THE HIGH COURT

COMMERCIAL

[2022] IEHC 39

[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. 3) of Mr. Justice Denis McDonald delivered on 28th January 2022

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Introduction

1. This is the third judgment I have given in these proceedings relating to the interpretation of the business interruption provisions of the FBD Public House Policy. In my first judgment delivered on 4th February 2021 ("*the principal judgment*"), I held that business interruption cover was available under the policy in respect of the closure of public houses in March 2020 ordered by the Government in response to the COVID-19 pandemic. This judgment should be read with the principal judgment. I will use the same abbreviations here as I did in that judgment.

2. The principal judgment addressed a significant number of issues relevant to the question as to whether FBD was liable to indemnify the plaintiffs under the policy. As part of that exercise, the court was required to reach a conclusion as to the proper interpretation of the business interruption section of the policy. The court was also required to consider the meaning of a number of specific words used in the policy. The interpretation of the policy and the interpretation of specific words within the policy had all been the subject of extensive debate in the course of the liability hearing which took place in October 2020. However, there was nothing to indicate that there was any dispute between the parties at that time in relation to the meaning of the word *"closure"*. For that reason, its meaning was not the subject of debate or submissions at the liability hearing and, likewise, was not addressed in the principal judgment.

3. The relevant insuring clause of the policy is extension 1(d), This provides that FBD will indemnify the insured where the insured's business is (*inter alia*) *"affected by: -*

> *(1) Imposed closure of the premises by order of the Local or Government Authority following: -*
>
> *...*
>
> *(d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same."*

4. The issue as to the meaning of the word *"closure"* was raised for the first time in written submissions delivered on behalf of Lemon & Duke in January 2021 following the judgment of the UK Supreme Court in the *FCA* case. I should explain that I had been due to give my decision on the liability issues on the same day as the U.K. Supreme Court announced that it proposed to give judgment in the *FCA* case. In light of the imminent publication of that judgment, I agreed, at the request of the parties, to postpone the delivery of the principal judgment until after the *FCA* decision and to give the parties an opportunity to deliver further written submissions in relation to the potential impact of that decision. Subsequently, in the course of the Lemon & Duke submissions addressing the U.K. Supreme Court judgment, the case was made, for the first time, that the word *"closure"* in the policy should be interpreted as including a closure of a part of the premises. Given that this issue had never been debated in the course of the liability hearing, I did not believe that it was appropriate for me to reach any conclusion on it in the principal judgment. However, after the principal judgment was delivered on 5th February 2021, it was agreed between FBD and each of the four plaintiffs that the court would be asked to address the meaning of the word *"closure"* at a further hearing.

5. Following that further hearing in February 2021, my second judgment was delivered on 23rd April 2021 ("*the supplemental judgment*"). Among the issues addressed in the supplemental judgment was the meaning to be given to the word *"closure"* in the policy. In particular, the supplemental judgment addressed the question as to whether the policy contemplated that a closure of a part of a public house premises could be said to fall within the ambit of *"closure"* for the purposes of extension 1(d). I addressed that issue in paras. 20 to 28 of the supplemental judgment. In para. 21, I came to the conclusion that, in order for a *"closure"* to occur, there must be a shutting down of the premises or of a part of the premises. I also expressed the view that a *"closure"* of premises (or of a part of the premises) could not plausibly be considered to be a synonym of either *"hindered"* or *"restricted"*. Extension 1(d) refers to a closure of the premises rather than a closure of the business or a restriction on the business. I indicated, accordingly, that extension 1(d) would not appear to be triggered by every restriction of trading that may be imposed on publicans. On the other hand, I indicated that, if a discrete part of a pub is closed to patrons as a consequence of government measures imposed in response to the pandemic, such a closure would appear to be capable of falling within extension 1(d). However, in circumstances where no evidence had been led by any of the plaintiffs in relation to any form of partial closure, I indicated that it would be necessary to hear evidence on the issue before reaching any final conclusion.

6. Pending further evidence, I also deferred any final decision in relation to cases where closure of a discrete part of the premises cannot be identified. That said, in para. 27 of the supplemental judgment, I expressed the view that, if there is no closure of any part of the premises, it becomes difficult to say that the relevant risk under extension 1(d) has eventuated. Nonetheless, in light of the fact that there would have

to be a further hearing of the proceedings in relation to quantum, I indicated that it would be prudent to defer any final decision on the issue until after more detailed evidence had been given on behalf of the plaintiffs as to how their respective businesses had been affected as a consequence of the COVID-19 measures imposed by the government. It is important, in this context, to keep in mind that each of the four premises has its own distinctive features. In addition to the Lemon & Duke located in central Dublin, the premises comprised the Leopardstown Inn in the South Dublin suburbs, Sinnotts, a sports orientated bar in Dublin city centre and Sean's Bar in Athlone, County Westmeath which claims to be the oldest pub in Ireland.

7. A subsequent hearing took place in July 2021. It had originally been envisaged that the July hearing would deal with an assessment of the quantum of the plaintiffs' respective claims. Regrettably, in the course of preparation for that hearing, it became apparent that there were a substantial number of issues in dispute between the parties which were identified in a comprehensive issue paper agreed between the parties on 12th May 2021. That issue paper was prepared on the direction of Barniville J. with a view to identifying the issues that require to be determined relevant to the assessment of quantum. A total of 21 issues were identified in the issue paper.

8. There was insufficient court time available in July 2021 to deal with all of the issues identified in the issue paper. In those circumstances, the parties agreed, in advance of the hearing, that the issues to be addressed would, for the most part, be limited to a number of points of principle which are in dispute between them. In broad terms, the issues to be addressed were identified by counsel for the plaintiffs, in the course of their opening statements, as follows: -

(a) In the case of each of the three Dublin pubs, an issue arises as to whether the bar counter area of their premises was subject to an

imposed closure during the periods 29th June, 2020 to 18th September, 2020 and 4th December, 2020 to 24th December, 2020 (which I will, from to time, refer to as *"the relevant periods"*). Essentially, the issue relates to whether or not restrictions imposed by Government on the use of the bar counter (as described in more detail below) constituted a partial closure of the premises such as to trigger cover under extension 1(d);

(b) In the case of Sinnotts and the Leopardstown Inn, a similar issue arises in relation to their carvery insofar as they suggest that they were unable to operate the self-service element of the carvery as a consequence of the restrictions;

(c) An issue also arises as to whether each of the three Dublin pubs were subject to an imposed closure within the meaning of extension 1(d) during periods where there was a requirement to close early (i.e. in advance of normal closing time);

(d) In the case of all four public houses (including Sean's Bar), an issue arises in relation to staff costs and, in particular, in relation to whether the plaintiffs are entitled to be indemnified by FBD in respect of staff wages during the periods of closure. This issue arises in respect of staff who were retained or re-engaged during periods of closure and also, in so far as the three Dublin pubs are concerned, staff who were laid off. Evidence was given by each of the plaintiffs at the July hearing in relation to the individual arrangements entered into by each of them with certain of their staff and I was asked to make findings as to whether the amounts payable to these staff members are recoverable

under the policy (although I have not been asked at this point to assess the amounts due). Because each of the four cases required individual assessment by me, this is an issue that has added significantly to the length of this judgment. It takes up 51 pages running from para. 187 to para. 260;

(e) In the case of all four public houses, an issue arises as what constitutes *"the trend"* or an *"other circumstance"* for the purposes of calculating the indemnity payable to the plaintiffs. In summary, each of the plaintiffs maintain that certain sporting events scheduled to be held during the relevant indemnity periods covered by the policy constitute an *"other circumstance"* for the purposes of the calculation. They also contend that growth in their respective businesses and price increases should be taken into account as relevant *"trends"* for the purposes of the calculation of the indemnity due. It was agreed that this issue would be addressed *"in the abstract"*. I am not asked to make any definitive ruling as to the amounts that might be due to any of the plaintiffs in the event that they succeed in their case as to the proper meaning of the words *"the trend"* and *"other circumstances"*;

(f) In the case of all four public houses, an issue arises as to whether the plaintiffs are entitled to damages from FBD arising out of any additional loses which they may have suffered because of the alleged failure of FBD to indemnify them within a reasonable time. This will be described in this judgment as the *"late payment issue"*;

(g) I am also asked to consider whether FBD is entitled to pursue any issue in relation to alleged underinsurance. Each of the public houses

maintain that FBD is not entitled to pursue this issue in circumstances where it has never been raised in the pleadings and was not identified in the issue paper agreed on 12th May 2021;

(h) Insofar as Sean's Bar is concerned, it was the subject of much longer periods of closure than the Dublin pubs. It did not serve a substantial meal and, accordingly, was treated as a *"wet bar".* During those periods of closure, it carried out a number of improvements to its premises which involved capital expenditure. The following issues arose with specific reference to it: -

(i) Whether Sean's Bar is entitled to be indemnified in relation to capital expenditure even where such expenditure continues to have a value for the bar after the end of the indemnity period;

(ii) If FBD is not liable to indemnify Sean's Bar for such proportion of the capital expenditure that benefits the business of the bar after the end of the indemnity period, how is that proportion to be measured?

(iii) Whether, in circumstances where Sean's Bar was closed in the period between 15th March, 2020 and June, 2021, the expenditure can be said to meet the test set out in the policy, namely that it was *"necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction of gross profit during the indemnity period…"*.

9. The precise terms of the above issues are set out in more extensive detail in the issue paper of 12th May 2021. For completeness, I have extracted the text of the relevant paragraphs of that issue paper and replicated them in the schedule to this

judgment. It should be noted that the underinsurance issue described above is not identified in the issue paper. It should also be noted that, on Day 4 of the hearing, I was informed that, following a meeting between experts, agreement had been reached between FBD and Sean's Bar in relation to the issues described in para. 8(h) above. It is therefore not necessary for me to address them.

10. Apart from the issues summarised in para. 8, a further issue which requires to be resolved is whether FBD is entitled to raise a question in relation to the applicable indemnity periods for Sean's Bar notwithstanding that, in the issue paper, FBD expressly accepted that Sean's Bar was the subject of two indemnity periods, the first commencing on 15th March, 2020 and ending on 21st September, 2020 and a second commencing on 7th October, 2020 which continued until the end of the maximum indemnity period available under the policy. In this context, it is important to note that Sean's Bar was closed for the entire period commencing on 15th March 2020 until 7th June 2021. It has always made the case that it was not in a position to serve a substantial meal and was characterised as a *"wet pub"*. As explained in para. 8 of the supplemental judgment, wet pubs outside Dublin were the subject of an imposed closure from 15th March 2020 to 21st September 2020. It should be noted that the relevant dates during which such pubs were permitted to open are different to those which applied to public houses in Dublin such as Lemon & Duke, Sinnotts and the Leopardstown Inn. They were briefly permitted to reopen in the period between 21st September 2020 and 7th October 2020. Although Sean's Bar was permitted to open in that period, it did not do so. Unsurprisingly, FBD maintained (and, ultimately, Sean's Bar accepted) that Sean's Bar is not entitled to an indemnity for the period when it could have opened between 21st September 2020 and 7th October 2020. Consistent with that approach, FBD, in outlining its position in the issue paper, expressly

accepted that there were two periods of indemnity applicable to the claim made by Sean's Bar, one running from the date of the first closure on 15th March, 2020 and ending on 21st September, 2020 and a further indemnity period commencing on the second closure, namely 7th October up to June, 2021. However, on 29th June, 2021 (just one week prior to the commencement of the hearing on 6th July, 2021), FBD's solicitors wrote to the solicitors acting for Sean's Bar to say that, if the remaining three plaintiffs succeeded in establishing that their premises were subject to a partial imposed closure for the purposes of the FBD policy:-

> *"it would follow that your client was the subject of an imposed closure during the period from 22 September 2020 to 6 October when it was entitled to serve customers seated indoors but did not do so. The result of such a finding would be that your client has a single indemnity period commencing on 15 March 2020 and ending on 15 March 2021…"*

In the course of the July hearing, FBD sought to make a case to that effect but Sean's Bar has contended that, in light of the approach taken in the issue paper and the steps taken by Sean's Bar in the intervening period in preparing for a trial, FBD is not entitled to pursue this point as against Sean's Bar in these proceedings.

11. I deal below with the issues described in paras. 8 and 10. However, as explained further below, I am unable to address the late payment claim at this stage. In addition, given what I was told on Day 4, it is unnecessary to address the questions summarised in para. 8(h).

The restrictions on the use of the bar counter

12. As outlined in para. 2.22 of the opening submissions delivered on behalf of Sinnotts and the Leopardstown Inn, they make the case that the bar counter, being a *"part of the licensed premises"* was not permitted to open at any time since 15th

March, 2020 and that this clearly constitutes a *"shutting down of... part of the premises"* within the meaning of the supplemental judgment. A similar argument is advanced on behalf of Lemon & Duke. In contrast, FBD argues that the bar counters could be put to some use during the relevant periods and, therefore, it could not be said that they were shut down.

13. In order to address this issue, it is necessary to identify the restrictions which were placed on the use of bar counters during the relevant periods. As noted above, there are two periods in issue, namely the periods between 29th June 2020 and 18th September 2020 and the period from 4th December 2020 to 24th December 2020. These were the periods during which public houses serving *"substantial meals"* were entitled to open. The issue which I have to consider is the extent to which the restrictions imposed during those periods could be said to give rise, in the case of the three Dublin pubs (Lemon & Duke, Sinnotts and the Leopardstown Inn) to a partial closure of their premises within the meaning of extension 1(d).

14. The relevant regulations governing the reopening of public houses on 29th June, 2020 are the Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 3) Regulations, 2020 (S.I. No. 234 of 2020) ("*the No. 3 Regulations*") which came into operation on 29th June, 2020. Initially, this was intended to be in force until 20th July 2020 but this timeline was subsequently extended. Regulation 6(1) required occupiers of premises to take all reasonable steps to ensure that members of the public were not given access to the premises where a business of the type specified in Regulation 6(2) was carried on. Among the types of business specified in Regulation 6(2) was the sale of intoxicating liquor but this was subject to an exception where a substantial meal was served. Regulation 6(2)(c) was 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."*

15. The effect of the No. 3 Regulations was that publicans were required to refuse access to members of the public unless they ordered a substantial meal. The No. 3 Regulations were silent in relation to the operation of bar counters. However, the Dublin pubs have drawn attention to a variety of other material which they contend led them to understand that they were not permitted to use the bar counter for the purposes of serving members of the pubic.

16. In the first place, they drew attention to the joint proposal made in May 2020 by the Licensed Vintners Association ("*LVA*") and the Vintners Federation of Ireland ("*VFI*") in which they set out their suggestions to Government as to how to manage social distancing in a bar environment. In that proposal, it was stated that bar counters would be *"dispense bars only, with no sitting, standing, ordering, payment, or drinking allowed at the bar/counter"*. The proposal also stated that table service would be the *"only permitted means of service for either food or drink orders"* and that all customers would be required to remain seated at tables. I was also referred to the press conference given by the then Taoiseach on 5th June, 2020 in which he stated

that *"pubs and bars can operate as if they were restaurants, but they won't need to have a restaurant licence"* and that it would not be a case of *"people sitting at a bar… hanging around and standing as you might like to do"*.

17. Notwithstanding the terms of the LVA/VFI proposal, neither the No. 3 Regulations nor the official guidelines expressly stated that customers could not be served at bar counters. Nonetheless, the Dublin pubs rely on the guidelines in support of their case that they were required to close the bar counters of their premises. They contend that, when the guidelines are read as a whole, they required the closure of the counter to customers.

18. The first such guidelines for reopening pubs were published on 17th June 2020 (in a joint publication by the Government and Fáilte Ireland). The guidelines stated that they constitute a living document *"which means that, as Government restrictions and Public Health guidelines evolve, this document will also evolve to reflect new Government advice and changes to protocols when they emerge"*. In the introduction to the guidelines, it was stated that a protocol had been developed under the aegis of the Safety Health and Welfare Act 2005. The introduction further stated that compliance with the guidelines would be enforced by the Health and Safety Authority ("*HSA*"). It was further stated that: *"Non-compliance can result in the closure of a business"*. Thus, although these measures were framed as "guidelines", they were clearly intended to be acted upon by publicans and they also carried a message that a failure to comply could have significant consequences.

19. Section 5 of the guidelines addressed the need for physical distancing. The guidelines specified that floor markings should be used to facilitate the physical distancing advice of two metres. In the case of seating, it provided that a similar distance should be maintained between tables but that, where this was not possible, it

could be reduced to one metre in controlled environments that complied with the additional safety measures identified in Appendix 1 of the guidelines. The Dublin pubs highlight that the guidelines specifically stated that: -

> *"It's the responsibility of supervisors and managers to ensure that customers do not congregate in groups.* ***Customers should be seated at a table*** *except when using the toilet, paying, and departing."* (emphasis added).

20. However, the guidelines did not prohibit use of the bar counter for all purposes. In the course of his evidence on Day 2 of the hearing, Mr. Chris Kelly of Sinnotts accepted that, under the guidelines, a customer could pay at the bar counter. The extracts from the guidelines quoted in paras. 16 and 19 above confirm this. It is also clear from the guidelines that employees could work behind the bar. Thus, at p. 14 of the guidelines, it was stated that employees must maintain the recommended physical distance from each other behind the bar. For this purpose, it was indicated that there should be a limit on the number of employees behind the bar at one time, a record should be kept of who is on duty and the bar should be divided into areas or zones allocated to each employee. In this context, these references in the guidelines to the *"bar"* are obviously intended to signify the bar counter.

21. There was significant controversy between the parties in relation to the following paragraph which appeared on p. 13 of the guidelines under the heading "*Front of House"*. The paragraph in question stated: -

> *"In circumstances where table service is not provided, customers will be encouraged to maintain physical distancing* ***whilst ordering from a dedicated service area at the bar****, with a partition in place between the customer and the bartender."* (emphasis added).

22. In the course of cross examination of the plaintiffs' witnesses, it was therefore suggested that it was *"clear as day"* that the guidelines anticipated that customers could order from the bar. Mr. Kelly, on behalf of Sinnotts, responded to say that there were *"anomalies"* in the guidelines but that, when read as a whole, the only form of service permitted was table service. Mr. Noel Anderson (who gave evidence on behalf of Lemon & Duke), accepted, in the course of cross-examination on Day 3, that, from time to time, he served takeaway coffee to customers who came up to the bar counter. However, he was strongly of the view that, for all other purposes, customers were not permitted to sit or stand at the bar counter. His evidence was: -

"Q. I want to bring you back ... then to the question of the bar.

A. Sure.

Q. You told the Court that your clear understanding of the regulations was that the bar counter was never to be used. I think that's the expression --

A. Yes.

Q. -- you used in your evidence. Just so we're clear as to what you actually mean by that, you're not, obviously, excluding its use by staff, isn't that correct?

A. That's correct, yeah.

Q. And matters of that sort?

A. Yeah.

Q. You're really saying customers could not sit there, isn't that the point?

A. Sit there and mingle and dance and drink and...

Q. And you go somewhat further; you say that customers couldn't purchase drinks at the bar, isn't that right?

A. I think the way we would try and do it is that somebody would sit at a table,

you'd seat somebody at a table and chairs. I think the odd anomaly could come in where you're allowed do kind of takeaway food and drink services. So, for example, I would've seen -- I covered a manager last Saturday ... so two ladies came in and asked for two cappuccinos to go, I just said 'Sure, just stand off counter', made them the two cappuccinos, made the purchase and they left. So, for me, that's kind of slightly different, because you couldn't say to them 'Sit at a table', because they were going.

Q. Sure. And I think we all understand the common sense of that.

A. Mm-hmm.

Q. And I think we all understand that that's not something that's actually precluded under the guidelines either, isn't that right?

A. I think the section that you point to on page 13, I think that's kind of where it refers to it.

Q. I think that's probably right, Mr. Anderson. I think we're probably agreeing, perhaps unexpectedly, on that.

A. Thank God.

Q. So there's clearly no problem with the guidelines in terms of somebody coming in and, as you say, buying their cup of coffee; that's fine, isn't it?

