mindful that, as FBD has emphasised, the interpretation placed on the Hiscox and Arch clauses considered by the UK Supreme Court was arrived at without the benefit of any detailed underlying evidence as to the business of the relevant insured parties in that case. Since there will have to be a further hearing in these proceedings in relation to quantum where such evidence will be available, it seems to me to be prudent to defer any final decision on where the dividing line should be drawn until after the detailed evidence has been given.

29. I also propose to leave over to the quantum hearing, any consideration of the case made by FBD that, where an insured voluntarily closes a premises or voluntarily keeps a premises closed, the premises cannot be considered to be subject to an *"imposed closure".* Save to the extent that Sean's Bar closed one day in advance of the Government announcement of 15th March, 2020 and did not reopen for the brief period when wet pubs outside Dublin were permitted to re-open in September 2020, I am not sure that such an issue could be said to arise on the facts in any of the four cases here. I note from very recent correspondence which I have seen in relation to discovery in the Sean's Bar proceedings, that the plaintiff there makes no claim in respect of the brief September 2020 period. In the case of Sean's Bar, FBD has also suggested in its written submissions that, after *"dry pubs*" were permitted to re-open in June 2020, Sean's Bar could have taken steps to comply with Regulation 6 of the 2020 Regulations by obtaining food from a nearby premises thus enabling it (so it is argued) to function as a dry pub. This seems to me to raise a somewhat different issue as to whether the owner of a wet pub had an obligation to take active steps to seek to

bring the operation of the pub within Regulation 6 so as to allow it to reopen. That is not an issue that could properly be considered without additional evidence. While the issue was addressed to a limited extent in the October 2020 hearing, it was not explored in any sufficient level of detail. At this point, I express no view on this issue or on whether it is open to FBD to make this case.

The issue that arises in relation to the territorial extent of the counterfactual

30. As explained in paras. 214 of the principal judgment, in order to assess whether losses have been sustained as a consequence of an insured peril, it is necessary to construct a hypothesis as to what would have been the position of each of the businesses of the plaintiffs in the absence of the occurrence of the peril which was insured under the FBD policy. Furthermore, as recorded in paras. 215 of the principal judgment, it was accepted by all parties to these proceedings that, in identifying the appropriate counterfactual, it is necessary to strip out the insured peril. This is because the object of the exercise is to identify what would have been the position of the business of the insured in the event that the insured peril had never occurred. For this purpose, it should be recalled that, in para. 136 of the principal judgment, I found that the relevant insured peril was a composite one which involved (a) an imposed closure (b) by order of a local or government authority (c) following outbreaks of contagious or infectious diseases either on the premises or within a 25-mile radius. Having regard to the nature of that insured peril, I posed a number of questions at para. 220 of the principal judgment as to how one constructs a counterfactual world in which there is no closure and no outbreaks within a 25-mile radius when the world beyond that 25-mile boundary is still affected by closures and outbreaks of COVID-19. I posed the question as to whether the impacts of the existence of the outbreaks beyond the 25-mile boundary should be factored into or excluded from the counterfactual. If the

counterfactual solely involved a stripping out of the insured peril, the outbreaks beyond the 25-mile radius would continue to exist in the imagined counterfactual world. If that were so, it could have significant consequences for the insured since it would then be necessary to speculate as to the impact those outbreaks would have on the insured's business. Extension 1 (d) did not provide cover to the insured in respect of the impact of outbreaks beyond the 25-mile radius. This meant that, if such outbreaks were not stripped out of the counterfactual, there would be significant scope to suggest, for example, that societal reaction to such outbreaks would continue to affect the insured's business even if the outbreaks within the 25-mile radius were stripped out with the result that recovery under the policy might be significantly reduced. This was not an issue that had received much attention in the evidence or the submissions in the course of the October 2020 hearing. However, the judgment of Lords Hamblen and Leggatt in the *FCA* case was instructive in this context. It made clear to me that the approach taken in *Miss Jay Jay* is relevant. The effect of the *Miss Jay Jay* line of authority is that an insured can recover under a policy in respect of a loss even where one of the proximate causes of the loss is not insured under the policy provided another interdependent proximate cause of the loss is insured and there is no exclusion in respect of the uninsured cause. At paras. 228 to 230 of their judgment in the *FCA* case, Lords Hamblen and Leggatt made clear that the existence of such a concurrent proximate cause has to be factored into the construction of the correct counterfactual. Thus, to the extent that the effects of COVID-19 outside the relevant 25-mile radius were a concurrent cause of the plaintiffs' losses along with the closure following the outbreaks within that radius, that concurrent factor, in the absence of a relevant exclusion in the FBD policy, must also be stripped from the counterfactual.

31. On the same basis, I concluded, in para. 222 of the principal judgment that, so long as the plaintiffs can establish that the closure following the outbreaks within the 25-mile radius was a proximate cause of their respective losses, their recovery under the policy will not be reduced just because the change in societal behaviour (whether within or outside that radius) as a result of the pandemic was also a proximate cause. In such event, the attitude of the general public will be stripped out of the counterfactual along with the specific elements of the composite peril. While the Lemon & Duke plaintiff is in a different position to the other plaintiffs, I do not believe that this difference is immediately relevant for present purposes. The issue which arises for present purposes relates to whether the counterfactual world should be limited to the impacts of COVID-19 within the territory of the State and that issue arises in all four proceedings. In para. 224 of the principal judgment, I posed the question as to whether the counterfactual is to be based on stripping out the presence of COVID-19 in the State or whether the existence of the disease anywhere in the world is to be stripped out. I noted that the counterfactual contemplated by the order of the Divisional Court in the *FCA* case made in October, 2020 is expressly confined to the existence of COVID-19 in the United Kingdom. In circumstances where this was not an issue that was addressed in any detail by the parties in the course of the hearing in October, 2020, I indicated in the principal judgment that further argument was necessary as to whether the elements to be stripped from the counterfactual should be geographically confined to the situation in the State.

32. At the subsequent hearing on 26th February, 2021, counsel for the plaintiffs advanced two principal reasons for their contention that the correct counterfactual is one where COVID-19 is not present either inside of the State or outside of the State:-

(a) First, the plaintiffs contended that COVID-19 outside of the State was a concurrent cause of the imposed closure of the plaintiffs' premises following outbreaks of COVID-19 within the relevant 25-mile radius. Such concurrent causes have not been excluded under the FBD policy and, accordingly, the plaintiffs argued that, in line with para. 199 of the principal judgment and the *Miss Jay Jay* principle, the existence of COVID-19 outside the State ought to be removed from the counterfactual for the purpose of quantifying the plaintiffs' respective losses;

(b) Secondly, it was submitted that a counterfactual under which the plaintiffs' indemnity is to be calculated in a world where COVID-19 is prevalent elsewhere but not in the State would require a quantification exercise of such impractical complexity and artificiality that it cannot form part of a reasonable interpretation of the FBD policy. The plaintiffs submit that the parties to the policy could not reasonably have been supposed to have intended a quantification exercise of such complexity when they entered into the policy.

33. The Sinnotts and Leopardstown Inn plaintiffs also drew attention to the way in which FBD chose to plead its case in their proceedings expressly by reference to the global nature of the COVID-19 pandemic. Using the statement of claim delivered on behalf of Sinnotts by way of example, it was alleged in para. 14 that Sinnotts is entitled to an indemnity from FBD pursuant to the provisions of the policy. In response to that plea, FBD alleged, in para. 9.4 of its defence and counterclaim:-

"Without prejudice to the generality of the foregoing, the closure of the plaintiff's premises was imposed as part of a suite of measures at national level ***in response to the COVID-19 global pandemic****"* (emphasis added)

34. In response to that plea, Sinnotts raised particulars of what was meant by the reference to the *"COVID-19 global pandemic"* and the response of FBD was in the following terms:-

"...The Defendant wishes to make clear that the phrase relates to the global outbreak of COVID-19, as well as the outbreak in the State generally, and not necessarily on the Plaintiff's premises or within 25 miles of same."

35. In support of the case summarised in para. 32 (a) above, the plaintiffs stressed that the FBD policy does not exclude loss from a national or global event. The plaintiffs submit that it is accordingly not possible to infer any territorial limitation on the indemnity. The plaintiffs highlight, in this context, the way in which the court, in the principal judgment, recognised that the occurrence of an outbreak of contagious or infectious disease outside the 25-mile radius does not deprive the insured of cover. The plaintiffs submitted that, insofar as the policy does not exclude loss where the outbreak occurs both inside and outside the 25-mile radius, there similarly can be no inferred territorial limitation on the excluded geographical area which must necessarily consist of all of those parts of the world impacted by the global COVID-19 pandemic and not contained within the 25-mile radius.

36. In further support of this argument, counsel for the Lemon & Duke plaintiff drew attention to the fact that, for insured public houses in border counties, a radius of 25 miles encompasses territory in Northern Ireland which, as a matter of law, is part of another jurisdiction, namely the United Kingdom. On that basis, counsel submitted that the insured peril itself encompasses an extraterritorial effect. In circumstances

where FBD designed this policy for public houses throughout Ireland (including those situated in border counties), counsel suggested that this was a strong pointer to a counterfactual world which extends beyond the borders of the State.

37. It was submitted on behalf of the plaintiffs that the spread and prevalence of COVID-19 abroad demonstrably formed part of the Government's considerations in its approach towards the disease in Ireland and was an operative factor in the decision to impose the closure of public houses in the State. The plaintiffs cited, in this context, the preamble to the 2020 Act which refers to the spread of the disease known as COVID-19 but makes no suggestion that this is confined to cases of the disease within the State. The plaintiffs also cite the minutes of NPHET meetings held in the weeks prior to the imposed closure of public houses including the meetings on 10th and 11th March, 2020 and 13th March, 2020 which make reference to the prevalence of the virus in the United Kingdom, Italy and other countries. There is also reference in the minutes to the engagement between NPHET and the ECDC.

38. I was also referred to a draft of the proposed order to be made by the UK Supreme Court which, in contradistinction to the order made by the Divisional Court, does not suggest that the counterfactual world is limited to the territory of the United Kingdom. However, it was acknowledged on all sides that this document is no more than a draft and, for that reason, I do not believe that it would be safe to proceed on the assumption that the order to be made by the UK Supreme Court will necessarily be in the same terms as the draft referred to in the course of the submissions in February.

39. In support of the case summarised in para. 32 (b) above, the plaintiffs referred to *Hickmott's "Interruption Insurance: Proximate Loss Issues"*, 1982, which states, at p. 29, that in relation to the calculation of losses under a business interruption policy

"there should be an agreed method which can be readily applied without difficulty and without raising a great number of points for dispute". The plaintiffs made the case that the relevant counterfactual is inextricably connected with the quantification of the indemnity and, for that reason, the counterfactual ought to be simple and uncontroversial. It was stressed that the exercise of trying to construct a counterfactual in which COVID-19 is not present in the State but is prevalent elsewhere (including in Northern Ireland) would entail inordinate complexity and a high level of artificiality. It would be necessary to hypothesise on a wide range of matters including the means by which the State had kept the disease outside of its jurisdiction, the measures that would be in place to prevent the arrival and spread of the disease in the State, the legal situation that would pertain to people arriving in the State and the measures that would be taken in respect of the border with Northern Ireland.