A. I would think so, yeah."

23. In this context, it is important to recall that the No. 3 Regulations did not prohibit a bar from operating a takeaway service. It would not be surprising in those circumstances that the guidelines should make some provision for the safe management of people attending a public house for the purposes of any such service. That said, it is not immediately apparent that this was the sole intention of the relevant

paragraph of the guidelines. Thus, for example, there are other aspects of the guidelines that envisage that a public house might continue to carry on, subject to compliance with certain conditions, a self-service carvery which would involve customers approaching a counter for that purpose. With this in mind, p. 9 of the guidelines stated: -

> *"**Self-Service Carvery/Buffet***
>
> - *This style of service must only be provided where physical distancing and other Public Health advice can be followed.*
> - *Physical distancing guidance must also be followed while queuing. See Queuing section above to ensure appropriate risk mitigation measures are in place. Customer access to buffet/ carvery/open food display should be staggered and a one-way system introduced."*

24. The reference in that extract to *"queuing"* is a reference to a further provision on the same page of the guidelines which, as outlined in para. 19 above, required that floor markings should be used to facilitate compliance with the physical distancing advice of two metres. Similar guidance was also given on p. 15 of the guidelines which also made clear that employees must serve up and plate food at a carvery in a manner designed to limit shared use of utensils. These provisions of the guidelines clearly envisage that counter service would be possible at least for the service of food to queuing customers.

25. The provisions of the guidelines dealing with function rooms and outside smoking areas also suggested that some use could be made of bar counter areas. Thus, on p. 16 of the guidelines it was stated that: -

> "*To reduce queues in bar areas, customers must be encouraged to remain seated and order from their seat wherever possible."*

26. The use of the words *"wherever possible"* implies that the guidelines recognised that seated service might not always be possible. As Mr. Colin Scott (the engineering expert who gave evidence on behalf of FBD) observed on Day 4 of the trial, this language would suggest that it is envisaged that, potentially, there may be situations where customers could order from the bar. On the other hand, the requirement that customers should be seated at a table had the effect that, to paraphrase Mr. Anderson, they could not sit at the bar counter or drink there.

27. The guidelines were subsequently revised on 23rd June 2020, 6th July 2020, 24th August 2020, 2nd September 2020, 21st September 2020 and 1st December 2020. It should be noted that in the version published on 24th August 2020, the paragraph quoted in para. 21 above was removed. On p. 2 of this edition of the guidelines it was stated that they had been *"updated in line with Government Public Health advice"*. This coincided with the publication on 18th August, 2020 of a statement issued by the Department of the Taoiseach against the backdrop of an increase in the prevalence of Covid-19 in Ireland. The statement dealt with a number of activities including public houses that served food. The statement expressly indicated that: -

> **"***All customers to be seated at a table, with no seating allowed at the bar and table service only."*

This statement was put to Mr. Kelly of Sinnotts in the course of his cross-examination by counsel for FBD. In response, Mr. Kelly sought to characterise it as *"clarifying"* what had been said in the earlier versions of the guidelines. He did not accept that the requirement was new.

28. It was not until further guidelines were issued on 14th September 2020 that, consistent with the Department statement, explicit provision was made in the guidelines that the bar counter could not be used for seating or serving customers. On

p. 20 of this version of the guidelines (which came into operation one week later on 21st September), it was expressly stated that: *"Customers must remain seated and order from their seat"* and that "*The bar counter cannot be used for seating or service to customers"*. However, the section of the guidelines dealing with the use of the bar by employees remained in place. Mr. Scott also emphasised the statement on p. 19 (dealing with glassware) to the effect that, when pouring drinks, employees were required to handle glasses by the stem or base and "*place on clean service trays* ***or the bar counter*** *before serving"* (emphasis added). In his evidence on Day 4 of the hearing, Mr. Scott characterised this as the form of everyday operations at bars that "*we are all familiar with"*. I have to say that I would not go that far. I agree that it reflects an aspect of everyday operations but, crucially, it does not include the most recognisable feature of a traditional bar counter, namely the service of customers either seated or standing at the counter.

29. In December 2020, further guidelines were issued with effect from 4th December 2020. These guidelines were in a different format to the previous version of the guidelines but continued to provide similar guidance in relation to physical distancing, queuing, limitations on the number of employees behind the bar and they also contained an explicit statement that: *"Table service only. Customers not permitted to sit at the bar counter"*. There were several iterations of the guidelines in December 2020 but all of them contained a similar statement.

30. In the circumstances described above, it is clear that, as from 21st September, there was an explicit requirement in the applicable guidelines that customers should not sit at the bar counter. The position in relation to the period prior to the 21st September 2020 guidelines is less clear. However, each of the three Dublin pubs strongly contended at the hearing that they understood that they were not permitted to

use the bar counter for service to customers proposing to eat or drink on their premises. In their closing written submissions, Sinnotts and Leopardstown Inn have contended that the guidelines on 3rd September 2020 contained a similar explicit statement to that quoted in para. 29 above. However, I believe that they are mistaken in so contending. The first set of guidelines to which I have been referred which contains such a statement are those issued on 14th September 2020 which came into effect on 21st September 2020.

31. More importantly, the plaintiffs also rely on the terms of the Health Act, 1947 (Section 31A-Temporary Restrictions) (COVID-19) (No. 4) Regulations 2020 (S.I. 326 of 2020) (*"the No. 4 Regulations"*) the relevant provisions of which came into operation on 3rd September 2020. Under Regulation 13(1)(d) a publican was prohibited from serving food or beverages unless they were consumed in accordance with the Regulation 11 *"whilst such… person… is seated at a table"*. Insofar as relevant, the reference to Regulation 11 is a reference to the requirement that the customer was required to order a substantial meal. On this basis, the Dublin pubs contend that, irrespective of the position under the guidelines, it is clear that, from at least 3rd September 2020, service of customers at the bar was prohibited. That seems to me to be correct but the Dublin pubs go further and contend that the effect of the June guidelines was to prohibit publicans from serving customers seated at bar counters. They accordingly submit that, for the entire of the periods in issue, there was a prohibition on the use of the bar counter for the service of customers (other than on a take-away basis) and that, equally, customers were barred from sitting or standing at the counter.

32. Ultimately, I do not believe that it is necessary to spend time on the position prior to the coming into force of the No. 4 Regulations. In the course of the closing

submissions on behalf of FBD on Day 8 of the hearing, it was very helpfully clarified by counsel that FBD was not making a point in relation to the pre-September period. Counsel accepted that, for the purposes of this judgment, I could proceed on the basis that, in the event that I find that there was a partial closure of the plaintiff's premises as a consequence of the restrictions imposed by the No. 4 Regulations on the use of the bar counter, FBD was not seeking to argue that this occurred for the first time in September, 2020. In other words, FBD accepts, for the purposes of this judgment, that the period before 3rd September 2020 should be treated as subject to the same restrictions as those which applied subsequent to that date. Consequently, I can proceed on the basis that the same level of restriction prevailed throughout the relevant June-September 2020 period. FBD, however, robustly maintains that, even on this basis, the bar counter could not be said to be closed.

33. In the circumstances, it is unnecessary to consider the evidence that was given about enforcement of the guidelines by members of An Garda Síochána. This was expressly accepted by counsel for FBD at p. 83 of the transcript on Day 8. While paras. 6 and 7 of the FBD written submissions delivered on 28th July 2021 (subsequent to the hearing) raise questions about the evidence available in relation to enforcement of the guidelines, I do not believe that such submissions are consistent with the concession made on Day 8. In my view, neither side was entitled to adopt a position in their post-hearing submissions that was contrary to the case made at the July hearing. That was not the purpose of such submissions.

The issue to be resolved in relation to the bar counter

34. In light of the concession made by FBD on Day 8, it seems to me that the question which I have to consider is whether the guidelines had the effect of requiring the closure of the bar counters during the relevant June-September, 2020 and

December, 2020 periods. FBD has argued that the bar counter could not be considered to be closed in circumstances where the guidelines specifically envisage use being made of it by members of staff including use of the counter for the purposes of preparing drinks. On the other hand, the case made on behalf of the three Dublin pubs is that, at most, the use which could be made of the bar was secondary to its primary use for the sale and consumption of intoxicating liquor and the service of customers at the bar for that purpose. They argue that, in the circumstances, a reasonable person would consider the bar counter to be shut down. In this context, both Sinnotts and the Leopardstown Inn sought to rely on the statutory definition of a *"bar"* in s. 6 of the Intoxicating Liquor Act, 1988 ("*the 1988 Act*") as *"any open bar or any part of a licensed premises exclusively or mainly used for the sale and consumption of intoxicating liquor and shall include any counter or barrier across which drink is or can be served to the public"*. It was submitted that the bar counter of a public house is instantly recognisable. It was suggested that, for example, one might agree to meet *"at the bar"* or to *"have a drink at the bar"* which would leave no one in any doubt as to where it was proposed to meet. Equally, it was submitted that, in circumstances where publicans were prohibited from serving customers at the bar counter, no one would be in any doubt that, during the currency of the guidelines, the bar counter was closed. Reliance was placed on the evidence of Mr. Kelly and the evidence of Mr. Stephen Cooney of the Leopardstown Inn that the bar counter is a focal point in any public house.

35. In considering the effect of the restrictions applicable under the guidelines and the No. 4 Regulations, it is essential to bear in mind the meaning of the word *"closure"* as explained in the supplemental judgment. In particular, as outlined in para. 21 of that judgment, I held that the use of the word *"closure"* involves a

shutting down of premises or of a part of premises. In the same paragraph, I stressed that cover is not triggered by every restriction on trading that may be imposed on publicans. It is also important to keep in mind that, as outlined in para. 22 of the supplemental judgment, I rejected the argument made on behalf of the plaintiffs that the references to the *"premises"* in the policy should be construed as a synonym for the business of the insured. Accordingly, cover is not triggered by a restriction on the operation of the business that does not involve a closure of the premises or a part of the premises. Nonetheless, in para. 23 of that judgment, I expressed the view that the policy will respond where the only form of business permitted under COVID-19 restrictions was a takeaway service. The effect of such a restriction is to prohibit patrons from visiting the premises for any of the purposes traditionally associated with a public house. I expressed the opinion that a reasonable person would regard the premises as closed in such circumstances. I suggested that it is relatively easy to see where the line should be drawn in that case. However, as noted in para. 25 of the supplemental judgment, 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 business of a public house (which is not *per se* covered) and a requirement to close a part of the premises (which is capable of falling within the cover provided by extension 1(d)). I expressed the tentative view that, if it is necessary to close a part of the premises such as the public bar area, it might be the case 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"*.

36. Furthermore, at para. 26 of the supplemental judgment, I indicated that the position becomes less clear where a closure of a discrete part of the premises cannot

be identified. I expressed significant doubt as to whether the conclusions of the UK Supreme Court in relation to an *"inability to use"* clause can be said to be of assistance in the case of a clause – such as extension 1(d) of the FBD policy – which requires closure of the premises. In para. 27 of the supplemental judgment, I indicated that I would not be justified in holding that an inability to carry on a part of the business which is not linked to a closure of at least a part of the premises could be said to be covered under the FBD policy. I did not, however, reach a final determination on that issue and indicated that it would be prudent to first hear evidence in relation to how the various forms of restrictions in force from time to time have affected the business of each of the plaintiffs.

37. Keeping those principles in mind, it is necessary to consider the physical arrangements in each of the three Dublin bars in question. Subject to what I say below in relation to the Leopardstown Inn, the bar counters are not physically separated in any way from the other arrangements within the premises. It would obviously be a more straightforward exercise to consider this question had there been some physical separation.

38. It is also the case that, in contrast to the supermarket arrangements described in para. 25 of the supplemental judgment, the bar counter areas were not railed off during the periods in issue. Indeed, none of the photographs produced by any of these three plaintiffs of their respective premises showed that the bar carried a *"closed"* or *"no service"* sign during the relevant periods in issue but Mr. Cooney of the Leopardstown Inn gave evidence that such signs were placed on the bar counters. It is also true that, in answer to the question from me, Mr. Kelly of Sinnotts gave evidence that, along the bar counter in Sinnotts, signs were placed in plastic stands stating *"no*

service". Regrettably, none of the photographs produced by Sinnotts clearly showed the signs in question.

39. However, given the approach taken by FBD (as summarised in para. 32 above), I will proceed on the basis that customers were not permitted to sit or stand at the bar counter for the purposes of consumption of drinks or food during the relevant periods. As outlined in more detail below, FBD nevertheless maintains that the bar counters could not conceivably be said to be *"closed"* during the relevant periods in circumstances where the bar counter could be used for the purposes of the preparation of drinks and dispensing drinks to servers.

The general layout of the three Dublin pubs

40. Before addressing the FBD position in more detail, I should describe the relevant layout of all three of the Dublin bars. In the case of Sinnotts, the pub is located at a lower ground floor level beneath St. Stephen's Green Shopping Centre on South King Street. The bar counter is situated in a central position within the bar with open counters on four sides. In pre-COVID times, there were 30 seats at the bar counter. There are tables and chairs around all four walls of the premises and there are large open dining areas (with tables and chairs) to the right and left of the bar counter.

41. The impact of the closure of the bar was described as follows by Mr. Kelly in his opening statement: -

> *"The Public Bar area of Sinnotts has remained closed (as required by law) at all times since 15 March 2020. That is the heart and soul of Sinnotts and of any pub business, particularly for drink sales. Sinnotts Bar, operating without a public bar, is a completely different business, more like a restaurant than anything else. The significance of the public bar as a source of revenue for Sinnotts is, I believe obvious and it is vouched by the analysis which Mr*

Jacobs has carried out which I have seen, and also demonstrated by the photos attached to this statement …. Government guidelines in place during all periods where indoor dining was allowed prohibited any seating at the Bar counter or standing at the bar. The Bar area in Sinnotts bar and most pubs accounts for most of the 'wet sales' of the business. The total capacity for Sinnotts is 630 people; 464 standing and 166 seats, of which 30 are at the Bar counter. Those seats could not be used during restricted indoor dining and customers could not socialize standing either as they would normally. The seats at the Bar tend to be taken first on quiet nights, with people preferring to sit at the counter and they are also a useful overflow and waiting area."

42. Mr. Kelly also described the impact of the physical distancing requirements in the following terms: -

"In normal times, Sinnotts Bar has a capacity of 630. It has 166 seats, of which 30 are at the bar and could not be used at all during in-door dining. In addition, the physical distancing requirements meant that people could not stand in the bar and socialize, as they would normally... We were only able to accommodate 88 total seats in Sinnotts, complying with the requirement of physical distancing. Our capacity was therefore reduced by 542 people. We had to remove 10 tables to comply with physical distancing requirements."

43. At this point, I should make clear that I do not believe that there is any basis upon which the plaintiffs can contend that there was a closure of their premises as a consequence of physical distancing requirements. In my view, that would not constitute a shutting down of the premises. I do not believe that any reasonable person would consider the premises to be closed just because its capacity has been reduced. For similar reasons, I cannot accept the argument made that, because they were

required to operate in a similar way to restaurants, this amounted to a closure for the purposes of extension 1(d). The fact is that the premises were open. Customers could enter the premises and be served. I do not believe that any reasonable person, in such circumstances, would regard the premises as having been closed. However, a different issue arises in relation to the bar counters. In circumstances where they could not be used for direct service to customers, an issue arises as to whether that part of the premises was closed such as to constitute a partial closure for the purposes of extension 1(d) of the FBD policy.

44. In the case of the Lemon & Duke, the pub is roughly rectangular in shape with an extensive bar counter running along most of the length of one of the longer walls of the rectangular space. Immediately opposite the counter is a further counter area which is not a serving bar but provides seating in a similar style for customers with high chairs arranged along the counter in question. The balance of the space is made up of seating areas with tables and chairs and some element of space between the tables presumably to allow customers to stand when the bar is busy. According to Mr. Anderson, prior to 15th March 2020, customers would mingle at the bar counter and he said that this area was particularly busy on Thursday, Friday and Saturday nights. In addition, customers dined at the bar counter throughout the week as part of what Mr. Anderson described as the *"everyday trade"* particularly at lunchtime. In normal times, there were 24 seats at the bar counter but, especially on weekend evenings, many standing customers congregated here. Mr. Anderson made the simple point that the closure of this area to customers reduced the capacity of Lemon & Duke and *"cost us significant loss of income notwithstanding that other areas of the premises were open"*.

45. In the case of the Leopardstown Inn, this is a much larger premises than either Sinnotts or Lemon & Duke. It is laid out in several different distinct areas comprising 14,000 square feet over two floors. On the ground floor, there is a lounge which is laid out, for the most part, in seating areas with tables and chairs in these areas. There is also an L-shaped bar counter at which customers could be seated at high chairs. In addition, around the bar area, there is a significant amount of empty space which could accommodate customers prepared to stand.

46. Adjoining the lounge is the *"Lep Bar"* which is considerably smaller than the lounge and is more luxuriously appointed than the lounge. Within the *"Lep Bar"*, there are seating areas with tables and chairs. There is also a bar counter along one wall. In the pre-COVID period, this was equipped with high chairs at which customers could sit. There is also a smaller room described as the *"Small Bar"* which is also equipped with a bar counter with high chairs together with a small seated area. On the first floor, there is the *"Nest Bar"*, the mezzanine and the function room with a bar. The Nest Bar also has an outdoor area. There is also an off licence.

47. The impact of the restrictions imposed during the relevant periods in issue was described in the following terms by Mr. Cooney in his witness statement: -

> *"39. At all times since 15 March 2020 the 5 main public bars have been closed and that closure is continuing. At relevant times, around each bar counter, we put up signage to indicate to customers that the bar was closed. The bar areas themselves provide for significant seating capacity. Even more significantly however we were also prohibited from utilising the space around the public bars at all times. Sales to patrons who are standing at or near our bars and socializing in their*

environs account for the vast majority of the wet on-sales in the business and are the most profitable aspect of our business.

40. *The combined seating capacity of the five* [bar counters] *is 50 people with standing room for hundreds of customers. All those seats are prohibited from being used, as are and were the surround areas.*

41 *The* ***Lep Bar*** *area, which could accommodate about 200 people, with a DJ playing at weekends and large crowds for big matches, race meetings, and corporate events had been required to operate table service only with the public bar remaining closed. This has meant a huge reduction in numbers and a very significant reduction in turnover for this area.*

42. *The* ***Nest Bar*** *is similar to The Lep Bar as it is targeted towards the younger and corporate market. We do not do sit down service in this bar in normal times. In an attempt to mitigate our loss, we converted the Nest Bar into an out-door dining area between 18 September and 21 October – servicing sales from the Lounge till. We also operated the Nest Bar area in that way between 4 and 23 December 2020. That involved a complete change in use of the Nest Bar because tables had to be installed and table service provided. That is by contrast with a bar, where people are served drinks at the bar and socialize standing up.*

*43. The **Lounge** is a large room, in which the bar is the focal point. Beyond this is the House area, The Conservatory and The Blue bar. Food is served in all areas but the Bar area was completely closed here since 15 March 2020 and this remains the case. The bar has 18 seats at the counter and room for up to 150 people standing.*

44. Some people may go to the Lounge for dinner in the House or Conservatory areas. Others go there to socialize at or near the bar standing up and some do both. During the periods between 29 June and 18 September 2020 and 4 and 24 December 2020 when it was possible to operate the lounge at all, the Lounge Bar was required to remain completely closed and we put up signs making it clear that it was closed. In addition, the space for socializing that is integral to what we are doing at the Lounge was of course required to remain closed. Customers could not mingle and socialize in the lounge in the way they would have done before Covid-19. We were effectively running a completely different type of business from what we had done for the years prior to that.

*45. In the same way, the **Small Bar** was required to remain closed. A few tables were able to operate in it between 29 June and 18 September and again between 4 and 24 December but the bar was not open. People could not sit at the bar or stand near the bar as they would in normal times.*

46. *The **Function Room** was not operational either. Normally, the Function Room is a space where people mingle standing up, socializing, dancing and enjoying drinks provided from the function room's bar and finger food. We did hold two weddings in that space, but that involved a complete rearrangement of the business of the function room. We put in tables and had people seated there, complying of course with guidelines to prevent Covid-19. The weddings were not profitable but kept our staff busy. Both these wedding requests were made by friends of management who had their wedding receptions cancelled because their numbers were too low as a result of government restrictions.*

47. *The bar is the focal point of any pub. The bar reflects the central function of any pub. Even when guests dine with us, they often go to the bar, while waiting for their party before dinner and/or to socialize before or after dinner.*

48. *In preparation for this statement, I had tried to obtain a precise percentage of our sales which were generated from that bar business which was subject to imposed closure, to assist the Court. However, it is not possible to disaggregate sales precisely in this way. That is because a public house customer may purchase a drink at say the Lounge Bar while socializing with friends, sit at a table in the Lounge (and perhaps order food and drink) and then return to the bar, either*

to socialize or perhaps for further refreshment periodically during the evening."

48. It should be noted that, during the course of the evidence, FBD called into question the evidence given by Mr. Cooney and Mr. Kelly to the effect that customers were not permitted to sit or be served at the bar counters of both premises. I address this aspect of the case in greater detail below. At this point, it is sufficient to note that such an issue exists. There is clear evidence that, on at least one occasion during the relevant periods, patrons were allowed to sit at the bar counter of Sinnotts. There is also evidence that high chairs were placed adjoining the bar counter in the Leopardstown Inn (giving the impression that they were available for patrons). However, in circumstances where there is an insufficient basis to conclude that this occurred on a widespread basis, I do not believe that it would be appropriate to take the evidence into account in determining the issue as to whether the bar counters could be said to be shut down for the purposes of triggering cover under the FBD policy. It seems to me that I should consider the question of closure of the bar counters without reference to such incidents. That said, to the extent that the evidence establishes that such incidents occurred, this will have to be taken into account in assessing the losses claimed by those plaintiffs.

The case made by FBD in relation to the bar counter

49. FBD, in its submissions, contended that there is a fundamental inconsistency with the case made now by the three Dublin pubs and that made at the liability hearing in October 2020. Counsel for FBD highlighted that, in the course of the liability hearing, both Sinnotts and the Leopardstown Inn had specifically accepted that public houses serving food were permitted to reopen in June 2020 albeit subject to various restrictions. Counsel for FBD emphasised that, at no point prior to the U.K.

Supreme Court judgment in the *FCA* case in January 2021, had any of the plaintiffs made the case that their premises were the subject of a partial closure after 29th June 2020. Counsel for FBD also highlighted para. 23 of Mr. Kelly's witness statement which was put in evidence during the course of the liability hearing. In para. 23, Mr. Kelly stated, in unqualified terms, that Sinnotts reopened on 29th June 2020. No suggestion was made that this reopening was, in any way, incomplete or partial. Counsel submitted that there is a very significant contrast between the sworn evidence given on behalf of the plaintiffs in the liability hearing and the sworn evidence now given in relation to the partial closure issue. Counsel submitted that this seriously undermined the credibility of the case now made by the plaintiffs.

50. Counsel also highlighted the approach taken by me in the supplemental judgment (summarised above) and a number of aspects of the judgment of the U.K. Supreme Court in the *FCA* case. In particular, counsel referred to the way in which the U.K. Supreme Court interpreted the reference to *"business premises"* in the Hiscox policy as encompassing a *"discrete part of the premises which is capable of being used separately from other parts"*. Counsel emphasised the reference to a *"discrete part"* of the premises. Counsel suggested that the example given by the UK Supreme Court at para. 140 of its judgment is particularly helpful for present purposes. There, the court cited the example of a golf course which, during the COVID-19 pandemic, is permitted to remain open but with its clubhouse closed. The courts suggested that there would be no doubt that, in such circumstance, there was a closure of a discrete part of the golf course premises.

51. Counsel for FBD also placed particular reliance on para. 21 of the supplemental judgment where I held that the natural meaning of the word *"closure"* in the context of premises involved a shutting down of the premises or of a part of the

premises. It was further submitted that the evidence in this case does not come *"remotely close"* to sustaining the proposition that there has been a shutting down of any discrete part of the premises of the three Dublin pubs. Counsel also argued that that the evidence of customer use of the bar counter in Sinnotts plainly demonstrated that there had been no shutting down of the bar counter. Had they been shut down, these incidents could never have happened. While I acknowledge the force of this submission, I reiterate that, for the reasons discussed in more detail below, I do not believe that I can conclude that these incidents were of a widespread nature and I do not believe that evidence of isolated incidents would be sufficient, of themselves, to draw a conclusion that there had been no shutting down. Nonetheless, the fact that the bar counters were not railed off or screened off in any of the three premises in question (which may have allowed incidents of this kind to occur) is a factor that I must take into account in considering whether there has been a shutting down of the bar counters during the relevant periods.

52. FBD drew attention to the following aspects of the evidence given on behalf of the three Dublin pubs: -

(a) The concession made by Mr. Kelly on Day 2 that what he described as the *"service hatch"* on the bar counter in Sinnotts was not closed during the periods in question. FBD made the point that there were bar staff behind the bar mixing and preparing drinks, pouring drinks, getting glasses (all of which are stored at the bar counter) and dispensing those drinks to the staff waiting tables;

(b) As noted above, Mr. Kelly also confirmed that, under the guidelines, customers were not prohibited from paying their bills at the bar. He also accepted that the bar counter could be used for preparing drinks

and displaying advertising materials. He also accepted that the business of Sinnotts could not function during the relevant period without having staff behind the bar;

(c) FBD also made the case that both Sinnotts and the Leopardstown Inn (which had both, prior to March 2020, operated a carvery service) were free under the guidelines to continue to operate that service. That is an issue that I address in more detail below when I come to consider this aspect of the case made by the plaintiffs that their carvery was closed as a consequence of the restrictions imposed by Government during the relevant periods;

(d) FBD also referred to the concessions made by Mr. Cooney under cross-examination on Day 3 when he acknowledged that the bar counter could be used for the preparation of drinks and that a *"COVID service station"* could have been set up at the bar. He was not, however, aware whether that had been done in the case of the Leopardstown Inn. On the same day, he also conceded that, for the last two weeks in September 2020, the Leopardstown Inn did open for carvery.

(e) A further aspect of Mr. Cooney's evidence that was emphasised by FBD related to the use of two small high tables which were shown in some photographs adjacent to the bar counter in the lounge area in the Leopardstown Inn. These tables are addressed in more detail below. It is sufficient, at this point, to note that the evidence given by Mr. Cooney was that these were used as sanitation areas where sanitation gel and *"blue roll"* were available for customer use. However, Mr.

Cooney also confirmed (and this is the element on which FBD particularly relies) that the tables had been used *"on an occasion"* at Christmas time.

(f) FBD also referred to the evidence given by Mr. Anderson of Lemon & Duke on Day 3 of the hearing quoted in para. 22 above. In particular, FBD highlighted his acceptance that the bar counter could be used by staff during the relevant periods and his acceptance that a number of takeaway sales of coffee has taken place from the bar counter.

The argument made on behalf of the three Dublin bars

53. On the other hand, counsel for the three Dublin plaintiffs submitted that there was a lack of reality to FBD's position. Counsel for Sinnotts and the Leopardstown Inn drew an analogy with the situation where a customer tries to order drinks from a bar after closing time. Such a person would be well used to the expression *"I am sorry, the bar is closed"*. By analogy, counsel submitted that a reasonable person would understand that the impact of the guidelines and the No. 4 Regulations was that the bar was closed to customers for service and closed to the publican for the purposes of selling drinks to customers at that location. Counsel also stressed the central importance of the bar counter in an Irish pub and highlighted Mr. Anderson's description of it, in the course of his evidence, as the *"Holy Grail of the public house"*. Counsel argued that the fact that the inner part of the bar counter could be used to make and mix drinks could not alter that fundamental proposition. As noted above, the Dublin plaintiffs also emphasise the statutory definition of *"bar"* in s. 6 of the 1988 Act where it is defined as a *"**part** of a licensed premises"* (emphasis added). It was argued that the bar counter within a public house is a distinct part of the physical layout, as well as being an identifiable part of the premises as a matter of law

(specifically for the purposes of liquor licensing). Counsel submitted that this is part of the relevant factual matrix in which this policy (which was specifically prepared for the public house sector) ought to be interpreted.

54. In considering the question whether a reasonable person would have understood the bar counter to be closed, counsel for the three Dublin public houses submitted that there is consistent evidence of the plaintiffs to the effect that: (a) each of them understood the bar counter was required to be closed; (b) this was the general understanding in the industry; (c) licensed premises (particularly those in Dublin city and including the plaintiffs' premises) were subject to regular Garda inspections in which the Gardaí sought confirmation that the bar counter was closed and was not being used to seat or serve customers; (d) that Gardaí had expressly stated they would object to the renewal of licenses for premises who breached the Guidelines; and (e) that public houses were required to operate *qua* restaurants (including the requirement that the bar counter could not be used to serve or accommodate customers) during the June-September, 2020 period and the December, 2020 period.

55. There are two aspects of that submission that can be immediately discounted. In the first place, I do not accept that the plaintiffs are in a position to give evidence as to the general understanding in the industry. At its height, the evidence is to the effect that these plaintiffs were not aware of others in the industry who thought that bar counters were open. I accept FBD's position that this evidence is anecdotal, at best. Secondly, the argument that the plaintiffs were required to operate as restaurants rather than as public houses seems to me to be of no significance. In my view, that aspect of the case made by the plaintiffs is beside the point. It does not assist in establishing that the plaintiffs' premises were shut down. On the contrary, it establishes that, whatever might be the position about the bar counter, the balance of

the premises was open for business. The policy does not provide cover for restrictions imposed on the way business is done. It provides cover in respect of a closure of the premises that falls within the ambit of extension 1(d).

56. As noted above, FBD, in its written closing submissions, seeks to challenge the plaintiffs' reliance on evidence of Garda enforcement of the closure of bar counters. FBD makes the case that any such evidence was entirely hearsay. For the reasons outlined in paras. 32 to 33 above, I do not believe that FBD is entitled to make this argument at least in so far as the closure of the bar counter is concerned. Nonetheless, I should record, for completeness, that I cannot accept that all of the evidence was hearsay. It is certainly the case that the evidence given by Mr. Kelly was hearsay. On Day 2 at p. 31, Mr. Kelly made clear that his evidence in relation to visits by members of An Garda Síochána was based on contacts between members of his staff and An Garda Síochána and that he was not personally present when any of the Garda inspections of Sinnotts took place. Similarly, Mr. Cooney of the Leopardstown Inn was not in a position to give direct evidence of any Garda inspections of the Leopardstown Inn. On the other hand, Mr. Anderson of the Lemon & Duke was physically present during Garda inspections of the bar. While his evidence is in rather general terms, it was given from his personal knowledge and this evidence was not challenged on cross-examination. On Day 3, at pp. 58-59, the transcript records: -

"Q. ***MR. JUSTICE McDONALD:*** *So, Mr. Anderson, in contrast to the other two witnesses, you are constantly on the premises, is that right?*

A. *I'm here, there and everywhere at the moment, Judge. I'm with my role in the LVA, with the case. But I am hands on as well, yes.*

Q. ***MR. JUSTICE McDONALD:*** *Well, how often would you be on the premises?*

A. *I would say I'm on my premises five or six days a week, twice a day.*

Q. ***MR. JUSTICE McDONALD:*** *For how long?*

A. *An hour or two at a time.*

MR. JUSTICE McDONALD: *All right.*

Q. ***MR. CUSH:*** *Therefore, is it the case that you have personal experience of the Gardaí calling to the premises?*

A. *Absolutely. I would've dealt with them when they came into the premises.*

Q. *And what were they checking? What were they looking at?*

A. *Some guards would be firmer than other guards, Judge, there was a real mixed bag. But the first thing they were doing – most guards were fine and polite – they could come in and some would look for the contact tracing, a lot of the time they were just trying to get a sense of the bar, that it was calm, controlled,* ***nobody sitting at the counter obviously****. You know, it was just managed, they were just trying to get a feel of the bar, very much so."*

(emphasis added)

57. It is true that, at a later point in his direct examination, he purported to give evidence of a Garda inspection witnessed by him in a different premises and I believe that Mr. Anderson's evidence is hearsay insofar as he purported to give evidence of what he was told by the staff member of the premises that, in the course of this inspection, members of An Garda Síochána had required that tables and chairs in the immediate vicinity of the bar counter should be removed.

58. Ultimately, the evidence as to Garda inspections is of fairly limited utility. In the first place, it seems to me that, as noted in para. 32 above, it is unnecessary, to reach any conclusion in relation to Garda enforcement in light of the concession made by counsel for FBD on Day 8. Secondly, even if that concession had not been made,

the issue as to the effect of the guidelines would fall to be considered by reference to their terms rather than by reference to how they were interpreted by An Garda Síochána. Thirdly, the evidence as to Garda enforcement cannot assist in relation to the more important question as to whether a reasonable person in the position of the parties would have considered the bar counter to be a discrete part of the premises which could be the subject of an imposed closure. Events which occur subsequent to a contract are not admissible as an aid to the construction of a contract.

Discussion and analysis of the issue as to bar counter closure

59. Insofar as this element of the case is concerned, there are two issues to be determined: -

(a) Whether service at the bar counter was prohibited by the guidelines prior to 3rd September 2020. While the FBD concession on Day 8 would appear to make this question academic, I propose to briefly address the question to the extent that it may be relevant to other premises insured under the FBD policy; and

(b) Whether a reasonable person in the position of the parties, at the time of the conclusion of the policy, would have considered the restrictions on the use of bar counters of the kind subsequently imposed by the guidelines and the No. 4 Regulations to amount to a *"closure"* of a part of the premises such as to trigger cover under extension 1(d) of the FBD policy.

60. Insofar as the first of those questions is concerned, it seems to me that the position is somewhat unclear up to the edition of the guidelines that was issued on 24th August 2020. As noted above, that edition of the guidelines omitted the passage quoted in para. 21 above which had envisaged a dedicated service area at the bar

counter (albeit with a partition in place between the customer and the bartender). It seems to me that, as from that date, the guidelines made very clear that the only form of service that was envisaged was table service. This seems to me to follow from both the removal of the passage quoted in para. 21 above and the continued inclusion of the very clear statement (quoted in para. 19 above) that it is the responsibility of supervisors and managers to ensure that customers do not congregate in groups and that customers should be seated at a table except when using the toilet, paying and departing. It is true that, under the heading *"Function Rooms & Outside Smoking Areas"*, there was a statement made to the effect that *"To reduce queues in bar areas, customers must be encouraged to remain seated and order from their seat wherever possible"*. However, that relates specifically to function rooms and outside smoking areas. It does not relate to the interior of the public house itself. Those areas are not relevant for present purposes.

61. As indicated above, the position is less clear cut in relation the period prior to 24th August 2020. However, I have come to the conclusion that, when the guidelines are construed as a whole, the paragraph envisaging a dedicated service area at the bar counter must be read in context and in a manner that takes account of the other provisions of the guidelines. When construed in that light, I take the view that the paragraph must be read as referring to circumstances where a public house was carrying on a takeaway service or where the public house was serving a person located in an outside smoking area. As outlined above, the section of the guidelines dealing with outdoor smoking areas appears to envisage that, while customers should be encouraged to remain seated and order from their seat wherever possible, this was not an absolute requirement for those in such areas. Given that public houses were entitled to provide service to customers seated outdoors and that they were also

entitled to maintain a takeaway service, it was understandable that a provision should have been included in the guidelines dealing with how persons availing of those services could be served. The opening words of the relevant paragraph (referring to circumstances where table service is not provided) makes sense in that context and can be read in a manner consistent with the balance of the guidelines which, to my mind, plainly envisage table service for indoor customers.

62. For the reasons outlined in paras. 60 to 61 above, I have come to the conclusion that the guidelines had the effect from their first publication in June, 2020 of restricting customer use of the bar counter to the provision of a takeaway service or for the purposes of taking orders from a smoking area outside. That means the bar counter could be used for those purposes. In addition, as outlined above, FBD has highlighted that the bar counter could also be used for the purposes of preparing drinks for customers inside the premises and for the purposes of dispensing those drinks to servers waiting tables. That leads to the next question to be resolved namely whether, notwithstanding those uses that could be made of the bar counter, the counter should nevertheless be considered to be closed for the purposes of extension 1(d).

63. For the reasons explained in the principal judgment, the key test to be applied in identifying the intention of any contractual provision is an objective one. The court does not have regard to evidence given by the parties as to what their understanding of the provision may have been. Instead, the court seeks to put itself in the mindset of a reasonable person in the position of the parties at the time the contract was concluded. Such a reasonable person is deemed to be aware of the relevant factual background and the task of the court is to consider what such a person, with knowledge of that background, would understand the contractual provision in issue to mean.

64. I believe that the following background facts are very relevant in considering whether a reasonable person in the position of the parties would consider that restrictions on the use of the bar counter constitutes a closure of a part of the premises capable of triggering cover under extension 1(d):

(a) In the first place, the bar counter is undoubtedly a highly important element of the offering available in a typical Irish pub. I do not believe that it is an overstatement to say that it would be regarded as an intrinsic element of a typical pub;

(b) Secondly, it is a readily identifiable and distinctive area of a pub. I accept that anyone familiar with pubs would immediately recognise the bar counter as a specific element within a pub such that, for example, no one would be in any doubt as to where to meet if asked to turn up at the bar of a particular establishment;

(c) Thirdly, there are some patrons who habitually drink at the bar counter. Furthermore, it is also a place where significant numbers of patrons congregate at busy times;

(d) Fourthly, the factors outlined above would be well known not only to publicans seeking to put insurance in place but also to insurers such as FBD who market a policy tailored to the public house market. The fact that the FBD policy is so tailored is itself an important element of the factual background;

(e) Fifthly, the Dublin pubs are correct in suggesting that the phenomenon of the bar counter being closed is a well-known concept to anyone who has approached the counter at a certain time of the night.

(f) Sixthly, the fact that s. 6 of the 1988 Act expressly contemplates that the bar counter is an identifiable area of a licensed premises is relevant.

65. In my view, these facts strongly support the view that the bar counter would be considered by a reasonable person in the position of the parties to be an identifiable part of the premises for the purpose of cover available under extension 1(d). Furthermore, the effect of the guidelines and the No.4 Regulations is to prevent the traditional use of that identifiable area of the premises. Customers can no longer sit or stand there to consume a drink or to congregate or mingle there. To my mind, if that scenario had been considered by a reasonable person in the position of the parties at the time the policy was put in place, that person would immediately have characterised the effect of the restrictions as a shutting down of the bar counter area. In view of the impact of the restrictions in prohibiting the traditional use of the bar counter, it is implausible to think that it could be characterised as anything other than a shutting down or closure of the bar counter. In this context, I do not believe that this conclusion is undermined by the fact that the bar counter could be used during the relevant periods of closure for a number of limited purposes. In my view, those purposes were so limited that a reasonable person would not consider the bar counter to be open. Fundamentally, the bar counter is a place for direct service to customers and for customers to congregate. The shutting down of those activities inexorably leads to the conclusion that the bar counter was shut down. The fact that bar staff may have still been present behind the bar counter does not alter that conclusion. They could not serve customers other than for takeaway purposes or to those outside the pub. In the supplemental judgment, I have already explained why I take the view that the availability of a takeaway service does not mean that a pub premises should be considered to be open. Logically, the same considerations apply to the bar counter. It

is true that bar staff could also take a payment from a customer but, in my view, that is no different to the customer who walks up to the bar counter at the end of the night to pay a tab after being told that the bar is closed. I do not believe that a reasonable person would regard the bar counter as being open in those circumstances.

66. It is also true that bar staff were free to prepare drinks at the bar counter during the relevant periods of closure. That means that the bar counter could be put to use by publicans. However, that is to confuse the concepts of use and closure. Of course, a pub can be put to some use even where it is closed. Again, the occasions when pubs were restricted to a takeaway service provides a useful analogy. Although the pub could be used for that purpose, I took the view in the supplemental judgment that the pub would still be viewed by a reasonable person as closed. That seemed to me to follow from the fact that no one could enter the pub for any of the purposes traditionally associated with a pub. To my mind, that would be classified by a reasonable person as a closure of the pub. As outlined in para. 65 above, the same considerations apply in the case of the bar counter. Yes, it could be used as a drinks preparation area but if any person visiting the pub were asked whether the counter was open, I have no doubt that they would answer *"no"*. In my view, that is also the conclusion that would be reached by any reasonable person giving thought to the effect of restrictions such as those imposed under the guidelines and the No. 4 Regulations.

Does the fact that there is, at minimum, considerable difficulty in estimating the losses stemming from the closure of the bar counter affect the issue?

67. However, there is one further step that requires to be considered namely whether the closure of the bar counter falls within the ambit of extension 1(d). In my opinion, notwithstanding the views expressed in paras. 64 to 66 above, there is a powerful countervailing factor which must be borne in mind in considering whether

the closure of the bar counter can be said to be a closure within the ambit of extension 1(d). This stems from the fact that no separate sales records are maintained by any of the Dublin pubs in respect of the bar counter and that, as a consequence, considerable difficulty arises in measuring the losses suffered as a result of its closure. As counsel for Sinnotts and the Leopardstown Inn said on Day 6 of the July hearing, it was never part and parcel of the business to keep separate records of the bar counter element of the business. Can it truly be said in those circumstances that the bar counter is a discrete part of the premises capable of falling within the ambit of extension 1(d)? My concern is accentuated by the claim made by Sinnotts and the Leopardstown Inn that it is *"impossible"* to separate the losses suffered as a consequence of the closure of the bar counter from the COVID losses suffered more generally by the remaining parts of the pub business while their premises were open during the relevant periods. In those circumstances they argue that, by reference to the *Miss Jay Jay* principle (described in more detail below), they should be entitled to recover all of the COVID losses suffered by them during the relevant periods; in other words that they should not be limited to those losses which are attributable to the closure of the bar counter notwithstanding that this was the only part of their premises which was closed. In my view, that raises a significant issue in applying the reasonable person test. Would a reasonable person in the position of the parties at the time the FBD policy was put in place think that extension 1(d) was intended to provide cover for the closure of a part of the premises where it is impossible to measure the losses that flow from that closure? The whole point of putting insurance in place is to enable the insured to be indemnified in respect of a measurable loss suffered after the eventuation of an insured peril. If a loss cannot be measured, that seems to me to raise a significant doubt as to what a reasonable person would think was covered by extension 1(d). I

therefore believe that I should defer any finding on the issue relating to bar counter closure until after I have considered the evidence in relation to quantification of loss (which I address below). If I come to the conclusion that, contrary to the case made by Sinnotts and the Leopardstown Inn, it is, in fact, possible to assess the losses attributable to the bar counter closure, then this countervailing factor will fall away and a finding can be made that the closure of the bar counter falls within extension 1(d). On the other hand, if I conclude that losses attributable to the closure of the bar counter are not capable of being separately estimated, that seems to me to call into question whether a reasonable person in the position of the parties would consider that the bar counter to be an identifiable area of the pub such as to bring its closure within the ambit of extension 1(d).