40. Having built a counterfactual on these hypothetical foundations, it would then be necessary to somehow model the economic consequences that would flow from that scenario. It was suggested that this would include examining the effect of the pandemic on Ireland's ability to import; the impact of the pandemic on supply chains and prices; any change in Irish consumer spending patterns due to the wider global economic uncertainty and the extent to which Ireland might be able to benefit from an increase in tourism related revenue as the only western country without COVID-19. It would also be necessary to try to evaluate or estimate the extent to which economic activity (and the hospitality sector in particular) would have been stifled by a State policy aimed at preventing COVID-19 outbreaks.

41. Having regard to these complexities, it was urged that a reasonable person, with all the background knowledge reasonably available to the parties at the time the FBD policy was put in place, would not have understood that an elaborate

counterfactual of this kind would be required in order to quantify a claim under the policy. It was also argued that the complexity and artificiality of an *"Ireland-only"* COVID-19 counterfactual is inconsistent with the indemnity quantification mechanism provided for under the FBD policy. That quantification mechanism involves, at its core, a side-by-side comparison of the gross profit of the insured during the indemnity period and the gross profit earned during the corresponding period in the preceding year. While that comparison is to be adjusted to take account of any trends or other circumstances affecting the business, it was submitted that a reasonable person reading the quantification mechanism would not have understood it to mean that, instead of using a year-on-year profit comparison as a starting point, a claimant is required to engage in a complicated and speculative exercise to construct a complex counterfactual which would undoubtedly require the retention of accounting and economic experts to assist in that exercise. Again, in this context, the plaintiffs refer to the regulatory obligations imposed on FBD as an insurer under the 2018 Regulations under which the insurer is obliged, *inter alia*, to provide the customer with objective information concerning an insurance product. The plaintiffs highlight that it was never suggested to them that a complex quantification exercise of the kind contemplated by an *"Ireland-only"* COVID-19 counterfactual would be required in the event of a claim being made in respect of an outbreak of disease.

42. In response, FBD made the case that the effects of COVID-19 outside the State should be stripped out of the counterfactual on two principal grounds:-

(a) In the first place, FBD submitted that, on a proper interpretation of the policy, only the effects within the jurisdiction are to be considered; and

(b) Secondly, FBD maintained that cases of COVID-19 outside the jurisdiction cannot be said to constitute a concurrent cause of the

imposed closure and, accordingly, FBD argues that the *Miss Jay Jay* principle does not arise.

43. Insofar as FBD's case on interpretation is concerned, FBD stressed that the geographic limitation of 25 miles is a component part of the composite insured peril such that any cases of COVID-19 or outbreaks outside of that radius are not part of the peril. On that basis, FBD contended that cases of COVID-19 outside the jurisdiction are likewise not part of the insured peril.

44. FBD submitted that support for this interpretation of the policy is to be found in the operative clause which makes clear that FBD agreed to provide insurance cover in respect of events *"occurring in the Territorial Limits…"*. While FBD accepts that the term *"Territorial Limits"* is not defined in the policy, FBD suggested that the policy nonetheless shows a clear intention to restrict the territorial scope of the cover provided depending on the nature of the cover concerned. Thus, for example, under s. 2 of the policy, cover is provided in respect of the temporary removal of property for cleaning, restoration or repair, but only to *"other premises in the Republic or* (sic) *Ireland"*. Likewise, s. 4, relating to household goods, provides slightly wider coverage in some instances such as cover for contents removed to *"elsewhere in Ireland, United Kingdom or the Continent of Europe"*. FBD also noted that, in s. 6, the policy excludes cover in respect of money for loss or damage occurring *"outside Ireland, or the United Kingdom"*. Section 7 (dealing with employers' liability) limits the scope of cover to injuries occurring to employees *"in or temporarily outside the Republic of Ireland"*. Section 8 (relating to public and products liability) provides cover for illness and injury occurring to a third party *"in Ireland, Northern Ireland, Great Britain, the Channel Islands or the Isle of Man, or elsewhere in the World"*. While this cover obviously extends beyond the State, FBD submitted that the nature

of products liability is such that a broad geographic scope of cover is appropriate. In contrast, the Addendum for Commercial Legal Expenses confines the cover in respect of that element of the policy to the State.

45. FBD suggested that it is noteworthy that ss. 1, 2 and 3 of the policy do not generally specify the geographic scope of cover and submitted that this is for the reason that cover under those sections is for loss related to the premises from which the insured carries on its business. Thus, the scope of cover is related directly to the premises which, by definition, will be situated in the State.

46. In relation to causation, FBD contended that it is possible to disaggregate losses caused by outbreaks of COVID-19 in the State and those which occur outside the State. Even assuming that disaggregation of loss as between outbreaks of COVID-19 within a 25-mile radius and a 100-mile radius might be difficult, FBD suggested that entirely different considerations apply in respect of outbreaks of COVID-19 in other jurisdictions:-

(a) In the first place, FBD submitted that the reactions of Irish society and the Irish Government are reactions to cases or outbreaks of COVID-19 in the community in Ireland and not to outbreaks in another jurisdiction or jurisdictions. Thus, to the extent that loss would have been caused in any event or concurrently caused by outbreaks of COVID-19 outside the 25-mile radius and societal reaction more generally to such outbreaks, it could not be said that outbreaks in other jurisdictions would concurrently have caused that loss because, so FBD argued, it was only outbreaks in Ireland to which society was reacting. On that basis, FBD contended that cases of COVID-19 outside the jurisdiction

are not concurrent proximate causes of the loss that was caused by COVID-19 within the 25-mile radius;

(b) Alternatively, even if outbreaks of COVID-19 outside the jurisdiction could be considered to be concurrently causative of the loss suffered by policyholders alongside outbreaks of COVID-19 within the 25-mile radius, FBD submitted that the outbreaks concerned were not of equal or approximately equal causal efficacy. FBD referred, in this context, to the observation made by Slade L.J. in *Miss Jay Jay* at p. 199 to the effect that, in that case, the causes of the damage to the yacht were *"equal, or at least nearly equal, in their efficiency in bringing about the damage"*. By way of example, FBD contended that, when then well-documented cases of COVID-19 infection were reported in Wuhan in China (or later in Italy), the Government and society in Ireland reacted only to a very limited extent to those cases. It was only after COVID-19 started to spread within Ireland that restrictions were imposed and alterations to societal behaviour took place.

(c) FBD rejected the suggestion that there would be any significant difficulty in disaggregating the effects of COVID-19 inside the jurisdiction from those outside. FBD suggested that COVID-19 outside the jurisdiction would have clear impacts relating to, for example, the cancellation of international sports events or the reduction in custom from international tourists. It was submitted that the impacts of COVID-19 outside of the jurisdiction would be calculable. Counsel for FBD submitted that, in the case of foreign tourists, the pubs should be in a position to estimate what level of business comes from such

tourists. Similarly, in the case of a pub with a significant trade arising from attendance to watch international sporting events on screens within the pub, a comparison exercise could be undertaken to compare the takings from a similar event in 2019 as against the same period in 2020.

(d) With regard to the suggestion made by the plaintiffs that, in an Ireland-only counterfactual world, pubs could argue that they would do better (in that customers would be induced to travel to Ireland as the only COVID-free destination in Europe), counsel for FBD suggested that the reality was that if there was no COVID-19 in Ireland but there was COVID-19 elsewhere in the world, tourists would not be permitted to come to Ireland. While counsel acknowledged that this would require evidence, she suggested that this was the reality of the position.

(e) Insofar as Northern Ireland is concerned, counsel for FBD submitted that the court should take judicial notice of the extent to which measures were introduced in this jurisdiction arising out of the events within the jurisdiction and irrespective of the events in Northern Ireland.

(f) Counsel for FBD also rejected any suggestion that the case now made by it is inconsistent with the case previously made by it in its pleadings.

Discussion and decision on the territorial extent of the counterfactual

47. As noted in para. 31 above, this issue has arisen in circumstances where there was no real debate at the first hearing in October, 2020 about the territorial limits (if any) to be adopted in constructing, for the purposes of assessing the plaintiffs' losses,

a counterfactual world where COVID-19 would be deemed not to exist. I was concerned that the order made by the Divisional Court in the *FCA* case made in October, 2020 was expressly confined to a counterfactual world where COVID-19 was deemed not to exist in the United Kingdom but where it continued to exist elsewhere. I was also concerned that the issue was not expressly addressed in the subsequent decision of the UK Supreme Court. That said, it is important to keep in mind that it appears to be the case that there was never any significant argument advanced to the Divisional Court by any of the parties in the *FCA* proceedings in relation to the territorial extent of the counterfactual. Likewise, there is no reasoned decision of the court itself as to why the order took the form that it did. The matter was addressed in quite brief terms in the course of a further hearing which took place before the Divisional Court in October, 2020 subsequent to the main judgment delivered by the court in September, 2020. In those circumstances, there is no detailed record of the reasons why the Divisional Court came to the conclusion that the counterfactual should be constructed in that way. The issue must, therefore, be addressed as one of principle without the benefit of any reasoned precedent.

48. In considering the ambit of the counterfactual world, it is important, in my view, to keep in mind a number of aspects of the principal judgment. In the first place, although I found that it was an inherent part of the insured peril that there should be an outbreak of contagious or infectious disease within 25 miles of the insured premises, that did not necessarily mean that the COVID-19 free counterfactual or hypothetical world is to be confined to that 25-mile radius. While all of the parties were agreed that the insured peril was to be stripped out of the counterfactual, the stripping out exercise is not necessarily to be confined to the insured peril. In the absence of any relevant exclusion in the FBD policy, any other concurrent proximate

cause of the plaintiffs' losses is also to be stripped out in accordance with the *Miss Jay Jay* principle. Accordingly, as noted in para. 220 of the principal judgment, in the event that the plaintiffs establish that the effects of the existence of COVID-19 outside the relevant 25-mile radius is a concurrent proximate cause of their losses alongside the closure following the outbreaks within that radius, that concurrent factor must also be stripped out of the counterfactual in addition to stripping out the existence of the more narrowly defined insured peril. In that event, although the existence of an outbreak within the 25-mile radius is a crucial element of the composite peril in terms of triggering cover under the policy, it becomes less relevant when it comes to an evaluation of the extent of the indemnity to which the plaintiffs are entitled under the policy. It seems to me that, in the absence of some indication to the contrary in the policy, there is no reason in principle why the *Miss Jay Jay* approach could not be taken in relation to causes of loss which originate outside the jurisdiction in the same way as causes within the jurisdiction provided, of course, that they are concurrent causes of loss and both causes can be said to be proximate. The only fly in the ointment in this regard is the existence of the Divisional Court order although sight should not be lost either of FBD's submission (summarised in paras. 44 to 45 above) as to the intention of the policy (considered further in para. 51 below).