The incidents highlighted by FBD as suggesting use of the bar counter by patrons in both Sinnotts and the Leopardstown Inn during the relevant periods

68. Before, leaving the issue of the closure of the bar counter, I must also address the case made by FBD that, in light of the evidence of customer use of the bar counter during the relevant periods, the bar counter could not properly be considered to be closed. This arises in respect of Sinnotts and the Leopardstown Inn. The issue first reared its head in the course of the cross-examination of Mr. Kelly on Day 2 of the hearing when a number of photographs were produced of the interior of Sinnotts Bar posted on the Sinnotts' Facebook page. The photographs clearly show a Leeds vs. Liverpool match that was played on 12th September 2020. This was after the No. 4 Regulations came into force. The slogan posted on the Facebook page of Sinnotts was to the effect: *"This is Leeds vs Liverpool right now"*. The photograph shows at least two couples and one other person seated on stools placed beside the bar counter and there is a half empty pint glass next to the person seated in the foreground of the counter as displayed on the Facebook page. There is no doubt that, contrary to the

evidence which had been given by Mr. Kelly in the course of his examination in chief, the counter was in use on 12th September 2020 as a seating area for customers. Furthermore, the posting of the photograph on Facebook was plainly done as a means of advertising to the world that Sinnotts was open and encouraging patrons to attend. The way in which the stools were arranged in pairs with physical distancing between each pair strongly suggests that those responsible understood that the bar counter could be used in this way but that it would be necessary to comply with physical distancing requirements. Mr. Kelly accepted that this was a breach of the requirements of the guidelines but contended that it was an *"anomaly"* and that he had given instructions to a senior team and managers to follow the guidelines and to ensure that the bar remained closed with no seating along the bar. In the course of the cross-examination, it also emerged that the Facebook page in question had been available previously but had been taken down just days before the commencement of the hearing. Mr. Kelly's response was that he was unaware of this.

69. A further photograph was also put to Mr. Kelly which was taken from a video posted on the Sinnotts Facebook page on 3rd December 2020 under the slogan *"Open from 12pm tomorrow with some festive cheer"*. Remarkably, the photograph shows six stools running the length of the bar arranged in very similar fashion to that shown on the 12th September photograph. Mr. Kelly's evidence was that this was a promotional video prior to the reopening in December 2020 and that, when he walked the premises whenever it was open, the stools are not at the counter. He said that he did so frequently.

70. FBD also sought to raise a TripAdvisor post of 2nd July, 2020 in which a TripAdvisor member purported to review a visit to Sinnotts in July, 2020 in which the reviewer stated that, on arrival at Sinnotts, *"we were asked to sit at the bar, but we*

refused because we booked way ahead of time to have a table…". I do not, however, believe that I can have regard to this posting. It is plainly hearsay evidence and its reliability and veracity cannot be tested. However, I am deeply troubled by the photographs of 12th September and 2nd December. The photographs suggest that the bar was set up for use by customers with appropriate physical distancing between them. I find it difficult to accept that what is shown on the 12th September photograph is an isolated incident, particularly in circumstances where the photograph was displayed on the Facebook page of Sinnotts which was clearly designed to attract customers. However, I must bear in mind that I am bound to decide this case by reference to the evidence. The only evidence placed before the court are the photographs in question. The December photograph does not represent a day when the bar was open. The September photograph clearly does represent a day when the bar was open. However, it is a snapshot of that day only. There is no sufficient evidence before the court to demonstrate that, on the balance of probabilities, this activity continued on other days. On the contrary, there is the evidence of Mr. Kelly (which has not been undermined) to the effect that he visited the premises on a regular occasion and that the bar was not in use on any of those occasions. In the circumstances, the only conclusion which I can properly draw is that, on 12th September 2020, the bar counter was in use by customers. On that basis, Sinnotts is not entitled to recover under the policy in respect of that day. I do not believe that I can go further than that.

71. Insofar as the Leopardstown Inn is concerned, photograph 19 in the report prepared by Mr. Colin Scott (the engineer called as an expert by FBD) showed that, in the Lep Bar, small high tables with accompanying chairs were sited immediately adjacent to the bar counter. When this was put to Mr. Cooney under cross-

examination, he explained that when he first saw this report he had spoken to the general manager of the bar who told him that these two tables were used as sanitation areas. However, he also said that the tables had been used at Christmas time on: -

> *"…an occasion they brought the tables out when they had opened the pub. But that was the only occasion."*

At the end of his examination, I asked Mr. Cooney some questions about this aspect of his evidence. He said that the stools were used not for seating purposes but as spare seats to be added to other tables, as the need arises. In answer to my questions, his evidence was that, when the cleaning staff came in in the morning, they *"re-set up the whole pub"*. When I probed this further, he made clear that his evidence in relation to the cleaning staff was based on presumption rather than on actual knowledge of what occurred.

72. Again, an issue arises as to whether the presence of these tables and chairs immediately adjacent to the bar counter suggests that, contrary to the case made by the Leopardstown Inn, customers were in fact seated immediately adjacent to the bar counter. I do not, however, believe that the evidence is sufficient to justify a finding to that effect. Based on the acknowledgment made by Mr. Cooney, it would appear that, on at least one occasion, the tables and stools immediately adjacent to the bar counter in the Lep Bar were used by customers. That is as far as the evidence goes. There is no other evidence before the court which demonstrates, on the balance of probability, that the stools were used on a more widespread basis. Thus, while an adjustment will have to be made to the Leopardstown Inn claim in respect of the use made of the tables on one occasion in advance of Christmas, there is no sufficient basis to find that this use was more common.

The claim of Sinnotts and the Leopardstown Inn in respect of their carveries

73. Both Sinnotts and the Leopardstown Inn claim that, as a consequence of the restrictions imposed by the guidelines (in particular, the physical distancing requirements), it was not possible to operate a carvery at either venue. Insofar as this element of the case is concerned, it is important to draw attention the fact that a self-service carvery/buffet was not prohibited under the guidelines. The guidelines explicitly provided that this style of service could be made available where physical distancing and other public health advice could be followed. According to Mr. Kelly of Sinnotts, the bar was unable to provide a carvery service of that kind during the relevant periods. The case made on behalf of Sinnotts was that such a service could not be operated without breaching the physical distancing requirements. In his witness statement, Mr. Kelly said: -

> *"In addition our carvery, which accounts for 27% of all food sales, has not been able to operate since March 2020. It is part of the Public Bar area (the counter folds down to reveal the Carvery unit), but social distancing and table service requirements made it impossible to operate…"*

74. In his oral evidence, Mr. Kelly explained that three members of staff were required to operate the carvery and that it was not possible to allow a space of one metre between each member of staff in circumstances where one chef would be required to carve and plate; he would then hand the plate to a second chef who would add the vegetables or potatoes and the third chef would do sandwiches and soup. He contended that it was impossible to maintain a one-metre distance between members of staff in those circumstances. However, he acknowledged that the bar was able to provide carvery-style food from the kitchen which was served to patrons seated at tables in the bar. Under cross-examination, Mr. Kelly was asked how a claim was

being made in respect of the carvery in circumstances where the carvery offering was available from the kitchen. His answer was: -

> *"Because two… things: First of all, all offices in the area are closed, so the volume of customers coming to the premises is less. And the fact that there's table service, we can only accommodate, for lunch then, 88 people… or in my previous statement, 100. The carvery would be busier than that, just seating at the counter and ledges etc. on a normal pre-Covid day."*

75. I am not persuaded that Sinnotts has a good case to make in relation to the operation of the carvery. One of the striking features of the bar counter at Sinnotts is the fact that, although the carvery area shown on the plan is relatively small, the counter itself is far more extensive and Map 1 attached to Mr. Kelly's witness statement shows that one side of the counter adjacent to the carvery is earmarked as a *"food counter"*. This shows the position prior to March 2020. This length of the food counter (excluding the area devoted to the carvery) is shown as accommodating ten bar stools. Given the length of that side of the bar counter, it is impossible to understand how the carvery could not have been organised in a manner which would have allowed at least one metre between each of the three members of staff. No explanation has been given as to why it would not have been possible to arrange things in a way so that the three staff members would be kept at an adequate distance from each other. Moreover, the answer given by Mr. Kelly under cross-examination (quoted in para. 74 above) shows that one of the primary reasons why the carvery was not operated was that the bar did not have its normal lunchtime trade in circumstances where most of the office buildings in the vicinity were closed during the relevant periods. Having regard to these considerations, I cannot accept that the carvery was closed as a consequence of restrictions imposed by Government.

76. Insofar as the Leopardstown Inn is concerned, Mr. Cooney stated in para. 49 of his witness statement that: -

> *"Our carvery has been required to remain closed and that closure is continuing. Our carvery accounts for 35% of our food sales in an average week."*

On Day 2 of the July hearing, Mr. Cooney said: -

> *"Well, from a social distancing point of view, it will be very hard to control. We were also conscious of the fact that there was* (sic) *no corporates in the area because people hadn't returned to work. In December we did do the carvery, but it wasn't carvery per se – there was a carvery, but it was brought to your table, so it was an a la carte carvery. So we did try that. But again, there were very few people had come back to work, so business wasn't very good."*

77. In the course of his cross-examination on Day 2, Mr. Cooney gave evidence that, during the December period, the carvery was laid out behind the bar in the lounge in its usual place but that customers could not queue at the bar in the normal way. They ordered food from their tables and it was brought to them from the carvery. However, it is clear from the guidelines discussed above that, subject to appropriate physical distancing, queuing for a carvery was, in fact, permitted. It was put to him that the Leopardstown Inn had been *"plugging"* the carvery in advertising in September and his evidence was that this was a surprise to him. However, on Day 3, Mr. Cooney confirmed that he had checked the position overnight and that, for the last two weeks in September, the Leopardstown Inn did open for carvery.

78. It is clear from Mr. Cooney's evidence in chief and from his evidence under cross-examination that the carvery was capable of being operated. The food was

displayed in the usual place in which carvery service took place prior to the advent of the COVID-19 pandemic. The only difference was that patrons could not queue to obtain it. Thus, it cannot be said that the carvery was closed. The real reason why the carvery was not successful was the lack of custom. This was made very clear on Day 2, in the course of Mr. Cooney's cross-examination, when he said: -

> *"Well, you see, the carvery would've been a very… busy part of the pub pre-Covid… because all the workers from Sandyford Industrial Estate would've come and you would've had queues nearly out the door for the carvery. And then with Covid, there was just no workers in the area. So it was a very unsuccessful part of the business during the two partial closures."*

79. Thus, Mr. Cooney's evidence demonstrates that the reason why the carvery was not successful was the lack of custom. It was not that the Leopardstown Inn was prevented from operating a carvery as a consequence of the COVID-19 restrictions. In all of the circumstances, I cannot see any basis for the claim made by either Sinnotts or the Leopardstown Inn that the carvery section of their bars were closed within the meaning of the policy as a consequence of the Government-imposed restrictions arising from the COVID-19 pandemic. In my view, there is no cover in respect of the claim made arising from loss of sales of carvery sales.

Early closing

80. There is no dispute between the parties that, with effect from 3rd September 2020, the No. 4 Regulations required public houses to cease on-premises service from 11.30pm. This represents an early closure of public house premises. Prior to March 2020, publicans were permitted to serve patrons until 12.30am on Friday and Saturday nights or, on the basis of those holding a restaurant certificate, until 1.30 a.m. In the case of diners, in circumstances where the No. 4 Regulations were intended to address

the COVID-19 pandemic, the three Dublin plaintiffs make the case that the requirement to close early pursuant to those regulations amounts to an imposed closure of the premises as a consequence of the outbreaks of contagious or infectious diseases and is, therefore, covered by the provisions of extension 1(d). The plaintiffs also maintain that, even in advance of 3rd September 2020, the Government had imposed early closing times on the industry. In this context, the plaintiffs relied upon the following: -

(a) They point to a statement made by the Taoiseach, Micheál Martin, on 4th August 2020 to the effect that restaurants and pubs serving food would have to close at 11.00pm from Monday, 10th August 2020. This is further referenced in a briefing issued by the Department of the Taoiseach on 6th August 2020 which noted that this *"decision was not taken lightly"*. The same briefing highlighted the continuing need to defend communities against COVID-19;

(b) There was also a briefing issued by the Department of the Taoiseach on 18th August 2020 to the effect that restaurants and pubs serving food should close by 11.30pm.

81. The plaintiffs, therefore, contend that, as from 10th August 2020, there were Government-imposed early closures of public houses albeit that these decisions of Government were not underpinned by regulations of the kind which subsequently came into force on 3rd September 2020.

82. It has to be said that the evidence on this issue is somewhat confusing. In his witness statement, Mr, Kelly suggested that, for the entirety of the relevant periods, Sinnotts was required to close early. However, he provided no details of this. In his evidence in chief, he gave hearsay evidence that senior management had been advised

by members of An Garda Síochána to close by midnight. Under cross-examination, he suggested that closing times over the relevant periods were *"a moveable feast"* and that they varied from 12.00 midnight to 10.30pm to 11.30pm. However, he provided no details as to where these times came from. In his witness statement, Mr. Cooney said that the Leopardstown Inn was required to close early at 10.30pm during the period 29th June to 18th September with last orders at 10.00pm. However, in the course of his direct examination on Day 2, he said that members of An Garda Síochána asked the pub to close at 11.00pm with last orders at 10.30pm. He was very unclear as to the position and was not able to give any direct evidence of any interactions with members of An Garda Síochána in relation to the issue. He suggested that the position was very unclear and inconsistent in the period up to the middle of August 2020.

83. Mr. Anderson's evidence in relation to this issue was also quite general and imprecise. On Day 3, it was to the following effect: -

"Q. Could I just ask you about the period running from… 3rd July up to 10th August?

A. Yes.

Q. Now, what time would your licence entitle you to remain open to?

A. We've a seven-day publican's licence – we've three different licences, but the seven-day licence would've allowed you to serve until 11:30 Monday to Thursday and then 12:30 Friday and Saturday and 11:00 on Sunday.

Q. And was there any difference in that first period prior to the Taoiseach's statement for you?

A. Yes, the guards were insisting on early closing. Judge, to be honest with you, there's been so many chopping and changing and there's seven different guidelines. To the best of my knowledge, it was around about eleven o'clock at that time, but it could've been earlier. But there was certainly no late trading allowed.

Q. So when the Taoiseach's statement then was made effective as of 10th August and he said eleven o'clock, that wasn't a change from the de facto position imposed by the guards for you?

A. I don't think so. But at that position then, we engaged back with the Department of Taoiseach to try and lobby for 11:30, because our members were looking to try and get as much as they could.

Q. And the regulations then in September added the half hour?

A. Yes, that's correct."

84. Having regard to the very general way in which the plaintiffs have addressed this issue and the complete lack of any detail in relation to the position prior to 10th August 2020, there is no sufficient basis to reach any conclusion as to the factual situation prior to 10th August. Had the plaintiffs wished to pursue a claim in relation to this period, it was open to them to call appropriate witnesses to deal with any relevant interactions with members of An Garda Síochána and to deal in a precise and detailed way with the instructions given by them over the period between 29th June, 2020 and 10th August, 2020 as to times when the premises were required to be closed. In the absence of that evidence, I am unable to reach any conclusions in relation to the factual position during that period It is, therefore, unnecessary to consider whether any such interactions with members of An Garda Síochána could be said to fall within the ambit of extension 1(d).

85. On the other hand, it seems to me that there is a proper basis on which to hold that, even prior to the coming into force of the No. 4 Regulations, there was a Government-imposed requirement as from 10th September 2020 to close public houses early. While that direction was not underpinned by legislation in the period between 10th August, 2020 and 3rd September, 2020, it seems to me that there is no distinction in substance between the type of direction given by the Government in August, 2020 and the previous direction in March, 2020 that public houses should close. It was accepted by FBD at the liability hearing that such a direction did amount to a Government-imposed closure. That approach is consistent with the views expressed by the majority in the UK Supreme Court in the *FCA* case.

86. It should be noted that this element of the plaintiffs' case is new. It was not raised in the course of the hearing in February 2021 which led to the supplemental judgment. I have to say that I was initially sceptical about this element of the plaintiffs' case. My initial reaction was to think that a reasonable person in the position of the parties would instinctively have characterised the early closing requirement as a restriction on trade rather than a *"closure"*. I was also mindful that there is nothing in the supplemental judgment to support the case now made that early closing could be considered to be a *"closure"* for the purposes of extension 1(d). As para. 19 of the supplemental judgment makes clear, my finding that the policy provided cover for a closure of a part of the insured premises was grounded on provisions of the policy which suggested that a physical part of a public house premises could be the subject of an imposed closure arising from any one of the events described in extensions 1(a) to 1(d). Accordingly, I concluded that the policy, read as a whole, did not reasonably require that the entire premises should be closed.

87. Furthermore, there seemed to me to be considerable force in the submission made by counsel for FBD that the overall impact, on a weekly basis, of the No. 4 Regulations was to reduce the number of hours that a public house is entitled to trade by two hours out of a total of 86.5 hours. That seemed to me to strongly suggest that the impact of the No. 4 Regulations (and the previous statements made by the Taoiseach) should be regarded as restrictions rather than closures. As identified in the supplemental judgment, there is a distinction to be made between restrictions on the operation of a business and a closure of premises which, in my view, involves a shutting down of those premises (or of a part of the premises).

88. However, on further reflection, I believe that there is more substance to this element of the plaintiffs' case than I had previously thought. In the first place, the evidence of the plaintiffs establishes that the lost hours are significant in terms of bar takings. According to Mr. Kelly of Sinnotts, the drink trade is at its most profitable in the last hours before normal closing as patrons move from beer to spirits (which have a higher profit margin). Based on the figures for 2019, Mr. Kelly said that Sinnotts generated approximately 15% of its turnover from sales after 10.00pm or 9% after 11.00pm. While these figures are somewhat higher than the analysis described in para. 89 below would suggest, the evidence before the court is that significant sales were made by all three pubs in issue in 2019 in respect of the post-11.00pm period.

89. Mr. Paul Jacobs, the accounting expert retained by Sinnotts and the Leopardstown Inn, also provided an analysis of sales per hour for each of those bars in respect of four periods of early closure, namely 29th June, 2020 to 9th August, 2020, 10th August, 2020 to 2nd September, 2020, 3rd September, 2020 to 18th September, 2020 and 4th December, 2020 to 24th December, 2020. For the reasons outlined above, I am not satisfied that the plaintiffs have proved their case that they were required to

close early in respect of the first of those periods. However, Mr. Jacob's analysis clearly demonstrates, for example, that sales after 11.00pm up to closing time for Sinnotts in the December, 2020 period were only €5,833 (which could represent customers paying for drinks ordered earlier or it could represent sales in breach of the Government measures) as opposed to €37,039 for the same period in 2019. The position is even more stark in the case of the Leopardstown Inn for the same period. In 2020, the hourly sales after 11.00pm were only €211 (which could represent staff drinks) as against €29,781 per hour in the same period in 2019. In the case of Lemon & Duke, Mr. Tim Roulston, accountant, gave evidence that, in the period from 4th September, 2019 to 19th September, 2019, hourly sales after 11.00pm amounted to €7,951.20 (inclusive of VAT) while the hourly sales for the same period in 2020 were only €54.09 (which probably relates to sales to staff after the bar closed).

90. Thus, even if counsel for FBD is correct his submission that the *"lost hours"* represent only 2.5 hours per week, the extent of the business lost is nonetheless significant, especially when one takes account of the number of weeks involved in the August-September and December, 2020 periods. Of course, the fact that the hours of trading lost are significant does not mean that the policy must respond. The plaintiffs have to show that the early closing requirement constitutes an imposed closure following outbreaks of contagious or infectious disease within the meaning of extension 1(d). In this context, there can be no issue that the No. 4 Regulations constitute a Government-imposed measure following outbreaks of COVID-19. Even the name of the No. 4 Regulations (quoted in para. 31 above) makes this clear in the way in which it expressly described the Regulations as COVID-19 related. This conclusion is further reinforced by the express temporary nature of the No. 4 Regulations which were intended to deal with the pandemic as it then presented itself.

Thus, the early closing requirements imposed by the No. 4 Regulations could not be said to be motivated by some desire to tighten the licensing laws for the good of the country or to promote sobriety. The No. 4 Regulations were plainly designed to address the COVID-19 pandemic and this also extends to the early closing requirement imposed by the regulations. However, that still leaves the question whether an early closing requirement can be said to constitute a *"closure"* within the meaning of the policy. On the face of it, it is a step which involves a shutting down of the premises and, as explained in the supplemental judgment, that seems to me to be the ordinary meaning of closure of a premises. However, counsel for FBD argued forcefully that a reasonable person in the position of the parties would never have contemplated that an adjustment to the opening hours would trigger cover. He also argued that to so construe the policy would lead to bizarre and unworkable consequences in that every day on which the requirement to close early was in force would involve the commencement of a new indemnity period in respect of that *"closure"*. I agree that such an interpretation of the policy would be unworkable. It would lead to daily notifications of claims to FBD and unnecessary duplication of work and investigation. Such a scenario seems to me to me to be so farfetched as to not be within the reasonable contemplation of the parties at the time the policy was negotiated.

91. In response, counsel for these three plaintiffs suggested that the scenario painted by counsel for FBD was misconceived. Instead, he argued that what triggers the indemnity period is the Government measure and the period lasts for as long as that measure is in force. However, that argument does not appropriately address the composite nature of the peril as explained in para. 136 of the principal judgment. For the reasons discussed in the principal judgment, I came to the conclusion that the peril

is a composite one involving (a) an imposed closure, (b) by order of a local or Government authority, (c) following a relevant outbreak of a contagious or infectious disease. Accordingly, it cannot be said that the period of indemnity is triggered solely by the relevant order. All other elements of the peril must also be in place. While many of those elements are in place for the periods in question, the issue remains as to whether it can be said that a rolling or recurring requirement to close early could be said to constitute a *"closure"* of a public house within the meaning of the policy, notwithstanding that such closure is not continuous. In considering this issue, it is essential to keep in mind that, as O'Donnell J. emphasised in the *MIBI* case, this question must not be viewed solely through the prism of the current dispute between the parties. On the contrary, it must be considered through the prism of a reasonable person standing in the shoes of the parties at the time the policy of insurance was agreed between them. As I sought to explain in the principal judgment, the court, in addressing that issue, will seek to consider the language used in the policy in light of the factual background existing at the time the policy was agreed between the parties. This is known as the *"text in context"* approach.

92. In considering whether a reasonable person in the position of the parties would have considered a rolling or recurring requirement to close early as falling within extension 1(d), it seems to me to be important to keep in mind that, as noted in para. 126(d) of the principal judgment, the policy expressly envisaged that a public house could be the subject of an imposed closure following an outbreak of contagious or infectious disease not only on the premises but within 25 miles of the premises. Next, it is necessary to bear a number of aspects of the factual background in mind. In the first place, it is necessary to keep in mind that the policy was specifically designed for public houses. Secondly, public houses, by design, are intended to permit people to

congregate in a social setting. Thirdly, experience demonstrates that such settings very often become more crowded as the evening wears on. Fourthly, experience also tells us that alcohol reduces inhibitions such that the longer patrons remain on the premises, the less inhibited they tend to become. For example, if one visits a public house in the early evening, there may be a relatively restrained atmosphere. If one were to leave the public house at that time and return at 10.30pm, one might well encounter a more crowded space and a markedly more lively atmosphere than before. In particular, on weekend nights, it is not unusual to see bars become more and more tightly packed with people as the evening progresses. A further important aspect of the factual background is that people in tightly packed spaces are at an increased risk of being infected with highly transmissible infectious diseases. Again, as noted in para. 126(d) of the principal judgment, this is especially so in light of the sheer scale of the public houses which are the subject matter of these proceedings where large numbers of the public can gather indoors in close proximity with each other and where social inhibitions are likely to be moderated by the influence of alcohol. One does not need to have experienced the COVID-19 pandemic to know that such conditions may lead to an increased risk of infection by a highly transmissible disease or virus. Influenza and the common cold provide more mundane examples. Moreover, as noted in para. 77 of the principal judgment, in the period since the current version of the FBD policy was designed, there has been the swine flu epidemic in 2009 and also the emergence of the SARS in 2003. Although the latter was largely confined, at that time, to the Far East, the emergence and spread of SARS was well publicised throughout the world and the advent of SARS had highlighted the possibility of the emergence of new pathogens of a serious and infectious nature.

93. Thus, there was material reasonably available at the time these policies were put in place which identified that late-night closing in public bars could give rise to a risk of infection. In the case of Lemon & Duke, the position is even more striking because, at the time its policy was negotiated in February and early March 2020, COVID-19 had already emerged as a highly infectious disease. Mr. Anderson had already seen the TV coverage of the closures imposed by the authorities in Northern Italy. In addition, the Ireland vs. Italy rugby match in Lansdowne Road had been cancelled.

94. Bearing in mind the factors outlined in paras. 90 to 93 above, it seems to me that, had the reasonable person in the position of the parties given thought to the issue at the time the policies were negotiated, that person would have identified the later part of pub opening hours as the hours of operation which were most likely to be hit by Government measures aimed at reducing the spread of an infectious disease through close physical contact. In my view, the reasonable person who thought about the issue would also consider that, if the Government was to decide to introduce such measures, they would be likely to be applied on a recurring daily basis. Such a measure involves a daily shutting down of a public house at an earlier time than it would ordinarily close. That is a form of closure albeit one that is not continuous. As I have indicated, it is a recurring or rolling closure but it still involves a shutting down. Given the factors outlined above, it is one which was well within the contemplation of a reasonable person in the position of the parties at the time of negotiation of the policy. In this context, as explained in para. 8 of the principal judgment, the reasonable person test overcomes the difficulty that might otherwise arise from the fact that one or both parties to a contract may not have given any thought themselves to the meaning of a particular clause. In contrast, the reasonable person is presumed to

have read and understood the contract and to be equipped with all the background knowledge that was reasonably available to the parties at the time the contract was made.

95. In these circumstances, I have come to the conclusion that, notwithstanding my earlier misgivings outlined above, a recurring or rolling closure of the kind in issue falls within the concept of closure in extension 1(d). Those early closures were imposed by Government measures which were prompted solely by the COVID-19 pandemic. In the circumstances, it seems to me that the periods of early closure summarised in para. 80 above fall within the ambit of extension 1(d). During those periods, each element of the composite peril was in place. As explained above the closure is of a rolling or recurring nature but it is triggered by the first imposition of the early closing requirement and, for that reason, it seems to me that the period of indemnity commences on that date. It would be absurd to treat the early closing on each day of the periods in question as triggering a new and separate indemnity period.

The quantification of loss arising from partial closure

96. At this point, I am not asked to measure the losses suffered by any of the plaintiffs either as a consequence of the requirement to close early or as a consequence of the closure of the bar counter. Instead, I am asked to address a number of specific aspects of the principles by which those losses should be assessed. In this context, the U.K. Supreme Court has given very helpful guidance in the *FCA* case, at paras. 281 to 286, as to how losses arising from a partial closure should be assessed. Those principles must, of course be seen, in the context of the specific terms of the various policy provisions in issue in that case. It is not necessary, at this stage, to consider the extent to which they can properly be applied in the context of the FBD policy. It is sufficient to note that the principles presuppose that turnover from the

affected part of the insured's business can be readily identified. The problem in the present case is that, on the basis of the evidence heard to date, that element of the assessment gives rise to significant problems. While the quantification of the losses suffered as a consequence of early closing should be a relatively straightforward exercise, the same cannot be said for the losses that flow from the closure of the bar counter. In short, the difficulty with the latter is that separate till receipts are not maintained for that element of the business carried on by the three Dublin bars.

97. In so far as the losses stemming from the early closing are concerned, there are hourly till receipts available for both 2019 and 2020. Accordingly, the hourly till receipts for the equivalent period in 2019 should, subject to any necessary adjustments for the trend and other circumstances affecting the business, assist in demonstrating the extent of the loss of business suffered as a consequence of the requirement to close early. Because the requirement to close early affects the whole of each premises, the assessment is relatively straightforward. For similar reasons to those discussed in paras. 227 to 228 of the principal judgment, I do not believe that it is possible to disaggregate the losses suffered as a consequence of early closing from the losses that would have been suffered in any event from changes in societal behaviour in response to the spread of COVID-19 in the community. In broad terms, one should therefore be able to determine the extent of the losses sustained by reference to (a) the hours lost in 2020 and (b) the hourly till receipts for the equivalent hours in the equivalent periods in 2019. An adjustment may also be necessary to address the trend and any other circumstances affecting the business (an issue addressed in more detail below). It will also be necessary to consider whether, in fact, there were any after-hours sales in 2020 in breach of the terms of the Government measures. If so, an appropriate deduction would have to be made from the relevant plaintiff's claim to that extent. The

requirement to make deductions of that kind was very properly acknowledged by counsel for Sinnotts and the Leopardstown Inn in the course of cross-examining Mr. Tom O'Brien, the accounting expert called by FBD on Day 5.

98. The position in relation to the closure of the bar counter is significantly more complex. There are no separate records kept of bar counter sales which creates obvious difficulties in terms of disaggregating such sales from other aspects of the public house trade carried on by the Dublin plaintiffs. On Day 3, Mr. Paul Jacobs, the accounting expert retained by Sinnotts and the Leopardstown Inn highlighted that, in the case of Sinnotts, there are four tills in all; three tills at the bar counter and one at the carvery. The till at the carvery is not exclusively used for carvery sales. It is also used to record drink sales particularly at busy times.

99. The position is broadly the same in both the Leopardstown Inn and Lemon & Duke. Mr. Jacobs was therefore of the view that one could not disaggregate the revenue of a public house derived from the bar counter from the revenue earned from the sale of drink and food in other parts of the premises. On Day 3, he expressed the view that it is not possible to disaggregate revenues by reference to the areas of the pubs where they were earned. He particularly emphasised that one could not tell where a drink might be consumed. Even if it is bought at the bar counter, the customer may take it to a different part of the premises such as a seating area. His evidence was: -

> *"It's not possible… if I may start in terms of where people, having purchased, would actually consume a drink. So the scenarios are you have a person who has purchased and sits on a stool at the bar; you have another scenario of somebody who stands at the bar between stools, let's say; a third scenario is that they may stand around the bar; another scenario is they may take their*

drink and sit at a table; they may stand on the floor area of the premises as another alternative…. And what is more, just from my own experience in life, people might move… from one of these locations to another. You can imagine that a couple of people meet up at the bar and they're waiting for friends and then they might then move to a table if they see one free, etc."

100. Under cross-examination, Mr. Jacobs was probed by counsel for FBD as to what he meant by his suggestion that it is *"not possible"* to undertake a disaggregation exercise and he accepted that what he actually meant by this is that it is impossible *"to identify* ***with certainty*** *what the actual loss … is"* (emphasis added). In this context, it should be noted that the approach adopted by Mr. Jacobs was not shared by Mr. Tim Roulston, the accounting expert who gave evidence on behalf of Lemon & Duke. Nor was it shared by Mr. Tom O'Brien who gave evidence on behalf of FBD. As explained in more detail below, I found Mr. Roulston's evidence to be particularly helpful. He took a very pragmatic approach. While acknowledging the difficulties that arise, Mr. Roulston expressed the view that it was, nonetheless, *"necessary to try and provide a basis"* and he put forward three different approaches which he suggested might be taken. While he accepted that each of these individual approaches have flaws and weaknesses, his evidence was that a reasonable approximation could be derived from a consideration of the results of all three. The results of each approach could be used to test the reasonableness of the results of the others. It will be necessary, in due course, to review this evidence in more detail.

101. A number of legal arguments were advanced on behalf of Sinnotts and the Leopardstown Inn in relation to the bar counter losses. In the first place, in their opening legal submissions, they made the case (subsequently not pressed in oral argument) that the quantification mechanism in s. 3 of the FBD policy does not

contemplate any form of disaggregation exercise. It was submitted that the quantification mechanism prescribed by the policy was to the contrary effect and that it expressly contemplated an analysis of the business solely in a *"unitary sense"*. Accordingly, these two plaintiffs sought to suggest that they should be entitled to be indemnified in respect of the whole of their losses during the periods in issue and that they should not be confined to those losses which stem from the partial closures. It should be noted that this argument is made solely by these plaintiffs. No such case has been advanced on behalf of Lemon & Duke.

102. In my view, this argument advanced on behalf of Sinnotts and the Leopardstown Inn is misconceived. Notably, it was not an argument that was advanced in the course of the February 2021 hearing when the issue of partial closure was first addressed. If anything, the argument tends to undermine the case then made. If it were the case that the quantification mechanism in the policy contemplates an assessment of the business solely in a unitary sense, that would tend to suggest that the policy does not envisage cover in respect of a partial closure. On the contrary, it would suggest that cover is confined to cases of a complete closure of the premises. After all, as explained in the principal judgment, the policy must be read as a whole and, if these plaintiffs are correct in their reading of the quantification provisions, that must, in turn, be borne in mind in looking at whether a *"closure"* within the meaning of extensions 1(a) to 1(d) also embraces a partial closure. However, in circumstances where I believe that this element of these plaintiffs' case is incorrect, it does not seem to me that the quantification provisions undermine the view previously reached by me in respect of a partial closure.

103. In my view, for the reasons explored in the supplemental judgment, *"closure"* can be construed as extending to a closure of a part of the premises even though no

express provision is made to that effect in extensions 1(a) to 1(d). To my mind, it must follow, that, similarly, the quantification provisions must be read consistently with that construction of the extensions – i.e. as though they also referred to the business carried on in the premises or a part thereof. For the same reason, references to *"the business being affected by …"* must be construed as though they read *"that part of the business being affected by …"*. In these circumstances, I reject the first argument made on behalf of Sinnotts and the Leopardstown Inn.

104. The next submission made by these two plaintiffs is similarly designed to permit these plaintiffs to recover all of their losses for the relevant periods notwithstanding that their premises were subject to partial closure only. This argument is advanced on the basis of Mr. Jacobs' evidence that it is *"impossible"* to disaggregate the losses suffered as a consequence of the closure of the bar counter from the other losses suffered by the plaintiffs. In such circumstances, it is contended that the court should apply the *Miss Jay Jay* principle and hold that the plaintiffs should be entitled to an indemnity in respect of all of their COVID-19 losses during the periods in issue (whether stemming from the closure of the bar counter or not). The *Miss Jay Jay* principle has been discussed in both the principal and the supplemental judgments and does not require to be explained again here. It is sufficient to recall that resort can be had to that principle where, on the evidence, there are two (or more) proximate causes of a loss suffered by a policyholder, one of which is insured under the policy and the other is not excluded. In such circumstances, the policyholder can recover under the policy notwithstanding that one of the proximate causes is uninsured. However, the case law demonstrates that this principle will only be applied where there is more than one proximate cause and it is impossible to say which of them is the effective cause of the loss.

105. A number of points arise in relation to this argument. In the first place, if Mr. Roulston is correct, it cannot be said to be impossible to disaggregate the bar counter losses. That issue is addressed further below. Secondly, I do not believe that the *Miss Jay Jay* principle has any application in circumstances such as these. If Mr. Jacobs is correct, the reason why disaggregation of the bar counter losses is not possible is not as a result of some uninsured peril operating at the same time as the insured peril; instead, it stems from the fact that separate records are not kept by the Dublin pubs of their bar counter business. That seems to me to be very different to the situation which arises in those cases where the principle has been applied. For example, in the *Silverseas* case (discussed in the principal and supplemental judgments) the relevant claim related to a serious drop in cruise line business for which two completely overlapping causes were identified – one was customer anxiety arising from the attack on the World Trade Centre on 11th September, 2001 (which was not insured) and the other was customer anxiety arising from US Government warnings that US citizens were under increased risk of terrorist attacks abroad (which was insured). The justification for the application of the principle was that it was not possible to divorce anxiety derived from the uninsured concurrent cause of the loss of business (namely the attacks themselves) from the anxiety derived from the insured cause (the very stark Government warnings). Both were perils, one insured, the other not and both were proximate causes of the same loss.

106. Thirdly and very importantly, as counsel for FBD observed in their opening written submissions, the loss sustained by the Dublin pubs arising from the closure of the bar counters is not the same loss as that suffered by other parts of the business that were not closed. The parts of the business that were open may have suffered losses as a consequence of the ongoing effects of the COVID-19 pandemic, but, in

circumstances where those parts of the business were not closed, those losses could not be said to be caused by closure. Accordingly, there is no concurrency of loss.

107. For completeness, it should be noted that, in support of their case that the *Miss Jay Jay* principle applies, I was briefly referred by counsel for Sinnotts and the Leopardstown Inn to a number of passages in the judgment of Lords Hamblen and Leggatt in the U.K. Supreme Court decision in the *FCA* case and, in particular, to what they said in paras. 186 to 188. However, I do not believe that those paras. are on point. In the first place, they are concerned with *"but for"* causation rather than the *Miss Jay Jay* principle. Secondly, the cases discussed in those paras. are quite different to the situation which arises on the facts here. Those cases were concerned with defence costs where costs are incurred both in relation to an insured claim and an uninsured claim. The effect of the cases is that an insured defendant will be entitled to a full indemnity in respect of defence costs covered on the face of a policy wording even where (a) the costs so incurred also benefit an uninsured defendant or (b) the defence costs are attributable to both an insured claim and an uninsured claim. Crucially, in either event, the costs would have been incurred in any event to deal with the insured claim. I fail to see how that this principle can be said to be applicable by analogy here and no argument has been made to me to explain how it is said to apply. In this case, it cannot be said that all of these plaintiffs' losses during the relevant periods arise from the closure of the bar counter. They are not therefore in the same position as an insured defendant who can show that its defence costs would have been incurred in any event even if those costs also benefitted an uninsured claim or an uninsured party.

108. All of that said, there is some scope for the application of the *Miss Jay Jay* principle in the event that the Dublin pubs succeed in proving a loss relating to the bar

counter business (assuming for this purpose that the plaintiffs establish that its closure falls within extension 1(d)). The application of the principle would, however, be limited to the losses attributable to the bar counter business. In particular, the principle could be invoked to defeat an argument made by an insurer that, even without the imposed closure of the bar counter, publicans would have suffered a loss in any event as a consequence of the changes in societal behaviour in the wake of the COVID-19 pandemic (which is not an insured loss under the FBD policy) and that, accordingly, they should not be entitled to be indemnified in respect of that element of the loss of business. In my view, the *Miss Jay Jay* principle could be invoked in response to any such argument. For similar reasons to those given at paras. 212 to 213 of the principal judgment and to those given by Tomlinson J. in *Silverseas*, at para. 68, it would be an unreal and impossible task to unravel how much of the bar counter losses would have arisen in any event even without the closure of the counter. Consequently, no deduction would be made to reflect the losses attributable to customers staying away from pubs because of concerns for their own health. This was very properly conceded in the course of the closing submissions of counsel for FBD on Day 8 of the hearing when he said: -

> *"If the Court finds that there's a partial closure because of the restrictions in respect of the use of the bar counter, the only application of the Miss Jay Jay principle would be that, if you were trying to actually assess the losses from the closure of the bar counter, you wouldn't say: 'well, how many fewer people would* [we] *have had sitting at the bar in any event'".*

109. Counsel then contrasted that position with the case made on behalf of Sinnotts and the Leopardstown Inn and he submitted: -

> *"But you can't then say: 'And also I'm now bringing in all of the losses from the other parts of the premises which are not the subject of the insured peril at all.' Those are quite separate losses and the only cause of those losses is the general COVID situation, it's not caused by the insured peril at all."*

In my view, counsel for FBD was correct in this submission. These plaintiffs are going too far in seeking to invoke the *Miss Jay Jay* principle to permit recovery of COVID-19 losses suffered by them in respect of the business carried on in those parts of their premises which were not subject to an imposed closure during the relevant periods. For all of the reasons outlined in paras. 104 to 107 above, I am of opinion that, save to the limited extent mentioned in para. 108, the *Miss Jay Jay* principle is of no application. In particular, it is of no assistance to Sinnotts and the Leopardstown in so far as they seek to invoke it to recover losses in respect of those parts of their premises which were not the subject of an imposed closure during the relevant periods.