49. Before leaving the issue addressed in para. 48 above, it may be helpful at this point to address the argument made on behalf of FBD summarised in para. 46 (b) above. As noted there, it was submitted by counsel for FBD in the course of the February, 2021 hearing that the only concurrent causes of loss that can be considered under the *Miss Jay Jay* principle are those that are equal or nearly equal in their efficiency in bringing about the damage. That argument was based on the language used by Slade LJ in the *Miss Jay Jay* case (quoted in para. 199 of the principal

judgment). I do not, however, believe that it is correct to say that concurrent causes must always be equal or nearly equal in their efficiency before the *Miss Jay Jay* principle can arise. I also do not believe that Slade LJ was laying down any rule to that effect. It seems to me that Slade LJ was simply drawing attention to the particular facts of that case from which it was clear that both of the causes of the damage to the yacht were approximately equal in efficiency with the result that there was no doubt that both were proximate causes. For the *Miss Jay Jay* principle to apply, it is, of course, necessary to show that there are two or more proximate causes of the relevant loss or damage. That necessarily requires that each of those causes can properly be described as a real and efficient cause of the loss. But I think it would be wrong to suggest that they must always be nearly equal in their efficiency. In the *Leyland Shipping* case (which is the principal authority on proximate loss and which was expressly followed by the Supreme Court here in the *Ashworth* case addressed in para. 194 of the principal judgment) Lord Shaw, at pp 370-371, drew a distinction between *"the real efficient cause"* on one side of the line and *"attendant circumstances"* on the other. Once it is shown that a cause of loss has the character of a *"real efficient cause"* of the loss, that seems to me to be sufficient to make it a proximate cause. On occasion, there can be more than one real efficient cause of loss even where each cause might not be fully or nearly equal in efficiency. Whether that is so in any individual case is a matter of degree to be assessed on the particular facts of that case. The closer the respective causes are to being equal in efficiency the easier it will be to say that they are each proximate causes of the relevant loss. But that does not necessarily mean that something approximating to equality in efficiency is required in every case. There are also cases where the two causes are so inextricably mixed that it is simply impossible to attribute weight to one or the other. This is well illustrated by

the decision of Tomlinson J. in *IF P & C Insurance Ltd. v. Silversea Cruises Ltd.* [2004] Lloyd's Rep. IR 217 (discussed in para. 202 of the principal judgment). In that case, insurers led expert evidence to the effect that the cause of a sharp drop in the insured's cruise line business following the attack on the World Trade Centre in September, 2001 was 80 to 90% due to the attack (an uninsured peril) and 10 to 20% due to Government warnings against foreign travel (which was an insured peril). At p. 245, Tomlinson J. rejected the attempted attribution of relative causal effect as entirely arbitrary and held that it was impossible to divorce the effects of one from the other.

50. The second aspect of the principal judgment to keep in mind is that, notwithstanding the case made by FBD at the October, 2020 hearing, it is doubtful that one could, in any event, disaggregate the effects of COVID-19 within the applicable 25-mile radius from those which arise outside the radius. In this context, it is important to recall that, in para. 228 of the principal judgment, I noted, in the context of the disaggregation case made by FBD, that FBD had argued that it would be possible to separate the effects on the plaintiffs' business arising from societal reaction to the outbreaks of COVID-19 generally from the effects of the composite peril insured under extension 1(d) (i.e. the imposed closure following outbreaks within the 25-mile radius). I nonetheless expressed the view that such a separation seemed to me to be unlikely to be achievable in circumstances where outbreaks of the disease are themselves an inherent element of the peril. I also said that, while I could see that an argument might, in theory, be made that the effects of the closure and outbreaks of Covid-19 in the 25-mile radius should be capable of being separated from the effects arising from events outside that radius, such an argument, nonetheless, seemed to me to lack reality. I expressly stated that I could not

understand how such a separation could be undertaken in practice and I noted that there was nothing in the evidence of the FBD expert, Mr. Mark Lewis, that assisted in that regard. In circumstances where changes in societal behaviour are as likely to be prompted by outbreaks which occur 26 or 30 miles away as those that occur within a radius of 25 miles, I observed that the attempt to separate the effects of one from the other seemed to me to be a hopeless task. While I accepted that the issue could only finally be determined in the quantum hearing, it seemed to me to be likely, having regard to the extent to which the composite peril and societal reaction to the outbreaks are likely to overlap as proximate causes, that, as was the case in *Silversea Cruises*, it would, in practice, be impossible to effect a disaggregation of that kind. For similar reasons, it strikes me that disaggregation may be equally difficult to demonstrate in the context of the international situation. While the principal judgment did not address the impact of COVID-19 abroad on the position in Ireland, there are a number of factors (which are considered further in para. 54 below) which would support the view that the worldwide nature of the pandemic had a significant influence on events in Ireland. Ultimately, if this aspect of FBD's case is to be pursued, a final conclusion can only be reached on disaggregation in the context of the quantum hearing. Pending that hearing, I have sought, in the immediate Irish context, to give guidance of a preliminary nature in para. 228 of the principal judgment. In so far as the wider international context is concerned, I have sought to give further guidance of a preliminary or provisional nature in paras. 54 to 61 below.

51. The third – and crucial – aspect of the principal judgment that should be kept in mind is the way in which FBD itself sought to make the case that the cause of the imposed closure of the plaintiffs' premises was the global COVID-19 pandemic. The case expressly made by FBD was that, because of the global pandemic nature of

COVID-19, extension 1 (d) did not provide cover to the plaintiffs. FBD's case to this effect went much further than merely pleading the matter in the manner summarised in paras. 33 to 34 above. As para. 1.3 of the report of Mr. Mark Lewis makes clear, FBD expressly instructed the expert witnesses retained by it that *"the imposed closure was not caused by outbreaks … on the premises or within 25 miles of same* ***but rather by a global pandemic****"* (emphasis added). Moreover, on Day 2 of the October, 2020 hearing, counsel for FBD, in opening submissions, said at p. 147 *"... with COVID-19 ..., it's a global pandemic that affects the entire globe at the same time."* FBD argued that cover for a disease with a global spread was plainly not intended by the FBD policy. As noted in paras. 15 to 17 of the principal judgment, FBD had intended to bolster that argument by evidence that it proposed to call from Mr. Paul Sharma, a London based insurance expert who, it was intended would give evidence that, *inter alia,* FBD had attributed no premium income to pandemic risk and held no solvency margin or provision in respect of such risk. After a ruling in relation to the admissibility of documents on Day 2 of the hearing, FBD did not pursue that business efficacy argument but it was not until after evidence had been given by FBD's Chief Underwriter, that it became clear that FBD was no longer pursuing an argument that extension 1 (d) could never respond to a pandemic albeit that FBD continued to make the argument that extension 1 (d) did not extend to closures due to nationwide outbreaks of infectious disease and that cover was confined to closures following outbreaks within the relevant 25-mile radius of the insured premises. For the reasons explained in paras. 143 to 147 of the principal judgment, I rejected that argument. Thus, the fact that COVID-19 is a global pandemic does not prevent cover from arising under extension 1(d). As further noted in the principal judgment, there is no exclusion in the FBD judgment in respect of pandemics. That seems to me to have

significant consequences in terms of the territorial extent of the counterfactual. Under extension 1 (d), FBD has provided cover in respect of contagious and infectious diseases without any exclusion in respect of global pandemics which by their very nature are liable to cross borders of both countries and continents. Given that extension 1 (d) is capable of responding in those circumstances, it is very difficult to identify any proper basis in principle to confine the counterfactual world to the territory of the State. The aspects of the policy on which FBD seeks to rely (as summarised in paras. 44 to 45 above) do not, in my view, come close to doing so. Those factors cannot displace or override the finding already made that extension 1 (d) applies notwithstanding that the disease in issue is a global pandemic. Given the global nature of this crucial element of the composite peril, I fail to see how it could be appropriate to determine, in advance of hearing evidence, that the global impacts of this element of the peril (or some more limited aspects of it) should not be taken into account in formulating the appropriate counterfactual for the purposes of assessing the plaintiffs' losses. Nor is there any reasoned authority that suggests that the counterfactual world should be confined solely to the State. While the order of the Divisional Court imposed such a limitation on the counterfactual, it did so in the absence of any written judgment or statement of reasons to support it. As previously noted, the UK Supreme Court did not subsequently address it.

52. A further important factor is the fact that, as the plaintiffs have emphasised, the FBD policy is sold to publicans throughout the State including those situated close to the border with Northern Ireland. In the case of any pubs situated less than 25 miles from that border, the relevant 25-mile radius will extend into the territory of Northern Ireland. Cover would thus be available in respect of outbreaks within that radius even where the outbreaks occur north of the border provided each other element of the

composite peril is triggered. While none of the plaintiffs' premises is so situated, the existence of this factor illustrates that the FBD policy itself is capable of having cross border effects.

53. Given (a) the cross border issue identified in para. 52 above, (b) the fact that, contrary to the argument previously made by FBD, extension 1 (d) has already been found in the principal judgment to be capable of responding even where the contagious or infectious disease is in the nature of a global pandemic and (c) the lack of any reasoned authority to the contrary, I can identify no good reason to make an order similar to that made by the Divisional Court confining the counterfactual world to the territory of the State. It would, however, be premature, at this point, to make any definite ruling determining whether all or any particular aspects of the global COVID-19 situation should be stripped from the counterfactual. In common with the approach signalled in para. 220 of the principal judgment, the ultimate decision on this issue will have to await the hearing of further evidence. All I can do at this stage is to offer, in a similar way to the guidance given in paras. 228 to 229 of the judgment, a preliminary or provisional view. This I now do in paras. 54 to 61 below.

54. In para. 228 of the principal judgment, I sought to give some guidance as to the possibility of disaggregating the effects on the plaintiffs' businesses caused by societal reaction to the outbreaks of COVID-19 from the effects of the peril itself. I believe that very similar considerations arise in relation to the impact of the COVID-19 pandemic at an international level as those discussed in para. 228 of the principal judgment. In this context, I accept that, as summarised in para. 39 (a) above, Irish society did not change its behaviour to any appreciable extent in response to the first reports of cases of COVID-19 in Wuhan in early 2020. I also accept that it was only after COVID-19 started to spread within Ireland that restrictions were imposed and

alterations to societal behaviour began to take place. However, there was a definite international element to those cases. It is clear from the chronology of events described in the principal judgment that the impact of the international situation on the position within Ireland changed very rapidly over the course of late February, 2020 and early March, 2020 and that all of these events fed into the recommendations made by NPHET and the subsequent decision of 15th March, 2020 to close the pubs. As recorded in para. 87 of the principal judgment, steps were taken as early as 26th February, 2020 to postpone the scheduled rugby match between Ireland and Italy as part of the Six Nations Rugby Championship. On 29th February, 2020, the first Irish case of COVID-19 was reported, namely a male who had returned to Ireland from Northern Italy. On 3rd March, 2020, the second confirmed case of COVID-19 was identified, namely a female who had travelled to Ireland from Northern Italy. Between then and 7th March, 2020, a number of further cases of COVID-19 were confirmed, most of which were associated with travel from Northern Italy. By the following day, NPHET had recommended that the traditional events scheduled for St. Patrick's Day should not proceed and on 9th March, 2020, the St. Patrick's Day Parade scheduled to take place in Dublin was cancelled. One can immediately see that, even in advance of the Government decision of 15th March, 2020 to close pubs, the international situation was already having a very significant impact on ordinary life in Ireland. It is also clear from the evidence given to date that the business of each of the plaintiffs suffered in the days immediately prior to the closure imposed on 15th March even though, at that point, there was nothing like the level of infection within Ireland that was experienced in subsequent weeks and months.

55. It also has to be borne in mind that, for more than twelve months after the events of late February, 2020 and early March, 2020, there were no restrictions on

travel into Ireland other than a requirement to self-quarantine for a period of time. In circumstances where Ireland was not closed off from the rest of the world, the risk of infection from abroad coexisted with the risk of infection from community transmission in Ireland. Against that backdrop, it seems to me to be unrealistic to suggest, as FBD does, that the sole cause of public concern were outbreaks of COVID-19 disease in Ireland. The reaction of NPHET to events in Italy and elsewhere suggests that, by early March, 2020 the international situation was also a significant factor. I therefore doubt that there is any reality in seeking to draw a line at the borders of the State for the purposes of determining what should or should not be stripped out of the counterfactual. Trite though it may be to say so, we live in a deeply interconnected world and this has been illustrated in real time by the way in which, over the course of 2020, we watched as the COVID-19 pandemic invaded every corner on the globe. It is, therefore, unsurprising that FBD expressly made the case in these proceedings that the losses claimed by the plaintiffs were caused by the global COVID-19 pandemic.

56. Strong support for stripping out the worldwide effects of the pandemic can be found by analogy with the way in which the UK Supreme Court in the *FCA* case addressed the *"trends and circumstances"* provisions of the policies in issue in that case. As the FBD defence in these proceedings demonstrates, there is a direct link between the *"trends and circumstances"* provisions of the policy and the counterfactual. To take the pleadings in the Sean's Bar case as an example, FBD made the case in para. 4 (a) of its response dated 29th June, 2020 to the plaintiff's request for particulars of its defence, that matters such as social distancing practices, widespread public concern about the risk of infection and the economic slowdown constitute trends or circumstances affecting the business that would require to be

taken into account under the quantification provisions of s. 3 of the policy. Simultaneously, these are all factors which FBD argued should also be retained in the counterfactual. The approach taken by the UK Supreme Court in the *FCA* case in relation to the *"trends and circumstances"* issue is therefore both relevant and instructive for present purposes.

57. As para. 266 of the *FCA* judgment illustrates, one of the issues which arose in that case was whether an adjustment should be made under the *"trends and circumstances"* clause for the existence of COVID-19 outside the relevant territorial radius of the insured peril that applied in some of the policies. Insurers sought to make the case that it was a circumstance that should be taken into account in adjusting the losses claimed by the insured. This was rejected in the majority judgment. In dealing with this aspect of the case, Lords Hamblen and Leggatt looked at the consequences that would flow from taking that approach and illustrated the anomaly that would arise by reference to the way in which it could lead not just to downward adjustments to the advantage of insurers but also to inflated claims by policyholders for upwards adjustments. They referred (*inter alia*) to the approach taken in the US case law. In particular, in para. 278, they referred to the decision of the Fifth Circuit Court of Appeals in *Catlin Syndicate Ltd v. Imperial Palace of Mississippi Inc* 600 F 3d 511 (2010). In para. 278, Lords Hamblen & Leggatt explained that, in US policy wordings, it appears that the counterfactual is generally expressed in terms of what would have happened *"had no loss occurred"*. In the case of a hurricane, this requires an assumption being made that the hurricane would not have occurred. By way of illustration, in the *Catlin Syndicate* case, the Imperial Palace Casino in Mississippi was damaged by Hurricane Katrina which also caused damage to large swathes of the surrounding area, putting several rival casinos out of business. The Imperial Palace

was not very badly damaged and was able to reopen before its rivals. This meant that after it re-opened, its revenue was much greater than before the hurricane as many nearby casinos remained closed and people who wanted to gamble had few choices. It made a claim under the Catlin policy in respect of the relatively short period when it was closed. The casino argued that, in quantifying its business interruption loss, the correct hypothetical was not one in which Hurricane Katrina did not strike at all; it was one in which the hurricane struck but did not damage Imperial Palace. This involved an assumption that no damage to the casino had occurred, but not that the hurricane had not occurred. The effect of this argument was that the relevant counterfactual world would be one where, alone of all its competitors, it would be the only casino open for business. On that basis, it made the case that its recovery should be based on the inflated earnings which it actually earned after it had re-opened rather than on the net profits (based on previous trading) that it would have earned had there been no hurricane at all. This argument was rejected by the court. At p. 515, Prado J. explained the court's approach in the following terms:-

> *"...Imperial Palace argues that Catlin's interpretation of the business-interruption provision conflates the term "loss" with the idea of an "occurrence". In this case, Hurricane Katrina was the "occurrence" which inflicted "losses" on many victims, one of which was Imperial Palace. Imperial Palace asserts that Catlin asks us to interpret the business-interruption provision in such a way that the phrase "had no loss occurred" morphs into "had no occurrence occurred". Imperial Palace argues that instead, we should disentangle the loss from the occurrence and determine loss based on a hypothetical in which Hurricane Katrina hit Mississippi, damaged all of Imperial Palace's competitors, but left Imperial Palace intact:*

the occurrence occurred, but the loss did not. While we agree with Imperial Palace that the loss is distinct from the occurrence – at least in theory – ***we also believe that the two are inextricably intertwined under the language of the business-interruption provision****. Without language in the policy instructing us to do so, we decline to interpret the business-interruption provision in such a way that the loss caused by Hurricane Katrina can be distinguished from the occurrence of Hurricane Katrina itself."* (emphasis added).

58. At para. 280 of their judgment, Lords Hamblen and Leggatt, having referred to the *Catlin Syndicate* case and also *Prudential MMI Commercial Ins Co v. Colleton Enterprises Inc* 976 F 2d 727 (1992) (which concerned damage to a motel in South Carolina caused by Hurricane Hugo) continued:-

"280. The US cases illustrate that the suggested construction avoids the problem of what have been termed "windfall profits". In both the Catlin case and the Prudential case the argument of the insured was that the loss should be adjusted by comparing the actual results of the business with what they would have been if there had been no damage to the casino/motel, but the hurricane had nevertheless occurred causing all the other damage that was in fact caused to the surrounding area. Adopting this basis of adjustment would have put the casino/motel in a position to claim increased "windfall" profits as a result of being the only undamaged casino/motel in the area."

59. I appreciate that the observations made in para. 280 of the UK Supreme Court judgment and the observations made by Prado J. in the *Catlin Syndicate* case relate to the other side of the coin in the sense that both were concerned with a hypothetical

that would benefit the insured rather than the insurer. In *Catlin Syndicate,* it was the insured rather than the insurer who was arguing that the counterfactual should ignore the more extensive effects of the hurricane. That may, at first sight, appear to be quite a distinct situation from the issue that falls for consideration in this case. However, the very same issue would arise in this case if the court were to determine that the counterfactual world should be hypothesised on the basis of an assumption that COVID-19 was absent in Ireland but was present beyond the borders of the State. In such circumstances, some policyholders, with a view to maximising their recovery against insurers, would inevitably seek to argue that, if Ireland was a COVID-free country, it would be a magnet for tourists and, in particular, would be a magnet for tourists from Northern Ireland and that this should be taken into account as a *"trend or circumstance affecting the business"* thereby meriting an upward adjustment of its losses. Of course, it is likely that, similar to the contention advanced by FBD (as summarised in para. 46 (d) above) an insurer, in response to such an argument, would argue that, in such a hypothetical world, Ireland would surely impose border controls to prevent tourists from COVID-19 infected countries travelling to Ireland. But, in my view, that starkly illustrates the problem that will undoubtedly arise. One then has to get involved in attempting to guess what might have occurred in such a world. For example, it is by no means certain that Ireland would have taken the same approach as New Zealand or Australia where quite stringent controls have been in place since an early phase in the unfolding of the pandemic. The fact that compulsory hotel quarantine measures were only introduced very recently in Ireland in respect of travellers from certain parts of the world illustrates the difficulty in making such an assumption. Moreover, as we were constantly reminded during the last twelve months, Ireland is inextricably interconnected with other parts of Europe and there has

to be very significant movement of goods (and of people involved in their transport) to and from the country in order to ensure that, on the one hand, supermarkets and shops can be stocked with essential goods, and, on the other, that exports can continue. Against this backdrop, one can readily see that there is significant force in the case made by the plaintiffs that a counterfactual, under which the plaintiffs' indemnity is to be calculated in a world where COVID-19 is prevalent elsewhere but not in the State, would require a quantification exercise of such impractical complexity and artificiality that it cannot form part of a reasonable interpretation of the FBD policy. As outlined in para. 39 above, it would become necessary to somehow hypothesise what is likely to occur in that imagined scenario. That would be an extraordinarily difficult and uncertain exercise for any court to undertake. The decision of Tomlinson J. in *Silversea Cruises* illustrates this very well. To the extent that such an exercise could be carried out (which, like Tomlinson J., I doubt) it would require complex and detailed economic evidence from appropriately qualified experts with all of the attendant expense that would entail. As noted in the principal judgment, the evidence adduced so far by FBD through the person of Mr. Mark Lewis falls far short of assisting the court in addressing such a scenario. Moreover, evidence of that kind seems far removed from the quantification exercise contemplated by the quantification provisions of s. 3 of the policy and it is difficult to accept that this could have been within the contemplation of reasonable persons in the position of the parties at the time the policy was put in place.

60. Similar considerations appear to underlie the conclusion reached by the UK Supreme Court in para. 287 of the judgment in the *FCA* case, in the context of the *"trends and circumstances"* clauses in issue there. At para. 287, Lords Hamblen and Leggatt said:-

> *"287. For the reasons given, we consider that the trends clauses in issue on these appeals should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril* ***and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause****. Such an approach ensures that the trends clause is construed consistently with the insuring clause, and not so as to take away cover prima facie provided by that clause."* (emphasis added)

61. I appreciate that, in making those observations, the UK Supreme Court was not expressly addressing the international situation. However, it seems to me that, in the case of a global event such as COVID-19, it would make sense to adopt a similar approach. After all, the logic underpinning the decision in the *Catlin Syndicate* case must surely also apply in the case of a hurricane which causes damage on both sides of an international border. The logic of that decision would be turned on its head if, for argument's sake, a devastating hurricane was to cause extensive damage in Southern Florida as well as the Bahamas. A hotel in the Bahamas could hardly be allowed to make the case that the hurricane in the Bahamas should be stripped out of the counterfactual but should nonetheless be assumed to have occurred in Florida, thus causing, on this hypothesis, large numbers of vacationers to transfer their holiday plans from Florida to the nearby Bahamas, creating a hypothetical goldmine for the hotel in the Bahamas. Given that the damage caused in that hypothetical example has the same underlying cause in both jurisdictions, it would not make sense to strip out the hurricane from the counterfactual world in one jurisdiction but leave it in existence in the neighbouring jurisdiction. It seems to me that, logically, the same

considerations arise, in the absence of some provision to the contrary in the FBD policy, in the context of the present case. Similar to the effects of a hurricane that pays no attention to national borders, a global pandemic, by its very nature, has transnational effects.