110. In my view, a more fundamental issue arises in relation to the case made by Sinnotts and the Leopardstown Inn that it is impossible to disaggregate the losses arising from the closure of the bar counters. As articulated in the evidence of Mr. Jacobs (quoted in para. 99 above), these two plaintiffs claim that, in the absence of separate till records for bar counter sales, there is so much movement of patrons between the bar counter and other areas of the premises that one cannot reliably identify what element of the business is attributable to the bar counter. Although Mr. Jacobs was addressing the position of Sinnotts and the Leopardstown Inn, it is clear that a similar business model is operated in all three Dublin pubs. That seems to me to be very relevant in the context of the factual background against which the terms of the policy must be construed. That aspect of the factual background was not addressed

in the course of the February 2021 hearing when arguments were first made that the cover available under extension 1(d) of FBD policy extended to a closure of a part of a public house premises. In those circumstances, when I came to write the supplemental judgment, I was unaware at that time that the business model of these plaintiffs makes no distinction between sales at the bar counter and sales to patrons seated or standing elsewhere in the premises. That business model clearly pre-dates the putting in place of the policies and therefore forms part of the relevant factual backdrop against which the policy must be construed. In the supplemental judgment, I deferred reaching any final determination as to the ambit of cover under extension 1(d) in relation to a partial closure until it is possible to make definitive findings of fact as to how the business of each of the plaintiffs has been affected by the Government measures in place during the relevant periods. The evidence as to the business model of the three Dublin plaintiffs is clearly relevant to any such determination.

111. As explained in the principal judgment, in construing the policy, the court will place itself in the shoes of a reasonable person in the position of the parties at the time the policy was negotiated and the court will assume that such a person has knowledge of the relevant background facts as they existed at that time. The approach now advocated by Sinnotts and the Leopardstown Inn seems to me to be capable of having significant repercussions in this context. If it were truly the case that it is impossible to separate the sales at the bar counter from other sales, that would be an important element in considering whether a reasonable person in the position of the parties would regard a closure of the premises (within the meaning of extension 1(d)) as extending to a closure of a part of the premises represented by the bar counter. If there is such a level of movement of patrons, if no separate sales records are kept and if it is

impossible to segregate the bar counter business from that carried on in other parts of the premises, would a reasonable person understand that the bar counter should be treated as a part of the premises capable of being the subject of an imposed closure sufficient to give rise to a claim under extension 1(d)? To my mind, the fact that this contract constitutes a policy of insurance is a critically important element of the context. By its very nature, such a contract is put in place with a view to providing an indemnity in respect of provable claims covered by the policy. Bearing that in mind, would a reasonable person consider, at the time the policies were put in place, that extension 1(d) was intended to permit a claim to be made in respect of a closure of a part of the premises even where it is impossible to relate that claim to the relevant part? I have to say that I think it is improbable that a reasonable person in the position of the parties could plausibly reach such a conclusion. If that is right, it would follow that the claims based on the bar counter closure must fail in their entirety. However, at this point, it would be premature to make a finding to that effect. Before reaching any final determination on that issue, I must first consider whether it can be safely concluded that a reasonable assessment can be made of the bar counter losses. If such a conclusion can be reached, that may dispose of the concern voiced in this paragraph.

112. It is therefore crucially important to consider whether there is a basis to disaggregate the losses suffered as a consequence of the bar counter closure. If not, it will be necessary to consider whether that is fatal to this element of the claim made by the Dublin pubs.

113. In speaking of disaggregation, it is necessary to make clear that the exercise to be carried out here is not the same as that proposed at the liability hearing by Mr. Lewis, the expert witness who gave evidence at that time on behalf of FBD. The disaggregation exercise posited by Mr. Lewis was addressed by me in paras. 227 and

228 of the principal judgment. That exercise attempted to distinguish between the effects of the COVID-19 pandemic on the business of the plaintiffs and the effects of the imposed closure on their business (which FBD, at that time, contended was the relevant insured peril). For the reasons discussed in the principal judgment, I rejected the approach put forward by Mr. Lewis and I also rejected the case made by FBD as to the ambit of the insured peril.

114. The disaggregation exercise which arises at this point is wholly different to that propounded by Mr. Lewis. What it is now necessary to measure are the losses which flow from the imposed closure of a part of a public house – namely the bar counter. In circumstances where this was the only part of the premises which was the subject of an imposed closure during the relevant periods, it is plainly necessary to undertake such a disaggregation exercise. As Lords Hamblen and Leggatt observed in the *FCA* case, at para. 141: -

> *"We should add that the FCA accepts that there is only cover for that part of the business for which the premises cannot be used. If, for example, a restaurant which also offers a takeaway service decides to close down the whole business it could only claim in relation to the restaurant part of the business. Equally, if there was a travel agent whose business was 50% walk-in customers, 25% internet sales and 25% telephone sales, it could only claim in relation to the loss of the walk-in business, even though all parts of the business may have been depressed by the effects of COVID-19 and the government measures taken."*

115. It seems to me that the same principle applies by analogy here. The only part of the pubs which were the subject of the imposed closure in issue is the bar counter. Thus, it is only the loss of business that flows from that closure which is capable of

being covered under the policy. Counsel for Sinnotts and the Leopardstown Inn sought to cast doubt on this element of the *FCA* judgment. In his closing submissions, counsel highlighted that this para. of the U.K. Supreme Court judgment proceeds on the basis of a concession made by the U.K. Financial Conduct Authority (*"the FCA"*). I fully accept that such a concession was made. However, that does not seem to me to undermine the logic of the point made in para. 141 of the judgment. Nothing has been said on behalf of Sinnotts and the Leopardstown Inn which undermines that logic or calls it into question. It is striking that counsel merely observed that: *"The Court may be driven to that conclusion itself in the context of this case, but it is important to note that it is a concession".* In my view, the concession made by the FCA was wholly correct. The logic of what is said in para. 141 is unassailable.

The approaches suggested by the experts to assess the bar counter losses

116. I must therefore review the different approaches put forward by the experts called by Lemon & Duke and FBD as to how the bar counter losses might be measured. As noted above, Mr. Jacobs took the view that it is not possible to do so with any degree of certainty. He therefore did not put forward any proposal as to how the losses might be measured.

Approach No. 1 of Mr. Roulston

117. Mr. Tim Roulston gave very helpful evidence on behalf of Lemon & Duke. He acknowledged that it is a difficult exercise to seek to disaggregate the bar counter losses. He put forward three potential methodologies. Two of them (approaches Nos. 1 and 3) are based on presumed drink sales while the other (approach No. 2) proceeds on the basis of the loss of customer spaces at the bar counter. In so far as approach No. 1 is concerned, Mr. Roulston identified from Lemon & Duke's records that, when

compared with pre-COVID sales, there was an overall decline in food and drink sales in the periods in issue. But he noted that the decline in drink sales was more marked than the decline in food sales. He made what he frankly acknowledged was a very broad assumption that the reason for this is likely to be the closure of the bar counter. In the case of the Lemon & Duke, there is, nonetheless, an evidential basis for that assumption at least to the extent its bar counter is principally used by drinkers rather than by diners. The evidence of Mr. Anderson was that, while the bar counter was used by diners for the lunchtime trade, that was not the experience in the evening time when it was predominantly used by drinkers (either sitting or standing at the bar). That is also consistent with common experience of public houses where the bar counter is sometimes the most popular location for patrons intent on drinking. In contrast to Mr. Kelly and Mr. Cooney, Mr. Anderson was present in the Lemon & Duke on a regular basis. His evidence was that he was on the premises five or six times per week, twice a day, for periods of one or two hours at a time. He was therefore in a position to give first hand evidence on this issue.

118. Accordingly, in approach No. 1, Mr. Roulston focused on drinks sales. He also concentrated on the days when the bar counter in Lemon & Duke is primarily popular with drinkers namely Thursdays to Sundays. In addition, given the usual increase in business in the run-up to Christmas, he included the entire 7-day week in the case of the December 2020 period. On the assumption that the Lemon & Duke sales records confirm this, that seems to be a reasonable approach to take in so far as it goes. In a manner which is fair to FBD, it excludes from the calculation those days when drink sales are less important. Subject to that exclusion, the approach then looks at the average total sales for drink and food on the relevant day per month (for example on a Thursday in July 2020) in the relevant periods and compares those sales with the

average figures achieved for that day in 2019. Thus, taking the average Thursday in July 2020 as an example, Mr. Roulston has identified that average daily sales of drink were 46% of the equivalent day in 2019 while average daily sales of food were 57% of the equivalent day in 2019. Mr. Roulston suggested that the difference between these figures can be used as a proxy to estimate the sales of drink that would likely have been made had the bar counter been open. Thus, in the case of the average Thursday in July 2020, Mr. Roulston took the difference between 46% and 57% and (again quite fairly to FBD) rounded it down to 10%. He then took 10% of the average drink sales for Thursdays in July 2019 which gave him a figure of €580.04. There were four Thursdays in July 2020, so that meant that the total sales lost on the basis of this approach was €2,320.16. A similar approach was adopted for all of the other drinking days in the relevant periods (taking a monthly average for each). It should be noted that the relevant margin between drink sales and food sales was not always as low as 10%. For example, the margin for Fridays in July 2020 was 43% and the margin for Saturdays in the same month was 57%. The margin between drink and food sales was also substantial on Saturdays in December 2020 when it ran, on average at 43%. It was 37% for Mondays in that month. The total for lost sales, estimated on this basis, was €221,150.43 to which Mr. Roulston applied the Lemon & Duke gross profit margin of 70% (which had been agreed with FBD's expert, Mr. O'Brien). That gave a figure of €155,505.30 for total gross profit lost.

119. Mr. Roulston very fairly accepted that there are weaknesses in the assumptions underlying this approach. That is undoubtedly so. For example, it is clear on the evidence that the bar counter in Lemon & Duke is not exclusively focused on drinks sales. As noted above, it is used for dining at lunchtime. A further concern is that food sales during the relevant periods may have been inflated as a consequence of the

requirement to order a substantial meal. Thus, it is doubtful that one can safely rely on the figures for food sales in 2020. To do so may skew the equation in the insured's favour. This is readily illustrated by the fact that the figures for food sales for Saturdays in each of July, August and September 2020, were higher than the equivalent days in 2019. The figure for Saturdays in July 2020 was 111% of the 2019 figure. This rose to 113% in August and reached 128% in September.

120. Moreover, when this approach was put to Mr. Jacobs by counsel for FBD, his response was that the approach would not work for Sinnotts. He highlighted in this context that food was put through the tills at the bar counter of Sinnotts and he reiterated his view that one could not determine where drink was actually consumed in the premises. There was also a very significant practical reason why approach No. 1 would not work in so far as Sinnotts is concerned in that the sales figures show that Sinnotts' food sales actually increased during the relevant periods over the sales figures achieved in the same periods in 2019. Thus, for example, in the case of the period 29th June to 18th September 2020, the total food sales were €62,415 while the total food sales for a broadly equivalent period in 2019 (1st July to 20th September 2019) were €18,489. The latter period was chosen to take account of the fact that 2020 was a leap year.

121. Approach No. 1 would also appear to be inappropriate in the case of the Leopardstown Inn. For example, in its case, there was no significant difference between the decline in food sales, on the one hand, and the decline in drink sales on the other. Based on the figures given by Mr. Jacobs in Tables 3.2 and 3.3 of his report on the Leopardstown Inn, sales of drink for the 26th June to 18th September period were, by my calculation, 64% of the broadly equivalent period in 2019 while the figure for food sales was 62%. This also demonstrates that the decline in food sales

was greater in the case of the Leopardstown Inn than the decline in drink sales. Thus, approach No. 1 would not work in its case.

122. Similar to the figures for Saturdays in Lemon & Duke, the fact that food sales figures have increased in Sinnotts in 2020 may be the attributable to the requirement imposed by the No. 3 Regulations to purchase a substantial meal. That is an issue that was raised by FBD's expert, Mr. O'Brien when he came to give his evidence on Day 5 of the hearing. Mr. O'Brien suggested that this was a flaw in approach No. 1. He said: *"... there is one if not two flaws in that. One is that it's using food revenues as a base for looking at the reduction in drink revenues in circumstances where it's a false food figure on the basis that there was a requirement to purchase a meal when the pubs are open. And then secondly, it doesn't attribute or set out where those ... sales were actually consumed".* That said, Mr. O'Brien agreed with Mr. Roulston that it was appropriate to concentrate on the busier nights of the week albeit that, as explained below, Mr. O'Brien put forward a different approach to estimating the losses sustained.

123. Having regard to the factors outlined in paras. 119 to 122 above, it is clear that significant issues arise in relation to approach No.1. However, it may have potential value in cases where there were significant food sales before the pandemic and where there was an overall decline in food and drink sales in the periods in issue with a more marked decline in drink sales than in food sales. In such cases, where there is evidence that, prior to the pandemic, the bar counter was largely used for drink sales rather than food sales, there is some basis to assume that the reason for the greater decline in drink sales is causatively linked to the closure of the bar counter. I fully appreciate that this will inevitably involve a fairly broad-brush approach and I examine further below the extent to which a court is entitled to assess a loss on such

an inexact basis. At this point, it is sufficient to note that approach No. 1 would not work for either Sinnotts or the Leopardstown Inn and, in light of the capacity of Saturdays' food sales to distort the picture, I do not believe that it would be safe to apply it in the case of Lemon & Duke.

Approach No. 2 of Mr. Roulston

124. Mr. Roulston's second suggested approach (*"approach No. 2"*) is based on an approximation of the number of people drinking at or in the vicinity of the bar counter. Mr. Roulston very candidly accepted that approach No 2. is *"very simplistic".* In the case of this approach, Mr. Roulston noted that there was a total of 136 seats in Lemon & Duke (90 indoor and 46 outdoor) during the relevant periods. It appears that this is a smaller number of seats than would have been available during the pre-COVID period. In addition, there are 24 seats located at the bar counter which were unavailable during the periods in issue. Mr. Roulston then assumed for the purpose of this exercise that the bar counter could accommodate at least another 24 people standing next to those seated. He then took the figure for the gross profit earned on actual sales achieved during the relevant periods in issue (namely €379,598) and divided that figure by 136 to get a figure for *"sales per customer or per customer space".* In turn, in order to *"approximate what those spaces would have achieved",* he multiplied that figure by 48 giving him a total of €133,976 as his estimate of the gross profit that might have been earned at the bar counter, had it been open during the relevant periods. It is important to note that this calculation is based on the overall sales figures achieved during the relevant periods. As explained in para. 108 above, those figures are likely to be depressed, at least to some extent, by the fact that, during those periods, there was reduced customer demand for public houses as a consequence of concerns about the transmission of COVID-19.

125. Although Mr. Roulston accepted that approach No. 2 is simplistic, he agreed with counsel for FBD that it may well be a valid approach where there is a serious lack of other information available on which to make an assessment. Under cross-examination, he also accepted that he would not have put this approach forward had he not believed that it was valid. However, he also stressed that he took comfort from the fact that all three approaches *"gave a number which is* [within] *a reasonable range".* In addition, it should be noted that Mr. Roulston further accepted that approach No. 2 could be adapted to try to take account of the capacity of the premises on busy nights but he stressed that capacity was not a matter that he, as an accountant, is qualified to address. Instead, he suggested that Mr. Anderson would be in a better position to address capacity and, in particular, to address *"where ... congregations* [of customers] *happen ...".*

126. Mr. Jacobs characterised approach No. 2 as *"excessively simple"*. I agree that is a very simple but it is an attempt to estimate the takings that would have been attributable to the bar counter, had it been open. Notwithstanding Mr. Jacobs' criticisms, I am grateful to Mr. Roulston for putting forward a potential methodology. Moreover, it appears from what was said by Mr. Jacobs, in the course of his cross-examination on Day 3, that his fundamental difficulty with all of the approaches proposed is that they do not address the issue as to where drink is actually consumed.

127. Mr. Jacobs voiced the same concern when it was put to him by counsel for FBD that an examination of till receipts over a period of time should assist in isolating bar counter sales. In this context, it was put to him that one could derive an estimate of drink sales achieved by table service by identifying the proportion of table service bills that relate to drink sales and one could accordingly conclude that those drink sales were not generated by the bar counter. In that way, one could estimate the

average drink sales that were driven by food customers over a particular period. That drink figure could then be deducted from the total drink sales to roughly determine the extent of bar counter drink-only sales in the same period. Mr. Jacobs' response was: *"that will give you drink but it will not tell you what was … consumed at the bar versus what was consumed in other areas of the premises. I've thought about all of this in quite a bit of detail and that is unfortunately the flaw. Look, I'm open to any good idea here, like all of us are trying to reach a solution but that unfortunately rests with the same fundamental problem that I've been talking about".*

128. It is accordingly very clear that Mr. Jacobs perceived that the same issue arises in relation to each of the proposed solutions put forward by the other experts. I examine in more detail below whether the *"fundamental problem"* identified by Mr. Jacobs is, in truth, an insurmountable impediment to making a fair assessment of the losses that flow from the closure of the bar counter. In particular, I consider further below whether bar counter sales to drinkers who consume their drinks in other parts of the premises are relevant to the assessment to be made. After all, such customers could equally place their orders with floor staff and, so, an issue arises as to whether sales to such customers can properly be attributed to the bar counter. Before reaching a conclusion on that issue, it is necessary to describe the third possible approach suggested by Mr. Roulston and also the approach put forward by Mr. O'Brien on behalf of FBD.

Approach No. 3 of Mr. Roulston

129. Approach No. 3 put forward by Mr. Roulston is an adaptation of an exercise done by Mr. Jacobs immediately before he gave his evidence on Day 3. Mr. Jacobs' exercise was undertaken for the purpose of showing that the losses sustained by Sinnotts and the Leopardstown Inn as a consequence of the bar counter closure were

material in scale. Mr. Jacobs did not suggest that the exercise could be used to accurately assess the losses actually sustained as a consequence of the closure. In the case of Sinnotts, Mr. Jacobs' exercise was based on the sales figures that would have been achieved had all of the 30 seats at the bar counter in Sinnotts been filled during the relevant periods and each of the customers sitting at the counter had consumed two drinks, the price for such drinks being taken to be the average of the best-selling drinks sold at the Leopardstown Inn.

130. On Day 5, Mr. Roulston expanded on the exercise undertaken by Mr. Jacobs and adapted it for use in the case of Lemon & Duke as a possible basis of assessing the lost bar counter sales. For this purpose, he took the price (excluding VAT) of the top six drinks by volume sold in Lemon & Duke namely a pint of Guinness (sold at €5.66), a Beefeater gin with mixer (sold at €8.69), a pint of Heineken (sold at €5.96), an Absolut vodka with mixer (sold at €8.50), a Lemon & Duke Espresso Martini (sold at €12.87) and a pint of Peroni (sold at €6.48). Based on these six products, he took a weighted average of €6.25 (excluding VAT) as the average price of a drink sold to a customer at the bar counter. He then produced a table showing the sales figures that would have been achievable depending on (a) the number of customers who might have sat at the bar on each day of the relevant periods during which Lemon & Duke was open and (b) the number of drinks that might have been consumed by those customers.

131. Taking the weighted average price of €6.25 and the number of seats at the Lemon & Duke bar counter (namely 24), Mr. Roulston estimated the total sales that might have been earned during the periods in question based on a number of different assumptions. First, he estimated the sales figure that would have been achieved if a total of 48 customers had patronised the bar counter during each day of those periods.

He did so on the basis of three different scenarios depending on whether each of those customers had taken two, three or four drinks at the average weighted price. Based on the fact that Lemon & Duke was open for 99 days during those periods, this resulted in figures of €41,607, €62,411 and €83,215 respectively. He then did a similar exercise on the basis that a total of 72 customers had patronised the bar counter on each day. This assumption gave rise to projected sales figures of €62,411, €93,617 and €124,822 respectively, depending on whether the customers bought two, three of four drinks each. Next, Mr. Roulston undertook a similar exercise on the assumption that 94 customers patronised the bar on each day. This resulted in figures of €83,215, €124,822 and €166,430 respectively. Finally, Mr. Roulston repeated the exercise on the assumption that the daily number of customers at the bar counter was 120. This resulted in figures of €104,019, €156,028 and €208,037 respectively.

132. Mr. Roulston suggested that the assumptions based on 48 and 72 customers per day were conservative. He also stressed that the periods in question contained 24 days in December 2020 and also Thursdays, Fridays and Saturdays (which, between them, account for 55 days of the total 99 days in those periods). Those are days on which it would be expected that there would be a higher demand at the bar counter. However, he acknowledged that, in common with approaches nos. 1 and 2, there were *"flaws and weaknesses"* in this approach. That said, Mr. Roulston highlighted that, within the range of figures thrown up by approach no. 3, there were two figures which, in round terms, were consistent with the results of approach no. 1 and approach no. 2. Those are the figures of €124,822 (based on 72 patrons buying four drinks apiece at the average weighted price used by him) and €166,430 (based on 96 customers each buying four drinks at that price). Mr. Roulston said that this gave him some comfort that the figures are reasonable.

133. Under cross-examination by counsel for FBD, Mr. Roulston acknowledged that there was no means available to measure, even on a very approximate basis, the number of customers moving between the bar counter and other areas of the premises. He nonetheless agreed with counsel for FBD that he had sought to do his best to come up with an estimation, albeit one that was based on a number of assumptions and subject to a number of caveats. Mr. Roulston accepted that the result obtained by applying approach No. 3 will always depend on the particular assumptions that are factored into the equation and, in particular, on the price and the estimated number of customers used for this purpose. He also accepted that, although December 2020 and Thursday to Saturday nights could be expected to be busier than other periods, he had nonetheless applied a constant number for customers patronising the bar counter each day. His evidence was that he had *"averaged this over the 99 days, so it is averaging out over the entire period".*

134. Approach No. 3 was described by FBD's accounting expert, Mr. O'Brien as his *"least preferred option".* He noted that it does not in any way link back to the lost drink revenues and that, depending on which assumptions are made, it results in a very wide variation in its estimates of lost bar counter sales ranging from €41,607 at the lowest to €208,037 at the highest. He also noted that it has a total of 16 permutations. That is true but it seems to me that permutations may well be necessary to address fluctuations in trading levels depending on the time of the day or the day of the week under consideration. Mr. O'Brien also suggested that the approach is not *"grounded in any statistics or* [key performance indicators] *that are coming from the pub".* Mr. O'Brien further criticised the approach on the basis that it *"doesn't ... recognise ... how that trade evolves during the week, as in busy versus quiet periods."* It must be acknowledged that the latter criticism is well made at least in so far as Mr.

Roulston assumed that a constant number of patrons would be present at the bar counter throughout the day. Any formula for measuring the losses must be capable of addressing fluctuations in trade. Nonetheless, for the reasons discussed in more detail below, I am of the view that there is merit in an approach that seeks to capture drink sales to patrons either sitting or standing at the bar counter. Notwithstanding the validity of some of Mr. O'Brien's criticisms, approach No. 3 certainly provides food for thought.

The approach put forward by Mr. O'Brien

135. On Day 5, Mr. O'Brien suggested an alternative approach. He accepted that, in the case of the three Dublin pubs, there are no records available to correlate the place of purchase of drinks with the place where those drinks were consumed within the bars. He also accepted that any estimation exercise is complicated. However, he highlighted that there are a number of factors that can be objectively ascertained. In the first place, the total lost drink sales can be quantified. Secondly, the gross margin on lost drink sales can be identified. Thirdly, as also identified by Mr. Roulston, a significant proportion of drink sales are generated on Thursday, Friday and Saturday. He calculated that these three days give rise to 68.44% of sales of drink in Lemon & Duke. In additional written estimations made by him (which were made available to the court at the end of Day 8), Mr. O'Brien subsequently calculated that the peak sales days for Sinnotts represent 66.43% of total drinks sales while the peak days for the Leopardstown Inn represent 69.74% of such sales. According to Mr. O'Brien, the concentration of drink sales revenue on peak nights led him to look at capacity as a potential measurement of lost bar counter revenues. His suggested approach involves (a) looking at where, within a pub, such capacity is spread – i.e. whether at the bar counter, the seating areas etc. and (b) allocating the lost drink revenue to those

individual areas within the pub. For this purpose, Mr. O'Brien utilised the figures for pre-COVID occupancy calculated by Mr. Colin Scott of AOCA Engineers (who gave evidence on behalf of FBD on Day 4). In the case of Lemon & Duke, Mr. Scott had estimated that, pre-COVID, the maximum occupancy available in the pub ranged from 248 on the basis of a low-density layout (which envisages that 80% of the pub would be seated) to 302 on the basis of a high-density layout (which envisages that seating would account for approximately 50% of use). In his evidence, Mr. Scott had explained that, in broad terms, fire safety load factors apply a load factor of 0.5 for standing patrons and 1.00 for seated patrons. Thus, if a bar layout is designed for a greater number of standing patrons than seated patrons, the capacity will be greater.

136. For the purposes of his exercise, Mr. O'Brien took the lower capacity figure of 248 for Lemon & Duke. As explained further below, he used this figure as a denominator in his equation for peak periods rather than the higher capacity figure of 302. He explained that, in doing so, he wanted to be fair to the plaintiffs because *"probably if you were to look at it, the number of days when these pubs are operating at maximum capacity is few and far between. So, on average, I would suspect that they're veering more towards the lower end than the upper end."* Obviously, the ultimate result will be higher where a lower denominator is used. Thus, on the face of it, the use of a denominator of 248 is more favourable to Lemon & Duke than a denominator of 302.

137. Mr. O'Brien applied a different denominator for off peak periods. For the purpose of those periods, he took the number of seats as the relevant denominator – namely 151 (in the case of Lemon & Duke) made up of 24 bar counter seats and 127 non-bar counter seats. He assumed that, at non-peak times (i.e. days other than Thursday to Saturday), the bar counter and the pub as a whole would be fully seated.

He accepted that his calculation that the pub would be fully seated on non-peak days was very much an assumption and that there may well be patrons who prefer to stand even with a half empty pub at their back.

138. Mr. O'Brien then took the figure for lost drink turnover for Lemon & Duke for the periods in issue (namely €618,395) and applied the 70% rate of gross profit for Lemon & Duke in order to arrive at the lost gross profit figure of €432,877 for those periods. Next, he split that figure between the peak and off-peak days (i.e. 68.44% and 31.56% respectively) attributing €296,272 to the peak periods and €136,604 to the off-peak periods. He then sought to apply his understanding of capacity. On the basis of his view that, during off-peak times, the bar counter would be seated only, his final calculation of the loss in respect of that element of the period would amount to €21,712. This sum was arrived at by multiplying the lost gross profit for the off-peak days (€138,604) by a numerator derived by him from the number of bar counter seats (24) and then dividing that by his denominator namely the total number of seats (151) in the pub as a whole. In the case of peak times, the calculation was carried out on a similar basis but this time multiplying the lost gross profit attributable to this element of the period (€296,272) by the total number of bar counter seats (24) divided by a significantly larger denominator derived by him from his view of the total capacity of the pub (248). On that basis, the loss for the peak days would amount to €28,671. When that figure is added to the sum of €21,712, the total loss suffered by the bar counter on the basis of this scenario would amount to €50,383.

139. Mr. O'Brien also carried out two further calculations on the basis, firstly, of an assumption that, during peak periods, for every seat at the bar counter, there would also be one person standing at the bar counter and secondly, on the assumption that, during peak periods, for every seat at the bar, there would be two people standing.

The former assumption would result in the peak period figure rising to €57,343. This is arrived at by multiplying the lost gross profit (€196,272) by 48 (made up of 24 seated and 24 standing) and dividing that by 248 (being the total capacity assumed by Mr. O'Brien). The latter assumption would increase the peak period figure to €86,014 (the calculation being the same as before but now using a numerator of 72 (made up of 24 seated at the bar and 48 standing) in place of 48).

140. I should explain that the above description of Mr. O'Brien's approach is based on the more detailed calculations made available on Day 8 of the hearing rather than the table used in the course of his evidence on Day 5. I have approached it in this way because the Day 8 calculations are set out more clearly than those summarised in the table discussed on Day 5. As I understand it, the underlying methodology is the same on both occasions.

141. I should also explain that, while I have concentrated in my description of Mr. O'Brien's approach on his evidence in relation to Lemon & Duke, he also undertook a similar exercise for both Sinnotts and the Leopardstown Inn. In so far as Sinnotts is concerned, he took the lower occupancy figure of 399 customers suggested by Mr. Scott (who had estimated that the higher end occupancy is 633). He also used the figure of 30 seats for the bar counter and 166 as the total number of seats. He applied those figures in a similar way to his Lemon & Duke calculation to the lost gross profit figures for the peak and off-peak periods, giving a total figure for lost bar counter sales of €35,457. This increased to €51,465 on the assumption that, during peak periods, there were 30 customers seated and 30 standing at the bar counter. It increased to €67,474 if one assumed that, during peak periods, there were 60 people standing at the bar in addition to the 30 assumed to be seated there.

142. In the case of the Leopardstown Inn, he applied a total capacity figure of 741 patrons (taken from Mr. Jacobs' report), a figure of 41 for the total number of seats at the bar counters and a figure of 261 for the total number of seats in the premises. Using the same methodology, he calculated that the loss attributable to the closure of the bar counter was €32,088 on the basis that there were no patrons standing at the bar counters but that all 41 seats were occupied. This increased to €46,465 on the assumption that, during peak periods, there were a further 41 people standing at the bar counters in addition to the 41 seated there. In turn, this increased to €60,843 on the assumption that there were 82 customers standing at the bar counters.

143. Mr. O'Brien accepted that his approach does not take account of occasions when the seating in the pub is not fully utilised and where, instead, a greater proportion of customers congregate at the bar counter. He also conceded that the figure for lost drink revenue was based on a combination of drink revenue attributable to those who attended Lemon & Duke solely for drink and those who ordered both food and drink. Under cross-examination by counsel for Sinnotts and the Leopardstown Inn, he further conceded that the numbers of seats within a public house may change depending on how busy the premises may be from time to time. In the case of Sinnotts, he accepted, with reference to the pre-COVID photographs of the premises, that one could, on occasion, have patrons standing five or six deep in the vicinity of the bar counter. He also accepted that *"the vast bulk of those standing patrons are going to be ordering at the bar over the bar* [counter]*."* On that basis, it was suggested to him that the numbers standing at the bar counter had the capacity to significantly alter the results of his exercise in respect of peak periods. It was also suggested to him that it did not necessarily follow that patrons would spread themselves about the premises in the manner posited by him and that, even on *"low*

density nights", one could have as many as 150 people standing in the vicinity of the bar counter.

144. It became clear on Day 6, that Mr. O'Brien's thesis is based on his own understanding or definition of the bar counter area. Under cross-examination, he explained his definition in the following terms: *"... you know, I've very clearly defined the bar as bar stools, one standing per bar stool and two standing per bar stool. If there's a different interpretation of that, of course, the figures change."* For the reasons discussed in more detail below, this concession on Mr. O'Brien's part should be kept in mind. The results of Mr. O'Brien's exercise could increase materially in the event that a more extensive definition of the bar counter area is applied.

145. For completeness, it should be noted that, in their closing written submissions delivered after the July hearing, Sinnotts and the Leopardstown Inn sought to raise additional criticisms of Mr. O'Brien's approach. It was argued, for example, that Mr. O'Brien's calculation proceeded on the basis that, on busier nights, 60 customers either seated or standing at the Sinnotts bar counter would have purchased no more than 1.6 pints per head. That was never put to Mr. O'Brien in cross-examination. He therefore never had an opportunity to respond to it. In these circumstances, I do not believe that I can properly have regard to this criticism or any of the additional points made in the closing submissions in relation to Mr. O'Brien's approach which were not canvassed in cross-examination.

146. On re-examination by counsel for FBD, Mr. O'Brien was asked the following leading question: *"So ... I suppose what I was asking you is this: when we're dealing with the plus five, plus six, plus seven, we are necessarily logically, I think, as a matter of definition, moving further and further from the bar* [counter], *is that*

correct" to which Mr. O'Brien, unsurprisingly, answered: *"Correct".* While that exchange is obviously of no evidential value, it usefully illustrates the case which FBD seeks to make, by way of submission, in answer to the point made by counsel for Sinnotts and the Leopardstown Inn recorded in para. 144 above.

147. I have a number of reservations about the assumptions underlying Mr. O'Brien's approach that patrons will be spread throughout a public house premises and that they will only opt to stand after all of the seats have been occupied. That may be true of certain premises but I do not believe that it can be universally applied. While there is a dearth of detailed evidence in this case as to the day-to-day experience in the three Dublin pubs, it is commonplace to see patrons congregating at a bar counter, often in relatively large numbers, notwithstanding that there are seats available in other parts of a public house. This phenomenon is very briefly addressed by Mr. Kelly in para. 84(a) of his witness statement, albeit only in the context of bar counter seating. However, the phenomenon is not addressed at all in Mr. O'Brien's approach. Furthermore, the propensity of customers in some premises to congregate at the bar counter would, plainly, require an adjustment to be made to the numerator used in Mr. O'Brien's equation to properly reflect the distribution of customers at the bar counter. From the perspective of a publican, the results will improve wherever a higher numerator is used to reflect the increased number of customers congregating at the bar counter. To take a hypothetical example, if, on an off-peak day, 151 customers patronised Lemon & Duke and (say) 48 of them decided to either sit or stand at the bar counter, that would mean that the numerator would rise from 24 (used by Mr. O'Brien for off peak periods) to 48. If one then applied that numerator to Mr. O'Brien's equation, it would become €138,604 x 48/151 which would, by my calculation, result in a lost gross profit figure of €44,059.55 which is more than

double the calculation made by Mr. O'Brien. It is clear that, in such a scenario, an adjustment to the numerator is capable of making a dramatic difference to the result.

148. Similarly, if one takes one of Mr. O'Brien's peak period calculations, the effect of an adjustment to the numerator is evident from the exercise undertaken by him. If one assumes that the number of customers standing at the bar counter equals the number sitting (resulting in an increase in the numerator from 24 to 48), the gross lost profit figure for the peak period rises from €28,671 to €57,343 and if one assumes that there are two people standing for every person sitting at the bar counter (i.e. increasing the numerator to 72), this increases the estimate of loss to €86,014. While Mr. O'Brien has not done this calculation, the estimate would rise to €100,350 if one assumed that another 12 people stood at the bar (i.e. bringing the numerator up to 84). That said, there is a limit to the extent to which the numerator can plausibly be increased. After all, there is a physical limit to the number of people who can sit or stand at the bar counters of the three pubs in question. To paraphrase what was said by counsel for FBD in his re-examination of Mr. O'Brien, there comes a point where those standing are so far from the bar counter that they can longer properly be said to be at the bar counter. Thus, if the lost sales attributable to the closure of the bar counter are to be confined to sales to patrons in its immediate area, there would have to be a cut-off point to demarcate where that area ends. That is an issue which I explore in greater detail in paras. 165 to 186 below.

149. Notwithstanding the reservations outlined above, I am grateful to Mr. O'Brien for putting forward a suggested methodology to measure the losses flowing from the closure of the bar counter. As is the case with Mr. Roulston, Mr. O'Brien's capacity-based approach provides food for thought.

The problem facing the court in assessing the bar counter losses

150. Unfortunately, the factual evidence called by the plaintiffs does not assist in identifying where the demarcation line may lie between the bar counter area and the rest of the pub. It also does not assist in identifying, even on a very approximate basis, the numbers of patrons who would typically stand or sit at the bar counter during either peak or off-peak periods. While very high-level evidence was given as to the importance of the bar counter to a public house (such as Mr. Anderson's description of it as the *"Holy Grail of the public house"*), this was not supported by any significant level of underlying detail. In fact, the witnesses who gave evidence on behalf of Sinnotts and the Leopardstown Inn (namely Mr. Kelly and Mr. Cooney) were not even present in their premises on a sufficiently regular basis to give detailed evidence of that kind. During the course of closing submissions, I remarked on the absence of such evidence and, in response, counsel for the Dublin pubs, in the course of his reply, acknowledged *"the force of that and I think also … that you didn't get as much of that as perhaps you ought to have got in this case … You did get some, I … respectfully suggest, but I think it would be open to publicans, I'm trying to address this at a test case level, … to give their own views of the significance of the trade at the bar and what percentage of revenue is attributable to those seated and standing immediately adjacent to the bar. Then the accountancy models, such of them as are appropriate to individual bars, could be further exercises to be undergone and between the oral testimony and the modelling … the Court, if needs be, or an arbitrator … will make an assessment."*

151. I have to say that this is an unsatisfactory position particularly in circumstances where the onus lies on the plaintiffs to prove their losses. In order to see if the accountancy models can work, one really needs to have the underlying

factual evidence. In terms of the evidence adduced at the July hearing, the approach taken by the Dublin pubs is so general and high-level, that it provides no significant assistance to me in determining which, if any, of the accountancy models might assist. This is unfortunate in circumstances where these cases were brought forward as test cases with a view to providing more general guidance for the very substantial number of premises insured under the FBD policy. It was therefore somewhat incongruous that, at one point, Mr. O'Brien was cross-examined on the basis that, until he had produced his table on Day 5, he had not undertaken an exercise to calculate the losses caused by the closure of the bar counter. The reality is that, with the exception of Mr. Roulston's very helpful exercise on behalf of Lemon & Duke, the Dublin pubs have not put forward any material by reference to which those losses might be quantified. However, even Mr. Roulston's exercise is, largely, theoretical in nature. What might have assisted was evidence from experienced bar staff who could give a first-hand account of their own knowledge of customers' use of the bar counter area during both peak and off-peak periods and also as to how this use changed in the course of the day and night time periods. I believe that experienced bar staff could well be in a position, for example, to give evidence as to their experience of the numbers of people sitting and standing at the bar counter during different periods such as a typical summer week night, a typical summer weekend night, a typical December night and also during particular sporting fixtures or in the periods before and after the holding of such fixtures. I should also have thought that experienced publicans might have been in a position to give evidence as to the approximate level of business attributable to the bar counters of their premises. It strikes me that, from time to time, considerable thought must surely be given by publicans to the design and layout of their premises having regard to the likely distribution of patrons within those premises. For example,

how do publicans decide how much of their space should be devoted to the bar counter area and how much to seated or dining areas?

152. It also strikes me that experienced publicans should be able to identify, at least in broad terms, the income earned from different elements of their own premises. One would also think that there would be some evidence available from within the greater drinks trade as to the average number of drinks bought by customers on peak and off-peak nights in different parts of the country. In the absence of some evidence of that kind, I find it difficult to understand how publicans come to make decisions in relation to the layout of their premises or as to whether to invest in new premises or in an update of their existing premises.

153. Be that as it may, I must now seek to reach a conclusion based on the very limited evidence provided at the July hearing. Before doing so, I should first outline what I understand to be the relevant legal principles applicable in such circumstances.

Relevant case law in relation to estimating loss

154. The fact that evidence of the kind outlined above is not before the court is not necessarily a bar to the determination of the issue. In this context, there is ample authority to the effect that a court should do its best to assess losses even where the evidence before the court is lacking in precision. As succinctly stated by Devlin J. (as he then was) in *Biggin v. Permanite* [1951] 1 K.B. 422, at p. 438 (in a passage cited by McGregor on Damages (21st Ed., 2021, at para. 10-002): *"Where precise evidence is obtainable, the court naturally expects to have it*, [but] *where it is not, the court must do the best it can".*

155. I was also referred to authority in the specific context of an insurance claim namely the decision of Eder J. in *Ted Baker plc v. Axa Insurance UK plc* [2014] EWHC 3548 (Comm). In that case, citing three previous authorities, Eder J. said, at

para. 140: *"Proof of one or more events caused by an insured peril is, of course, only the first stage. Thereafter, once an actionable head of loss has been established, the Court will generally assess damages as best it can by reference to the materials available to it. In that context, I accept* [counsel for the insured's] *two-pronged submission that (i) the balance of probability test is not an appropriate yardstick to measure loss; and (ii)* ***lack of precision as to the amount of quantum is not a bar to recovery****".* (emphasis added).

156. It should, nevertheless, be noted that Eder J., ultimately, came to the conclusion that the insured had failed to prove its loss of profits claim. At para. 164, he said: *"I fully recognise that the work done by Mrs. Britten in carrying out this modelling exercise has been very considerable and, at first blush, I also recognise that the exercise she has carried out has some superficial attraction. However, even applying the broad approach stated above, I remain unpersuaded that it provides a sufficiently reliable or reasoned method for assessing the appropriate loss of profit in the present case…".* In making that observation, Eder J. identified that there were fundamental flaws in the approach taken by the insured's expert which she was unable to satisfactorily address.

157. The approach taken in the English authorities cited above seems to me to be consistent with the approach taken by O'Flaherty J. in the Supreme Court in *Callinan v. VHI* (Supreme Court, unreported, 28 July, 1994) and with the observations made by O'Donnell J. (as he then was) in *Emerald Meats Ltd. v. Minister for Agriculture* [2012] IESC 601 at paras. 38 to 39. In the latter case, it was acknowledged by O'Donnell J. that, in assessing damages, the approach taken by Feeney J. in the High Court in that case was *"self-evidently a rough and ready one in respect of which there was a significant element of estimation on his part. It is … to be inferred that he*

adopted this method of calculation in default of a better alternative and because it produced an outcome broadly consistent with the view he took of the likely damage done to Emerald".