62. In circumstances where extension 1 (d) of the policy is capable of applying to a pandemic disease – and, crucially where COVID-19 is such a pandemic disease – my provisional view is that the approach taken by the UK Supreme Court in para. 287 of the majority judgment (quoted in para. 55 above) should be applied by analogy in the context of the present dispute as to the extent of the elements to be stripped out of the counterfactual. Such an approach would recognise the reality that the disease which, in combination with the imposed closure, has triggered cover in these proceedings is international in its effects while also ensuring that the case to be made on either side would be free of the artificiality and anomalies which are discussed in para. 58 above. I stress that this view is given as no more than guidance at this point and is not intended to be binding. I will defer any definitive view until after the evidence in the next phase of the proceedings has been heard. That said, for the reasons explained in para. 53 above, I have determined that it would not be appropriate to make an order in similar terms to that made by the Divisional Court in the *FCA* case confining the counterfactual world to the State. In my view, no sufficient basis has been identified to justify the court in making such a determination. The precise parameters of the counterfactual will have to be worked out in the context of the evidence to be given at the next hearing.

The plaintiffs' application for legal practitioner and client costs

63. Subject to an issue that arises in relation to the Sinnotts proceedings (described in more detail below), there is no dispute between the parties that the plaintiffs should

be entitled to their costs of the proceedings. This is unsurprising in circumstances where the plaintiffs have substantially succeeded in the proceedings save in relation to the claim made by them in relation to the indemnity period and, in the case of the Lemon & Duke plaintiff, the case made by it at trial that it should be awarded aggravated damages. The time spent on addressing those issues was relatively short and it is unsurprising in the circumstances that FBD has not sought an apportionment of costs. That said, it is clear from the judgment of Murray J. in the Court of Appeal in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 at para. 19(g) that, even where a party has not been entirely successful, the court is required under O. 99, r. 3(1) to have regard to the matters referred to in s. 169(1)(a)–(g) of the Legal Services Regulation Act, 2015 ("*the 2015 Act*"). I confirm that I have carefully considered each of the matters listed in s. 169(1) including the conduct of the plaintiffs in these proceedings and I am satisfied, in the circumstances, that, subject to the particular position of the plaintiff in the Sinnotts proceedings (addressed further below), that it is appropriate to make an order in favour of the plaintiffs in respect of the costs of the proceedings (including all of the reserved costs, the costs of discovery, the costs of the written submissions, the costs of the shorthand reporting of the case and the costs of TrialView).

64. The issue between the parties is not in relation to whether the plaintiffs should be entitled to costs but as to the form of the order to be made. Ordinarily, the costs to be recovered by a party in High Court proceedings will be in the nature of *"party and party"* costs. This has been the longstanding practice of the courts and it is, in any event, expressly provided for in O. 99, r. 10(2) of the Rules of the Superior Courts which makes clear that this is the form of order that should ordinarily be made. Order 99, rule 10(1) expressly provides that Part III of O. 99 applies to costs which are to be

paid to a party to any proceedings by another party to the proceedings. Order 99, rule 10(2) then provides as follows:-

> *"(2) Subject to sub-rule (3), costs to which this Part applies shall be adjudicated on a party and party basis in accordance with s. 155 and Schedule 1 to the 2015 Act."*

65. The terms of that rule are clear. However, in this case, the plaintiffs submit that the court should instead apply O. 99, r. 10(3) which permits a court to award costs on a legal practitioner and client basis (formerly known, prior to the enactment of the 2015 Act, as a solicitor and client basis).

66. Order 99, rule 10(3) provides as follows:-

> *"(3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be adjudicated on a legal practitioner and client basis."*

67. The current version of O. 99 was introduced following the enactment of the 2015 Act which introduced a new statutory regime for the adjudication of costs by the Legal Costs Adjudicator. The Office of the Legal Costs Adjudicator has replaced the Office of Taxing Master. Under the 2015 Act, the Legal Costs Adjudicator is required to carry out the adjudication of costs in the manner prescribed by s. 155 of the 2015 Act and Schedule 1 to the Act. It would be wrong, at this point in the proceedings and prior to consideration of the issue by the Legal Costs Adjudicator, to express any concluded view on the effect of the 2015 Act on how costs should be measured. However, the 2015 Act requires the Legal Costs Adjudicator to carry out any adjudication of costs (whether between legal practitioner and client or between party and party) in accordance with s. 155 and Schedule 1. The only distinction between these two scales of costs made by the 2015 Act in relation to their quantification is

that contained in s. 155(6) which requires the Legal Costs Adjudicator, in the context of the adjudication of costs as between client and legal practitioner, to have regard to any agreement under s. 151 of the 2015 Act (which permits a legal practitioner and a client to make an agreement in writing in relation to the amount or manner of payment of costs).

68. Previously, in the period prior to the enactment of the 2015 Act, a distinction was made under O. 99 (in its then form) between party and party costs, on the one hand, and solicitor and client costs (as they were then known), on the other. The relevant distinction was succinctly summarised by Laffoy J. in *Dunne v. Fox* [1999] 1 I.R. 283, at p. 293, where she said:-

> *"The different bases of quantification comprehend not only different ranges of costs allowable, but also differences in the imposition of the burden of proving that the costs are within the relevant range. This is illustrated in relation to taxation on a party and party basis and taxation on a solicitor and client basis under O. 99 as follows:-*
>
> *(i) Under r. 10(2) to be allowable on taxation on a party and party basis, the costs must be within the range of costs which are shown to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The onus of showing that expenditure comes within that range is on the party who incurred it and who is claiming that it is allowable.*
>
> *(ii) Under r. 11(1), on a taxation on a solicitor and client basis, the range of costs allowable encompasses all costs other than expenditure which is shown to be of an unreasonable amount or to have been unreasonably incurred. Subject to the special evidential impact of the*

> *presumptions stipulated in r. 11, the general thrust of r. 11 is that the onus of proving that an item of expenditure was of an unreasonable amount or unreasonably incurred is on the party against whom the costs are being taxed. This interpretation of r. 11(1) is supported by the dictum of Murphy J. in McGrory v. Express Newspapers Plc (Unreported, High Court, Murphy J., 21st July, 1995)."*

69. While the *dictum* of Murphy J. to that effect in *McGrory v. Express Newspapers Plc* was subsequently doubted by Binchy J. (insofar as the onus of proof is concerned) in *Buckley v. O'Neill (Taxing Master)* [2018] IEHC 717, my understanding from my time as a barrister is that the prevailing view among legal costs accountants (who are involved, on a day to day basis, in the ascertainment and assessment of costs) was that, on a solicitor and client taxation, the onus lay on the client to show that the costs claimed by the solicitor were unreasonable save in respect of unusual items where the onus of proof was reversed. This meant that, in practice, it was more difficult, on a solicitor and client taxation, to reduce the quantum of costs claimed unless it could be shown that they were of an unreasonable amount. In contrast, on a party and party taxation, the only costs that could be recovered were those which were shown to be necessary or proper for the attainment of justice or for enforcing or defending the rights of the party in whose favour the costs order was made. That was the test laid down in the previous version of O.99. In practice, as cases such as *Tobin & Twomey Services Ltd. v. Kerry Foods Ltd.* [1999] 1 ILRM 428 illustrate, the view was taken by the Taxing Masters over the years was that some items were regarded as *"luxuries"* which could not be said to satisfy the *"necessary for the attainment of justice"* test. This approach can be traced back to the decision of Sullivan M.R. in *Dyott v. Reade* (1876) 10 ILTR 110 where he observed that *"[i]n*

party and party costs one does not get a full indemnity for costs … The principle to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay the costs. You cannot indulge in the 'luxury of payment'; a remarkable instance of that occurred in this case … occasioned by way of excessive caution, and the adversary is not to pay for that". This had the result that, after assessment of costs on a party and party basis, there was often a solicitor and client element that had to be borne by the successful party in legal proceedings over and above the amount recovered on taxation, save in those cases where, as often occurred, the solicitors and counsel were prepared to accept the amount recovered on the party and party taxation. This difference in the amount recoverable was recognised, for example, by Kelly J. (as he then was) in *Re National Irish Bank Ltd (No. 3)* [2004] 4 I.R. 186 at p. 201 where, in awarding costs to inspectors appointed by the High Court to investigate the affairs of National Irish Bank, he adverted to the consequences of the normal party and party order, in the following terms:-

> *"Insofar as legal costs of the inspectors are concerned, I am going to make an order that the bank and the company pay those costs to include all reserved costs. In the light of the bank's attitude that the taxpayer should not be liable for such costs, I will not make a normal order for costs. That would only cover party and party costs. That never amounts to a full indemnity. Rather I will order costs to be paid on the highest possible scale, namely, solicitor and own client costs. I do this to accommodate the bank's view that the taxpayer should not be liable for any of the inspectors' costs."*

A number of observations need to be made in the context of the *National Irish Bank* case. In the first place, it should be noted that, in that case, the bank did not oppose

the making of an order on those terms. Secondly, it is extremely unusual for a party to voluntarily submit to such an order. Thirdly and most importantly, notwithstanding the fact that an award of party and party costs does not provide a complete indemnity to the successful party in recovering the costs incurred in the proceedings, both courts and the Rules Committee continue to regard such an order as appropriate and have done so for many generations.

70. The distinction between costs necessary or proper for the attainment of justice, on the one hand, and costs shown to be of an unreasonable amount or to have been unreasonably incurred, is not expressly maintained under the current version of O. 99. Instead, as noted in O. 99, r. 10(2) (quoted in para. 64 above), O. 99 provides that party and party costs are to be taxed in accordance with s. 155 and Schedule 1 to the 2015 Act. Similarly, O. 99, r. 11 provides that a legal practitioner and client adjudication *"shall be conducted in accordance with section 155 and Schedule 1 to the 2015 Act, and such of these Rules as are applicable to legal practitioner and client costs"*. Despite the reference to *"such of these rules as are applicable to legal practitioner and client costs"*, there appears to be nothing further (apart from some rules dealing with the form of the application for adjudication and the documents to be lodged with it) in O. 99 which addresses the distinction to be made between an assessment of party and party costs, on the one hand, and legal practitioner and client costs, on the other. Nonetheless, O. 99, r. 10(3) continues to make a distinction between them and envisages that adjudication of costs on a legal practitioner and client basis should be treated as an exception to the general rule prescribed by O. 99, r. 10(2) that costs should be adjudicated on a party and party basis. The plaintiffs here appear to believe that, if an order for adjudication of their costs is to be made on a

legal practitioner and client basis, they will fare better (in terms of the recovery of their costs from FBD) than they would on a party and party taxation.

71. For this purpose, the plaintiffs accept that a principled basis must be established before the court can properly depart from the general rule prescribed by O. 99, r. 10(2). The plaintiffs have referred, in this context, to the way in which there is now an established line of authority (the effect of which is very helpfully summarised in the *Trafalgar Developments* judgment considered in para. 72 below) which permits the court to depart from O. 99, r. 10(2) where the court wishes to mark its disapproval of the conduct of the party against whom the order for costs is to be made.

72. The plaintiffs do not suggest that the conduct of FBD here merits any disapproval by the court but the plaintiffs submit that there is an alternative basis (described in more detail below) which they contend would justify the court awarding costs on a legal practitioner and client basis in this case. Before addressing the basis upon which the plaintiffs make that submission, I should, in the first instance, refer to the decision of Barniville J. in *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13 where he summarised the relevant legal principles (having previously analysed the case law) in the following terms:-

> *"(1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.*
>
> *(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.*

(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis…

(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.

(5) The conduct in question can include:-

(a) A particularly serious breach of the party's discovery obligations;

(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;

(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;

(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or

disapproval, such a particularly serious or blatant breach of a court order…

(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should:-

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;

(d) In light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).

(7) While a failure to comply with the provisions of the Rules… or of… order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious

consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis…"

73. Having regard to the decision of Barniville J. in that case (and having regard to the authorities considered by him in his judgment), there is clearly a principled basis for the court to invoke its powers under O. 99, r. 10(3) where a party has been guilty of the type of conduct described by him in that case. Counsel for the plaintiffs submitted that, similarly, there is a principled basis on which to exercise the discretion of the court under O. 99, r. 10 (3) where the proceedings are in the nature of a test case and the decision in the proceedings clarifies the law for the benefit of the paying party and a very substantial number of other parties with similar claims against the paying party. Counsel drew attention, in this context, to the observations made by Lord Woolf C.J. in *Excelsior Commercial & Industrial Holdings Ltd v. Salisbury* [2002] C.P. Rep. 67 in support of their argument that it may be appropriate to award costs on a legal practitioner and client basis in the context of a test case. Before considering the observations of Lord Woolf in that case, it is important to bear two matters in mind. In the first place, his observations were made against the backdrop of the particular statutory regime contained in the Civil Procedure Rules in England & Wales. Secondly, the observations are clearly *obiter* in that it is clear from a consideration of the judgment as a whole that the reason why the equivalent of legal practitioner and client costs were considered to be justified in that case arose as a consequence of the conduct of the relevant party such that, the *ratio* of the case takes the matter no further than the judgment of Barniville J. in *Trafalgar*.

74. While bearing those caveats in mind, it is instructive to consider para. 15 of the judgment of Lord Woolf where he referred to the relevant provisions of the Civil

Procedure Rules under which a distinction is made between a standard order for costs (which appears to equate in broad terms to a party and party order in this jurisdiction) and an indemnity order for costs (which seems to equate to a solicitor and client order under the previous version of O. 99 in Ireland). In para. 15 of his judgment, Lord Woolf said:-

> *"15. 44.4(2) and 44.4(3)* [of CPR] *draw a distinction between the difference in substance between a standard order for costs and an indemnity order for costs. The differences are two-fold. First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made. The other important distinction between a standard order and an indemnity order is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matters in issue, this requirement of proportionality does not exist in relation to an order which is made on the indemnity basis. This is a matter of real significance. On the one hand, it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable in consequence of litigation. On the other hand, an indemnity order means that a party who has such an order made in their favour is more likely to recover a sum which reflects the actual costs in the proceedings. The question of whether an order for costs on a standard or indemnity basis is made in litigation*

of the sort with which we are here concerned may be a matter of substantial financial significance…"

75. Having identified the difference between the two forms of costs order available in England & Wales, Lord Woolf expressed the following view in para. 31 of his judgment as to the circumstances in which a court might award costs on the higher indemnity basis:-

"31. …An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate."

76. The plaintiffs have highlighted that O. 99, r. 10(3) is not prescriptive as to the circumstances in which the court can make an order for costs on the legal practitioner and client basis. The plaintiffs urge that, in those circumstances, the jurisdiction of the court under the sub-rule cannot be exclusively concerned with the conduct of parties. While they accept that the court should only depart from the general rule prescribed

by O. 99, r. 10(2) on a principled basis, they submit that the additional criteria suggested by Lord Woolf provide such a basis. In making this case, the plaintiffs draw attention to the following:-

(a) In the first place, they note that, at paras. 2 to 3 of the principal judgment, I observed that it is *"hoped that the ultimate outcome of these cases will assist in the resolution of a large number of similar claims which have been brought against FBD"*. They also highlight that I referred to the evidence of the Chief Underwriting Officer of FBD that the FBD policy in question in these proceedings has been sold to approximately 1,300 publicans throughout Ireland ranging from the owners of small rural pubs to larger urban pubs. The plaintiffs submit that the proceedings were a test case in respect of the policy generally and that the outcome of the proceedings will govern the claims of all other publicans holding a similar policy from FBD.

(b) The plaintiffs have also emphasised that, on the application to admit these proceedings into the Commercial List, counsel for FBD expressly stated, having regard to the number of policies, that *"it is in the public interest that there be a test case and that there be a judgment in relation to the policy interpretation...* [T]*he proposed timetable appears ambitious but the parties, I think, have responsibly recognised the importance of getting an early determination from the court on what is a very important issue…"*.

(c) In the same vein, counsel for the plaintiffs also drew attention to the following averments made by Mr. Jackie McMahon, the Chief Claims Officer, in an affidavit sworn on 19th May, 2020 in support of FBD's

application to admit the Sean's Bar proceedings into the Commercial List in which he said:-

> *"27. While there is a dispute between the parties as to the correct interpretation of the Policy, there is a much wider dispute between the Defendant and many other policyholders who have also claimed cover under the… Policy… which has also been declined…*
>
> *35. Having regard to the issues in dispute, the determination of these proceedings have much wider implications than just the within proceedings, since it is likely that a determination in this case as to the correct interpretation of the Policy and causation, and to an extent, the determination of certain issues relating to quantum, will affect a significant number of other policyholders' claims for cover under the… Policies. As noted above, the Defendant provides cover… to in or around 1,077 of public house owners.*
>
> *36. Although each dispute takes place in an individual factual context, the defendant considers that a ruling from this Honourable Court on the correct interpretation of the… Policies will significantly expedite the resolution of individual cases, ensure*

consistency, and avoid the unnecessary incurring of costs for all involved.

37. Having regard to the complex issues which arise, I say and believe that it is in all parties' interests that a case proceed, by way of in effect, a test case, so that as many of the legal issues as possible which arise can be determined as quickly as possible with the potential of avoiding the incurring of unnecessary costs by way of the initiation of multiple arbitrations and/or proceedings concerning the same issues."

It should be noted, in this context, that it appears to have been envisaged originally that the Sean's Bar proceedings would go forward as a test case. However, it was subsequently agreed between the parties that the issues of liability in all four of these cases should be tried together. That arrangement appears to me to be entirely consistent with the approach taken by Clarke J. (as he then was) in *Kalix Fund v. HSBC Institutional Trust Services (Ireland) Ltd* [2010] 2 I.R. 581 in which he observed, at p. 602, that there is no reason *"why issues which are common to all or many… proceedings cannot be tried together"*.

(d) The plaintiffs submit that, given its exposure to such a large body of policyholders, the defendant has derived a much greater benefit from having the issues in these cases clarified than any of the individual plaintiffs. They submit that the clarity thereby afforded to FBD will result in FBD saving significant costs in future litigation or arbitration

when faced with claims brought by other policyholders. In such circumstances, the plaintiffs make the case that the proceedings fall squarely within the type of scenario envisaged by Lord Woolf in the *Excelsior* case.

(e) The plaintiffs also refer to the manner in which the Central Bank has indicated that it has an expectation that the reasonable costs of policyholders will be paid in any test case relating to the interpretation of an insurance policy in the context of the COVID-19 pandemic. The plaintiffs have placed particular reliance upon the Central Bank Supervisory Framework document entitled *"COVID-19 and Business Interruption Insurance"* in which the Central Bank noted, in para. 2, that the issue as to whether or not business interruption insurance policies provide cover for the losses arising from Government measures taken in response to the pandemic has *"become a central issue both in Ireland and internationally"*. This document sets out the Central Bank's expectations of regulated financial service providers ("*RFSPs*") which includes FBD. In para. 14 of the same document, the Central Bank states:-

> *"14. Where policyholders have commenced litigation against an RFSP, and it is agreed between the parties that the case has the potential to act as a "test case" for the determination of issues in relation to BI insurance policies for wider groups of customers, the Central Bank has the following expectations:-*

(i) RFSPs should be cognisant of the significant costs burden faced by such plaintiff policyholders and should consider how the issues in dispute can be narrowed to ensure that the litigation can proceed in the least costly and most expeditious manner possible, reflecting the RFSP's obligation to act fairly, honestly and professionally in the best interests of its customers;

(ii) In circumstances where the RFSP obtains the benefit of a court's interpretation of the relevant policy wording in its determination, and in consideration of the financial burden placed on the customer plaintiffs to mount the litigation to have their claims under the policy determined, an RFSP should agree:-

(a) to pay the reasonable costs of such customer plaintiffs in agreed test case litigation, to be assessed in default of agreement; and

(b) should not seek its costs against these plaintiffs."

The Central Bank document does not explain what the Central Bank has in mind in terms of *"reasonable costs"*. The plaintiffs submit, however, that, as the judgment of Simons J. in *Doyle v. Donovan*

[2020] IEHC 119 demonstrates, legal practitioner and client costs can constitute *"reasonable costs"*. In that case, Simons J. made an order pursuant to O. 99, r. 10(3) on the basis of the manner in which the defendant conducted itself in the litigation. In para. 32 of his judgment, he said that, in making an order pursuant to O. 99, r. 10(3), his intention was that:-

> *"...the plaintiff will recover costs at a higher level than the usual "party and party" basis, and that the adjudication will allow all reasonable costs (even if such costs are not strictly speaking "necessary" in the sense that the term is understood for the purposes of adjudication). For example, the costs are to include the costs of both senior and junior counsel before the High Court, and to include the costs of the written legal submissions filed."*

That is not to say, however, that party and party costs might not also constitute *"reasonable costs"*. It is important to keep in mind, in this context, that Schedule 1 to the 2015 Act expressly makes clear, in para. 1, that a Legal Costs Adjudicator, in adjudicated on a bill of costs, is required to apply the principle that the costs have been reasonably incurred and that the costs are reasonable in amount. That principle applies to both party and party costs and legal practitioner and client costs.

77. On the basis of the factors outlined above, the plaintiffs submit that there was an *"undeniable public interest"* in the outcome of these proceedings. They submit that it would be unfair to require the plaintiffs to bear any portion of their own costs in

these circumstances. They suggest that this chimes with the expectation expressed by the Central Bank in its Framework document and that it also chimes with FBD's obligation to act in the best interests of its customers at all times. Counsel for the plaintiffs also submitted that the principal judgment had implications beyond the FBD policies. It was submitted that, in considering the question of costs, I should take judicial notice of the fact that the Central Bank has, since the principal judgment was delivered, been urging other insurers to honour policies in light of the judgment. Counsel further suggested that there was a difference between a test case such as that which arose recently in relation to the large number of proceedings against Allied Irish Banks Plc in connection with the so-called Belfry Fund and the present case. Counsel submitted that there is a qualitative difference between the private investor who puts money into a product of some sort with a view to making a profitable return (which counsel suggested was the object of the exercise in the context of the Belfry Fund) which it was suggested was at *"one end of the spectrum"* and the position of the plaintiffs here who were obliged to take out insurance by law and for whom insurance is *"an absolutely crucial aspect of their business and for all of the thousands of people, employees and the like who depend on those businesses"*. Thus, while it was accepted that not every test case would justify a departure from the ordinary rule under O. 99, r. 10(2), it was submitted that these cases, being at the *"opposite end"* of the spectrum, should be considered for this purpose. In the case of Sean's Bar, counsel submitted that the plaintiff there was interested solely in ensuring that there was cover which the plaintiff understood was available under the FBD policy. Undoubtedly, the plaintiff in those proceedings became involved in expensive litigation but it was suggested that he did so by invitation of FBD (as the first nominated test case). Counsel further noted that the plaintiff in those proceedings had

not sought to add to the burden of costs and had confined its evidence to one expert witness (which was a shared witness).

78. FBD submitted, on the other hand, that the application made by the plaintiffs for an order for costs on the legal practitioner and client basis represented a significant departure from established legal principles. Counsel for FBD submitted that the clear thrust of the jurisprudence to date in Ireland is that an award of costs on that basis is only appropriate, in truth, where the court wishes, in some way, to express its disapproval of the conduct of a litigant or where there has been some flagrant breach of the rules or of a court order. Counsel stressed that no authority has been put before the court that offers support for the proposition that, because a court action is a test case, there is any basis to award costs on a legal practitioner and client basis. Counsel for FBD referred, in this context, to the decision of Barrett J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697 where the principles governing the making of an order on a *"solicitor and client"* basis were summarised in a passage (subsequently followed by Simons J. in *McCool Controls and Engineering Ltd v. Honeywell Control Systems Ltd* [2019] IEHC 749) in the following terms:-

> *"It seems to the court that the principles applicable to making an order of costs on a solicitor and client basis might be summarised as follows. First, in making such an order the court departs from the normal measure of costs. Second, this being so, there has to be a reason why the court departs from the usual order. Third, as indicated in Geaney, and accepted by the court as correct, the court will order costs on a solicitor and client basis when the court wishes to mark its especial disapproval and/or displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought."*

79. Counsel for FBD emphasised that, in all of the cases to date, the only ground on which the court had seen fit to depart from the primary rule under O. 99, r. 10(2) (as it now is) was in the circumstances noted by Barrett J. in the *Dunnes Stores* case. The decision of Simons J. in *Doyle v. Donovan* was also consistent with this line of authority as was the decision of Barniville J. in the *Trafalgar* case.

80. It was submitted on behalf of FBD that considerable assistance can be obtained from the judgment of Clarke J. (as he then was) in *Cork County Council v. Shackleton* [2007] IEHC 334. While that case was not concerned with the award of costs on anything other than a party and party basis, it nonetheless addressed the circumstances in which the status of proceedings as a *"test case"* was relevant in the context of an award of costs. In that case, the applicant County Council succeeded in setting aside the award of the respondent acting in his capacity as property arbitrator. The application had been opposed by the notice party, Murphy Construction. Although the notice party had failed, it nonetheless sought an order for costs as against the County Council on the basis that the proceedings were, in substance, a test case which was of general application to many parties and which was necessitated by virtue of the difficulties encountered in interpreting and construing the relevant legislation. In para. 4.1 of his judgment in that case, Clarke J. stressed that, while the court retains a discretion to depart from the ordinary rule in relation to costs, that discretion *"...needs to be exercised against a background of appropriate principles. To state that the court retains a discretion is not to give the court carte blanche ... all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned"*. With regard to the status of test cases, Clarke J. continued in para. 4.2 of his judgment:-

> *"Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising. Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case…"*

81. FBD relied on that observation by Clarke J. and submitted that there is no good reason for departing from the normal rule in the present case which involves a dispute between commercial entities on both sides. In particular, FBD stressed his observation that where proceedings involve entirely private parties, there is no proper basis to depart from the ordinary rule in relation to costs.

82. FBD also referred to the judgment of Finlay Geoghegan J. in the Court of Appeal in *Sony Music Entertainment (Ireland) Ltd v. UPC Communications Ireland Ltd* [2017] IECA 96 in which the defendant opposed the making of an order for costs against it on the ground that it had been sued as a non-infringing internet service provider and on the ground that the issues in the case were novel and were in the nature of a test case. In the High Court, the trial judge suggested that the novelty of the issue was potentially a special circumstance to which some weight could be given in the context of the award of costs. In the Court of Appeal, Finlay Geoghegan J. said at paras. 16 to 19 of her judgment:-

"16. UPC contend that this was a permissible special circumstance. Further that [the trial judge] *should also have taken into account that the proceedings were in the nature of a test case for the wider industry and should have resulted in a greater diminution of the order for costs.*

17. The plaintiffs… submit that in litigation between private parties the fact that it is in the nature of a test case does not warrant a departure from the ordinary rules that costs follow the event…

18. I accept the submission on behalf of the plaintiffs that in accordance with the reasoning of Clarke J. in Cork County Council v. Shackleton… at para. 4.2 in litigation between private parties the fact that a case may be considered to be a test case is not, in general a proper basis for departing from the general rule in relation to costs… There may, of course, be other special features of a particular test case which might justify a departure from costs following the event. As appears from his judgment on costs the trial judge did not in any way rely upon the fact that he considered these proceedings to be a test case and in my view he was correct in so doing.

19. …I would hesitate to agree that even such novel and complex issues would of themselves amount to special circumstances which would justify a departure from making an order that costs should follow the event."

83. In the course of the appeal to the Court of Appeal, the plaintiffs in the *Sony Music* case sought an order for the costs of the appeal as against the defendant on a solicitor and client basis arising from the way in which the defendant had pursued what was contended to be a wholly unmeritorious argument. This was rejected by the Court of Appeal. Finlay Geoghegan J., at para. 30 of her judgment, said that she did not consider that there was a basis for an award other than on the ordinary party and party basis. She added:-

> *"It is inevitable that a defendant who disputes a liability issue may also wish to make submissions on further issues, whether they be quantum or other issues which would arise if the Court finds against the defendant on the disputed liability issue."*

84. Insofar as the *Excelsior* case is concerned, counsel for FBD submitted that the observations of Lord Woolf on which the plaintiffs seek to rely are *obiter* only and that, in any event, Barniville J. in the *Trafalgar* case had cautioned that the English cases were of limited assistance in Ireland. It was further submitted that no proper basis had been identified by the plaintiffs here for departing from the usual rule enshrined in O. 99, r. 10(2). Quite apart from the lack of authority, FBD also submitted that the plaintiffs had overstated the way in which they claimed to have been forced to participate in a test case. Counsel suggested that, on the contrary, all of the plaintiffs had wanted to participate in the test cases. FBD had proposed a single test case – namely the Sean's Bar case – but each of the other plaintiffs had pressed that their cases should also be heard at the same time.

85. Insofar as it is suggested by the plaintiffs that they will be saddled with an unfair costs burden if the court does not award costs on an indemnity basis, counsel for FBD expressed surprise that none of the plaintiffs has actually put any evidence

before the court as to what that burden would be. Counsel for FBD drew attention to the correspondence which has passed between the parties and submitted that it was not appropriate to ask the court to make any determination that costs should be awarded on a legal practitioner and client basis in the absence of any appropriate evidence.

Discussion and decision in relation to costs

86. In my view, it is significant that no Irish authority has been cited by the plaintiffs for their contention that it would be appropriate for a court, in a test case, to award costs on a legal practitioner and client basis. It must be borne in mind that test cases (in the same sense in which that word is used in these proceedings) have come before the courts on a reasonably regular basis over a long number of years. Historically, the fact that such proceedings have the status of test cases is something which has always been taken into account during the course of the taxation (now the adjudication) of costs. It has, for a long time, been recognised that, on a party and party taxation, the fact that the relevant proceedings in which the order was made constitute a test case is a factor which justifies a higher allowance in respect of the successful party's costs than might be measured in other litigation. However, this factor has been taken into account not at the stage the court makes its order for costs but at the stage when the costs come to be measured (historically by the Taxing Master and now by the Legal Costs Adjudicator). In several test cases, there have been reviews of taxation which have come before the court and which have been the subject of written judgments. Those judgments acknowledge that the status of proceedings as a test case is a relevant factor to be borne in mind by the assessor of costs (now the Legal Costs Adjudicator) in measuring the appropriate level of costs.

87. An example is to be found in the decision of Kinlen J. in *Gaspari v. Iarnród Éireann/Irish Rail* [1997] 1 ILRM 207. In that case, the plaintiff was a passenger on a train travelling between Dublin and Knock, County Mayo. Cattle invaded the railway tracks. The cattle were owned by the third named defendant but were grazing on lands of the second named defendant. The train collided with the cattle and a significant number of passengers on the train were injured. In turn, this resulted in a significant number of personal injury claims being pursued against all three defendants. The plaintiff's case was the first of the passenger cases to come to trial. An issue arose as to whether it was truly a test case. The defendants did not accept that it was. The plaintiff's solicitor's instructions fee was claimed at IR£150,000 but was reduced by the Taxing Master on taxation to IR£90,000. This was the subject of a motion to review brought to the High Court which was heard by Kinlen J. He came to the conclusion that the proceedings were in the nature of a test case. Although the damages were modest, the case established the duty of carriers and of persons using accommodation crossings across railway lines. In view of the status of the case as a test case, Kinlen J. increased the instructions fee from IR£90,000 to IR£120,000.

88. A further example is to be found in the decision of Kearns J. (as he then was) in *Superquinn Ltd v. Bray UDC* [2001] 1 I.R. 459. In that case, a storm known as Hurricane Charlie caused catastrophic flooding in Bray, County Wicklow in August, 1986. Upwards of 500 properties were damaged consisting of both residential and commercial properties, one of which was the Superquinn premises in Little Bray. The ensuing damage led to widespread claims being brought against various insurers, one of whom, Eagle Star, exercised it subrogation rights via the plaintiff against a number of potential defendants. The case was heard by Laffoy J. who gave judgment exonerating all of the defendants from any responsibility. The defendants were

awarded their costs against the plaintiff. Issues subsequently arose as to the allowances made by the Taxing Master and this was the subject of a motion to review which was heard by Kearns J. At p. 478 of the report, Kearns J. noted that the Taxing Master, in the course of the taxation, had taken into account that there was a *"test case dimension"* to the proceedings. Brief fees of IR£52,500 were claimed by senior counsel for the first named defendant. These were reduced by the Taxing Master to IR£18,000. In the High Court, Kearns J. increased the brief fees by IR£7,000 to IR£25,000 each. He did so on the basis that, as explained at p. 481:-

> *"This is in recognition of the complexity and degree of preparation which the case entitled and its test case character which I feel was insufficiently recognised by the Taxing Master."*

Insofar as instructions fees were concerned, the solicitors claimed IR£575,000 but these were reduced on taxation to IR£105,000. This was increased by Kearns J. in the High Court to IR£150,000.

89. More recently, McGovern J. in *Kenny v. Ireland Roc Ltd* [2009] IEHC 146 refused to interfere with an assessment of an instructions fee by the Taxing Master at €285,000 in proceedings which addressed a novel issue under the Commercial Agents Directive which arose not only in those proceedings but also in four other proceedings in the Commercial List and in at least twelve other cases. The relevant ruling by Kelly J. is quoted by McGovern J. at pp. 5-6 of the latter's judgment. Kelly J. noted that, strictly speaking, there is no such thing as a test case in this jurisdiction (at least not in the sense in which that term is understood in other jurisdictions) but he nonetheless said:-

> *"...it is not a test case in the sense in which that term is used in other jurisdictions, but it is a test case in a rather more loose and less binding way,*

in that it gave the court an opportunity to have ventilated before it legal questions as to the applicability of this Directive, in circumstances where it was highly likely that the decision in Mr. Kenny's case would have application in many, if not all, of the other cases. So, to that extent, there was an element of the test about it. It was also the first occasion upon which an Irish court was asked to consider questions pertaining to the applicability of the Directive. To that extent, it is a test case also because it was the first case…"

90. McGovern J. held that the Taxing Master was entitled to have regard to the character of the case as described by Kelly J. and refused the defendant's application to review the determination of the Taxing Master who had taken account of its test case status in assessing the amount of the fee.

91. Those decisions were reached in the context of the previous version of O. 99. It should be noted that, under the previous version of O. 99, there was a provision in O. 99, r. 37(22)(ii) which required the Taxing Master to have regard to all relevant circumstances and, in particular, to issues such as the complexity of the item and the difficulty or novelty of the issues involved in the proceedings. The matters to which the Legal Costs Adjudicator is now required to have regard under Schedule 1 to the 2015 Act do not coincide, word for word with the provisions of O. 99, r. 37(22)(ii). However, it seems to me that s. 155 of the 2015 Act, read in conjunction with Schedule 1 of that Act, would clearly continue to permit the Legal Costs Adjudicator to have regard to the circumstances of proceedings as a test case in adjudicating on the level of legal costs which would be appropriate. Thus, for example, s. 155(3) provides that, in determining an application for the adjudication of legal costs, the Adjudicator shall *"to the extent which he or she considers it necessary to do so, consider and have regard to* ***the entire case or matter to which the adjudication relates and the context***

in which the costs arise*"* (emphasis added). Those words seem to me to be sufficiently wide to permit the Legal Costs Adjudicator to have regard to the nature of these proceedings as a test case.

92. Similarly, s. 155(4)(b) provides that the Adjudicator is to determine whether or not *"in the circumstances it was appropriate that a charge be made for the work concerned or the disbursement concerned"* and to determine what *"a fair and reasonable charge for that work or disbursement would be* ***in the circumstances****"* (emphasis added). Again, those words seem to me to be sufficiently wide to make it proper that the Legal Costs Adjudicator should have regard to the nature of proceedings as a test case in determining what is a fair and reasonable charge for the work or disbursement in question.

93. Furthermore, under s. 155(5)(a), the Legal Costs Adjudicator is required, insofar as reasonably practicable, to ascertain, in relation to work, *"the nature, extent and value of the work"*. Those words again seem to me to be sufficiently wide to take into account the nature of proceedings as a test case.

94. Similarly, a consideration of Schedule 1 leads to the same conclusion. Under para. 2(a) of Schedule 1, the Legal Costs Adjudicator is to consider the *"complexity and novelty of the issues involved in the legal work"*. In a test case such as these proceedings in which a myriad of difficult issues were raised, that is a consideration which will arise with particular force.

95. In addition, under para. 2(d) of Schedule 1, the Adjudicator is required to have regard to the urgency attached to the matter by the client and whether this requires the legal practitioner to give priority to the matter over other matters. That is a factor which seems to me to arise most definitely in the present case where the proceedings were brought to trial in a very attenuated timeframe. The proceedings were entered

into the Commercial List in May, 2020 and were heard in October, 2020. In the intervening period, the pleadings had to be completed (with significant exchanges of requests for particulars and responses), extensive discovery had to be undertaken and reviewed (which led to a number of applications to the court) and, all the while, the case had to be prepared for trial with witness statements being taken from witnesses as to fact and expert reports procured from experts. I have no doubt that, in these circumstances, all of the lawyers involved were required to work very long hours and to give priority to such work over other matters. This is not something that would have arisen if these cases had not been brought forward for trial at a very early point in order to provide guidance more generally. There are also other paragraphs in Schedule 1 which may be of relevance to the test case status of these proceedings but, it is unnecessary, for present purposes, to refer to them all.

96. In circumstances where, in ordinary course, the test case nature of these proceedings can be factored into the assessment of costs on a party and party adjudication, I can see no proper basis on which to exercise the discretion of the court under O.99, r. 10 (3) to order that they should be assessed on a legal practitioner and client basis. The manner in which test case costs should be addressed is clear from the authorities cited in paras. 87 to 90 above. For the reasons previously advanced, those authorities seem to me to be consistent with the provisions of the 2015 Act discussed in paras. 91 to 95 above. Rather than departing from the usual practice (now embodied in the current version of O. 99 r. 10) of awarding costs on a party and party basis, the appropriate way to take account of the test case nature of these proceedings is to treat it as a relevant circumstance in the adjudication of the plaintiffs' costs by the Legal Costs Adjudicator. That is the way in which the costs of test cases have been addressed to date. In light of that consideration and in light of the long-

established practice of the court to award costs on a party and party basis even in test cases, I am not persuaded that it would be appropriate to take a different course in these proceedings.

97. I appreciate that the plaintiffs have attempted to suggest that these cases deserve to be treated differently to other test cases. As recorded in paras. 76 to 77 above, the plaintiffs highlight the particular importance of these proceedings to the paying party, FBD, and suggest that it has derived a much greater benefit from these proceedings than any of the individual plaintiffs and that the *"clarity"* afforded to FBD will result in a saving of significant costs in future litigation and arbitrations. Reliance was also placed on the suggestion that the resolution of the questions that arose in these proceedings was of wider public importance. However, in my view, similar considerations frequently arise in proceedings of a test case nature and do not sufficiently distinguish these cases from other test cases in the past. Nor can I see any proper basis to distinguish these cases from the Belfry litigation to which counsel for the Lemon & Duke plaintiff referred. Like the investors in the Belfry proceedings, all of the plaintiffs in these proceedings are involved in a process designed to make a profit; the former from the proceeds of a commercial investment, the latter from a commercial enterprise namely the running of pubs.

98. In taking this course, I have not lost sight of the case made by the plaintiffs by reference to the views expressed by Lord Woolf in the *Excelsior* case as outlined in paras. 74-75 above. As noted in para. 73 above, those views were expressed in the context of a different statutory regime in relation to costs and were purely *obiter.* It is striking that, notwithstanding the passage of 19 years since Lord Woolf made those observations, none of the plaintiffs has identified any English authority in which it has subsequently been held that an indemnity order for costs should be granted in a test

case in that jurisdiction. Moreover, I must decide this case by reference to the position in Ireland where, as explained above, the costs of test cases are addressed in a different way.

99. I am, of course, conscious of the terms of the Central Bank Framework document discussed in para. 77 above. However, para. 1 of Schedule 1 to the 2015 Act makes clear that the approach to be taken by the Legal Costs Adjudicator in the context of party and party costs is to consider whether the costs have been reasonably incurred and whether they are reasonable in amount. An order for party and party costs in this case does not therefore appear to be inconsistent with the terms of the Framework document which envisages that regulated financial service providers such as FBD should pay the *"reasonable costs"* of customer cases in test cases. If, however, the Central Bank had some other form of costs in mind, that is a matter which the plaintiffs would need to clarify with the Central Bank and I will give liberty to re-enter the issue of costs in the event that the Central Bank indicates that it intended that parties in the position of the plaintiffs should be paid their costs on an indemnity basis or something approaching that basis.

100. I am also conscious of the importance placed by the Central Bank on the regulatory obligation placed on regulated service providers to act fairly, honestly and properly in the best interests of its customers. However, although the plaintiffs have highlighted this aspect of FBD's obligations, the present application has not been advanced on the basis that FBD is in breach of those obligations in the way in which it defended these proceedings. Had the defence been conducted in breach of that obligation, it may have provided a basis to apply the *Trafalgar* line of authority in support of a legal practitioner and client order. However, that is academic in present circumstances.

101. At this point, the only form of relief which appears to me to be appropriate is to direct that, subject to the position of the plaintiff in the Sinnotts case addressed further below, each of the plaintiffs should recover their costs on a party and party basis against FBD to include each of the elements mentioned in para. 63 above. To the extent that any other elements of costs need to be expressly mentioned in the order, they can be the subject of further submissions in relation to the form of the order. The plaintiffs may also wish to consider making an application for a certificate in respect of matters such as the number of counsel retained. For entirely understandable reasons having regard to the sheer extent of the work to be done in the attenuated time available, there were extended teams of counsel engaged both by the Leopardstown Inn and Sinnotts plaintiffs and by FBD. I note that the Supreme Court, very recently, gave a certificate for four counsel in *Zalewski v. Chief Adjudication Officer* [2021] IESC 29 at para. 13.

102. I should also make clear that, in accordance with the usual Commercial Court practice, any review under s. 161 of the 2015 Act of the determination of the Legal Costs Adjudicator should be heard in the Commercial List and that it would make sense, having regard to my familiarity with the work involved in this case, that any such review should be undertaken by me.

103. With regard to the plaintiff in the Sinnotts case, its case was, after a certain point, run in conjunction with the Leopardstown Inn proceedings with the same team of counsel and the same firm of solicitors. In the course of the hearing on 26th February 2021, it was confirmed by counsel for the Leopardstown Inn and Sinnotts plaintiffs that counsel did not propose to mark brief fees or refresher fees in both sets of proceedings and that the instructions fee that will be proposed by the firm of solicitors will take account of the fact that the bulk of the work, after a certain point,

was done in the Leopardstown Inn proceedings. It has been clarified in a letter dated 26th March, 2021 from that firm to the Registrar that the Sinnotts plaintiff confines its application for costs to a party and party order. It is also acknowledged in that letter that the fees proposed will take account of the commonality between certain of the work carried out in both cases. Against that backdrop, it seems to me to be appropriate to make an order for costs on a party and party basis in the Sinnotts case and leave it to the Legal Costs Adjudicator to decide how the costs should be apportioned as between that case and the Leopardstown Inn case. However, in view of the dispute that has arisen between the Sinnotts plaintiff and FBD as to whether agreement was reached that only one set of costs would be pursued in respect of both sets of proceedings, the order will be without prejudice to the determination of that dispute and will be vacated in the event that a binding determination or agreement is reached that only one set of costs is to be recovered.

104. Finally, I will give liberty to re-enter in the event that the Central Bank clarifies that it expected costs to be paid on a legal practitioner and client basis. I will also list the matter electronically for mention at 10.30 on Friday 7th May, 2021 with a view to allowing the parties, in the intervening period, to agree the form of order to be made on foot of this judgment.