158. The effect of the authorities seems to me to be that, where damage is known to have been suffered, the court should do its best to estimate the loss sustained, even where that loss is not capable of precise quantification. Difficulty in quantification of that loss is not a bar to recovery. That said, the court's estimation of that loss should be based on some reasonable basis that can be broadly related to the damage believed to be suffered. The court is not free to pluck a figure from the air. Furthermore, the court, on the basis of all of the materials before it, should seek to identify and apply the best of the methodologies potentially available to estimate the loss suffered. That presupposes that some reasonable methodology can be identified. As the decision in *Ted Baker* shows, there may be cases where no plausible methodology can be identified by which to estimate a loss.

The positions taken by the parties in their closing submissions as to the approach to be adopted

159. In the closing written submissions delivered by FBD towards the end of the July hearing, FBD accepted that, where there are significant difficulties in calculating damages, the court will do its best to assess damages even where this involves a level of estimation. In this context, it was argued that Mr. O'Brien's approach should be the preferred model of calculation. In addition, it was argued that this should not preclude the use of a simpler model (such as approach no. 2 suggested by Mr. Roulston) for those cases where sufficiently granular information is not available to allow Mr. O'Brien's approach to be taken.

160. In contrast, in detailed closing submissions delivered on behalf of Sinnotts and the Leopardstown Inn on 22nd July 2021 (after the conclusion of the hearing), it was

argued that the court should not favour any one of the various methodologies proposed by the experts. Instead, it was submitted that the court should *"exhort"* the experts to *"engage further on the issue"* following the delivery of this judgment. It was also suggested that, if necessary, further evidence might be heard at that stage from the principals of the plaintiffs *"as experienced publicans…".*

161. In so far as the legal principles are concerned, these were not addressed in the Sinnotts and Leopardstown Inn closing submissions. Instead, reliance was placed on the oral submissions of counsel on Day 6 of the hearing. On that occasion, counsel for these plaintiffs submitted, without prejudice to his primary argument that the *Miss Jay Jay* principle applies, that the court could rely on the approach taken by the Supreme Court in *Emerald Meats.* However, counsel argued that the approach taken by the expert witnesses here could not form the basis of the assessment to be made. He characterised their approaches as *"lacking in any precision"* and he submitted that *"the variables and a swinging valuation that arises from those variables are so significant and the approach so complex that … none of them could be relied on comfortably by the Court in adopting either an Emerald Meats type approach or the Ted Baker approach…".*

162. It should also be noted that, in their closing written submissions, it was further argued on behalf of Sinnotts and the Leopardstown Inn that the appropriate measure of loss was: *"What the Plaintiffs actually lost as a consequence of that imposed closure* [of the bar counter] *were all the sales which they would have made in normal times to customers directly from the bar* [counter]*".* An analogy was drawn with an imposed closure of a kitchen where it was suggested that the loss recoverable would be the food sales that would have been made had the kitchen been opened. I do not, however, believe that this is an appropriate analogy to draw. The closure of a kitchen

operates to wholly prevent a line of business – namely the supply of food. The closure of the bar counter is different. It does not wholly prevent the sale of drink. Drink can still be sold through floor staff and, in fact, under the terms of the Government measures imposed, the bar counter can still be used for the preparation of those drinks and for their supply to floor staff.

163. In its written response delivered on 28th July 2021, FBD strongly refuted the case made by Sinnotts and the Leopardstown Inn that their losses should be measured by reference to all sales that would have been made, in normal times, to customers directly from the bar counter. In response, FBD argued (a) that the position was never advanced previously; (b) that it was not supported by any of the expert witnesses; (c) that it was a naked attempt to claim all losses by alternative means in the event that their argument based on the *Miss Jay Jay* principle failed; and (d) that it failed to recognise that the sale of drinks can continue through floor staff even where the bar counter is closed. FBD also robustly rejected the suggestion that the principals of the Dublin pubs might give additional evidence on this issue following the delivery of this judgment. FBD characterised this aspect of the Sinnotts and Leopardstown Inn submissions as an attempt to mend their hand in circumstances *"where they failed to adduce any such evidence … at a hearing where it was clear to all parties that this would be an issue of primary importance. Instead,* [they] *decided to tender expert evidence from Mr. Jacobs suggesting that the exercise could not be done, and they should not now be allowed to alter and reserve their position in the event that their first approach … is rejected".*

164. I believe that there is considerable force in the FBD submissions in relation to the suggestion that the plaintiffs' principals might be asked, following this judgment, to give additional evidence to assist in the methodology to be applied. The appropriate

time to do that was at the July hearing. Nevertheless, for the reasons explained in para. 184 below it seems to me that I cannot altogether exclude the possibility that some additional evidence may be required in the context of the quantification exercise to be carried out. However, as I seek to further explain in para. 184 below, any such evidence would be of a distinctly more limited nature than that canvassed in the closing submissions delivered on behalf of Sinnotts and the Leopardstown Inn after the conclusion of the July 2021 hearing. It would be wholly inappropriate to allow evidence to be given now in support of a case that could have been made (but which was not made) at the July hearing.

Conclusions in relation to assessing losses stemming from the bar counter closure

165. In my view, it is necessary to commence any consideration of this issue by looking again at the terms of extension 1(d) of the FBD policy. In particular, it is important to keep in mind that what is covered by extension 1(d) is loss of gross profit as a result of *"the business being affected by … imposed closure* ***of the premises*** *by order of … Government Authority following outbreaks of contagious … diseases …"* (emphasis added). Thus, it is losses which flow from a closure of the physical premises – rather than those which flow from a closure of an element of the business – which are covered. That seems to me to flow from the natural and ordinary meaning of the words used in extension 1(d). If there is no closure of premises, there is no cover under the extension. For that reason, it seems to me that, as noted previously, the Dublin pubs are mistaken in so far as they have, from time to time, sought to contend that they were forced by the Government measures to operate as restaurants rather than as public houses. The inference appears to be that, by being forced to operate in that way, their pub business was subject to an imposed closure. In my view, that argument (in so far as it was put forward) fails to address the fact that, even if

they are right in suggesting that they were forced to operate as restaurants (something which is strongly contested by FBD), their premises were not closed. During the relevant periods, they were able to open their doors and admit customers to enter and remain on their premises. I do not believe that any reasonable person would conclude that, in such circumstances, their premises were closed.

166. Applying that principle to a closure of a part of the premises – i.e. the bar counter – it is necessary to identify, as precisely as possible, the part of the premises which can be said to be the subject of the imposed closure. Only then, can one begin to identify and measure the losses which flow from that closure. For the reasons previously discussed in paras. 63 to 66 above, it seems to me that the effect of the Government measures was to require the bar counter to be closed. The fact that it could still be used for some limited purposes by the publican would not alter that view. Crucially, it could not be used to serve dine-in customers. In my view, if anyone was to ask a customer visiting a pub during these periods whether the bar counter was open, the customer would immediately answer that it was shut and that one could sit or stand at the bar. To my mind, that is also the view that a reasonable person in the position of the parties would take had the issue been considered at the time the policy was put in place.

167. Taking that approach, it seems to me that what was required to be closed here was not just the bar counter but also the seating and standing area adjoining the bar counter. The effect of the closure extended that far. However, the closure was confined to that area alone. Patrons, in other parts of the pub, could still order drinks albeit in conjunction with a substantial meal. To state the obvious: those other parts of the pub were not closed. It therefore seems to me to be essential to confine the enquiry to those customers who chose to drink at the bar counter (whether sitting or standing).

In my view, it is not necessary, in assessing the losses suffered, to have regard to those customers who buy their drinks at the bar counter and then move away from the counter to consume them. Such drinkers are not purchasing their drink at the bar counter because of the special draw of the bar counter or because of its unique atmosphere or *"hallowed"* status as described by the principals of the three Dublin pubs; they are doing so for the purpose of buying a drink and that is something which they can continue to do just as readily, during the relevant periods, through floor staff. For that reason, I do not believe that it is necessary to have regard to sales to customers who, in normal time, may have bought their drinks at the bar but then consumed their drinks elsewhere in the premises. Given that such customers drifted away from the bar counter, there is no sufficient basis to conclude that the closure of the bar counter has led to a loss of the business of such customers. I therefore disagree with Mr. Jacobs that this factor creates a fundamental problem for the purposes of estimating the losses attributable to the closure of the bar counter. On the same basis, I also reject the submission made on behalf of Sinnotts and the Leopardstown Inn that the losses should be measured by reference to all sales that would have been made in normal times directly from the bar. In my view, the focus should be on trying to identify the custom that would have been secured by those customers who, in normal times, would congregate at the bar counter and drink there. Those are the patrons whose custom is relevant for the purpose of measuring the loss that flows from the closure of the counters.

168. The effect of the closure of the bar counter was to prohibit pubs from serving customers either seated at the bar counter or standing in the vicinity of the bar counter. For that reason, it seems to me that there is some merit in the desire of both Mr. Roulston and Mr. O'Brien to seek to estimate the relevant capacity of the bar

counter area and to use that as a yardstick by reference to which the losses sustained might be measured. That was the avowed aim of Mr. O'Brien's approach and it also seems to me to underly approaches Nos. 2 and 3 suggested by Mr. Roulston. While I believe that there are difficulties with each of these three approaches, they each, subject to significant modifications, contain the seeds of an approach that might be taken. I have already explained why I believe that Mr. Roulston's first approach will not work in the case of any of the three Dublin pubs. In so far as approach No. 2 is concerned, I believe that, as currently devised, it does not provide an appropriate methodology. In the first place, it is based on the overall sales figures during the relevant periods. In my view, any process of estimation has to be based on sales achieved during the pre-COVID period. Secondly, it pre-supposes that the same number of people will be present at the bar counter throughout the relevant period. That does not take account of fluctuations in trade from day to day and from period to period within the day. However, importantly, as previously noted, Mr. Roulston accepted that the approach could be modified to take account of capacity although he stressed that he did not have the expertise to assess capacity.

169. Approach No. 3 is also beset with difficulty. It rests on the assumptions that a constant number of customers will attend the bar counter from day to day and that they will each consume a specific number of drinks based on an average of only six of the many drinks available at a pub. It is an entirely theoretical exercise which, as Mr. O'Brien highlighted, is not grounded on any statistics derived from the business actually conducted by the pubs. In addition, as Mr. O'Brien also stressed, it does not recognise how the trade evolves as between busy and quiet periods.

170. Likewise. Mr. O'Brien's approach, as currently framed, is also problematic. It proceeds on the assumption that, in quiet periods, all patrons will be seated. As

previously noted, it does not take account of the propensity of many Irish drinkers to stand at the bar counter even where there is ample seating elsewhere in the premises. As a consequence, he has used a numerator that may well be too low. If so, that, in turn, means that the results of his exercise are likely to be artificially deflated.

171. However, as outlined above, there seems to me to be significant merit in considering an approach that takes the capacity of the bar counter area into account. That capacity is an obvious limiting factor on the amount of sales that can be said to be attributable to those who choose to drink at the bar counter and, for reasons which I discuss in more detail below, it may also assist in measuring the proportion of drink sales which are attributable to the counter as opposed to the pub as a whole.

172. In my view, it is accordingly necessary to seek to assess the capacity of the bar counter area and also to devise a methodology that can, as objectively as possible, estimate the numbers of customers attending the bar counter (within the limits of that capacity) and the amount likely to be spent by them on drink.

173. When one looks at the plans of each of the three Dublin pubs, there are, in each case, readily identifiable areas for standing patrons adjoining the bar counters in each premises. In the case of Sinnotts, the plan and photographs of what is described as *"the main level",* show the bar counter as a rectangular island with seating around the island and some room for standing between the bar counter and the neighbouring bar dining areas which are located opposite it along the adjoining walls. There is also a somewhat wider but shorter standing area at either end of the bar counter which extends from the counter to the dining areas on both of its shorter sides. I assume, however, that each of these standing areas must also allow some space for circulation of patrons and floor staff.

174. In the case of the Leopardstown Inn, the ground floor plan shows that there is clearly identified seating at each of the bar counters together with some space for standing adjoining the bar counters in each of the lounge, the Lep Bar and the Small Bar although the space in the Small Bar is very confined. In the case of the lounge, the area that might be available for standing appears, on the face of the plan, to be quite large but some of this area may well be required as a circulation area to allow patrons and floor staff to move to and from the seated areas and to and from other parts of the premises. Moreover, as noted in para. 176 below, there has to be some demarcation line between those patrons who can be said to be at the bar counter and those who are not.

175. In so far as Lemon & Duke is concerned, the plan of that premises shows a long bar counter running along most of one side of the roughly rectangular premises. The plan shows seating along the length of the counter and there is also clearly an area that could be used for standing between those seats and the seating that runs in parallel with the counter. There is also a somewhat wider area between the corner of the bar counter and the entrance to the premises from Royal Hibernian Way. However, some part of that area may also be required as a circulation area for both patrons and floor staff.

176. In each case, it is necessary to identify a demarcation line between those patrons who can be said to be at the bar counter and those who are not. To illustrate the point, it is useful to consider a particularly stark example; take a hypothetical situation where people stand more than 10 deep away from the bar counter. In the context of each of the three Dublin pubs here, I do not believe that any reasonable person would regard those persons standing at the outer edge of such an extensive congregation as being at the bar counter. There are simply too many people standing

between them and the bar counter for those at the outer edge to be so considered. While it is straightforward process to come to that conclusion in the context of a congregation that deep, that leaves the more difficult question of where one should draw the line. There is no expertise or science to assist in this context. Nonetheless, the line has to be drawn somewhere. Applying a common sense approach, it seems to me that the outer limit of the relevant area for this purpose is a depth of four people from the bar counter. Applying any more extensive depth seems to me to lack reality. A person who is five persons away from the bar counter can hardly be said to be at the bar counter. They could be described as standing near the counter or in the vicinity of the counter but I do not believe that a reasonable person would consider them to be at the bar counter. Thus, for example, such persons would be unlikely, in my view, to be able to take a drink from the counter without pushing forward through the intervening throng. I am conscious that a similar issue might be said to arise for those who are in the fourth row. Nonetheless, with some hesitation, I take the view that they are – just about – on the right side of the dividing line. Moreover, it seems to me that the definition proposed by Mr. O'Brien is too narrow in so far as he sought to limit the bar counter area to a maximum of one person sitting and two people standing. He offered no explanation as to why it should be so limited. I believe that it does not accord with common experience of a crowded bar on a busy night. I do not believe that customers would regard the bar counter area as so confined.

177. It does not, however, follow that a depth of four people will be available in all cases. The depth may be constrained by physical features within a public house (such as a wall or a row of seating parallel to the bar counter) which act to reduce the depth of the standing area available for those wishing to drink at the bar counter. It seems to me to be necessary that an appropriate engineering exercise should be carried out to

assess, on the basis of the demarcation line suggested above and on the basis of any physical constraints present in the premises, how many people (whether seated or standing) could be safely accommodated in 2019 within that demarcation line in each of the three Dublin pubs, allowing for any fire safety or circulation requirements that may exist. With a view to minimising cost and the scope for further dispute, I can see no reason why a single expert, agreed between the parties, could not be appointed to carry out that exercise. Once that exercise is completed, we will have an objective assessment of the maximum number of people who could be accommodated at the bar counter of each of the pubs in normal times. In addition, it will be necessary for the expert to assess the maximum capacity of each of the pubs in 2019 having regard to any fire safety or other applicable requirements. I appreciate that Mr. Scott has looked at the latter issue on behalf of FBD but, so far, it has not been addressed by any of the plaintiffs.

178. In turn, these measurements seem to me to be capable of providing significant assistance in objectively measuring the proportion of the drinks business that can be attributed to the bar counter business (i.e. the drink sales to those customers who congregate at the bar counter). While I am prepared to consider further submissions in relation to this issue (in the event that it is shown to be necessary to do so), I believe that this can be achieved by considering the total drink sales achieved at identified times on a number of days during the equivalent periods in 2019 when the parties are agreed that each of the pubs were at maximum capacity. Where the pubs were at maximum capacity, it follows that all parts of the pub will be fully utilised. It can therefore be assumed that the bar counter area (as defined above) will also be at maximum capacity with its full complement of drinkers. This is likely have occurred on major sporting occasions which attract large crowds to venues such as these. I am

quite sure that the parties, in a spirit of constructive engagement, should be well capable of agreeing the most suitable dates and times or occasions to use for this purpose. Once those occasions and times have been identified and agreed, the next step will be to identify the total drink sales achieved at times when it is believed that the pubs were at maximum capacity. In order to arrive at the most representative figure possible, it would be wise to try to identify all occasions in the equivalent periods in 2019 when maximum capacity was achieved and to take an average of the sales achieved on those occasions.

179. As I understand it, the drinks sales records maintained by each of the three Dublin pubs are capable of identifying not only the total drinks sales on each day but also the timing of the drinks sales. This was confirmed by Mr. Jacobs on Day 3 of the hearing when he gave evidence as to the total sales by hour achieved in Sinnotts in 2019 and 2020. Thus, it should be possible to identify by reference to a particular hour on each of the chosen days what the total drinks sales were. Once that figure is known, it can then be divided by the figure for the maximum capacity of the pub to give a figure for the drinks sales per customer during that hour. In turn the figure for the drink sales per customer can then be multiplied by the figure for the maximum capacity of the bar counter area in order to measure the drink sales attributable to that area during that hour. Importantly, that figure can also be used to identify the proportion of total drink sales referable to that area as compared with the drink sales achieved by the pub as a whole.

180. To take a hypothetical example, suppose that a pub was at full capacity (200 patrons) during the 2019 All Ireland football final during the period 3.30 p.m. to 5.30 p.m. on that day and that the total drinks spend during that period was €3,800. That gives a spend per customer of €19. Suppose also that the capacity of the bar has been

assessed at 60. That gives a total spend attributable to the bar area of €1,140. That exercise not only measures the sales attributable to the bar counter area during that period but it also identifies that the proportion of sales attributable to the bar counter represents 30% of the total sales of drink sold by the pub during that period.

181. This process can then be repeated in relation to a number of other events where full capacity is believed to have been attained. An average taken from all of the events chosen to reach final figures on the total spend on drinks during a period of one or two hours (whichever is chosen), the spend per customer, the spend based on the capacity of the bar counter area (as defined above) and the proportion of the overall drink spend which can be attributed to that area.

182. I fully acknowledge that the proportion of sales attributable to the bar counter can vary. In particular, as discussed above, there is a propensity among some drinkers to congregate at the bar counter notwithstanding that there are seats available elsewhere in a pub. That means that the 30% figure in the hypothetical example described above may not always fully reflect the proportion of business attributable to the bar counter. This is especially so during quieter periods. Nevertheless, it seems to me that, in the case of pubs where customers have a propensity to preferentially congregate at the bar, the figure can be taken to be the minimum contribution that can be attributed to the bar counter and can be used as a proxy to calculate the minimum total sales attributable to the bar counter at any particular time. All that would be required to be done is to apply that percentage figure (30% in the hypothetical example), to the total sales of drink for the equivalent periods in 2019 in order to assess the minimum amount of drink sales that would have been earned by the bar counter during normal trading times, adjusted to the extent necessary by the trend and other circumstances of the business.

183. The advantage of taking this approach is that it relies on objective data and avoids the use of theoretical models. The total drinks sales records for the equivalent periods in 2019 are available. Those records show the timing of sales. Hourly figures can therefore be computed for total drinks sales. Furthermore, this method prescribes an objective method by which the capacity of the bar counter area can be measured. It also allows fluctuations in business to be taken into account in that the relevant proportion of the overall spend on drinks attributable to the bar counter area can be applied to the total spend on drink for any hour on any day during the equivalent period in 2019 thus covering both quiet and busy periods. I fully appreciate that this model is not perfect and that it does not take account of occasions when the proportion of drinkers at the bar counter will be higher than on the occasions of maximum occupancy but that is offset to some extent by the fact that, equally, it does not address the converse occasions when the proportion of drinkers at the bar counter is lower than on occasions of maximum occupancy. Moreover, I do not have any sufficient evidence from the Dublin pubs that would allow me to devise a methodology that would assist in making adjustments to cater for such fluctuations. I nonetheless believe that, on an overall basis, the methodology proposed by me is fair to the plaintiffs particularly in circumstances where they have the benefit of the inclusion of a fourth row of drinkers in my suggested demarcation of outer-most confines of the bar counter area. As outlined above, I think that the inclusion of that row was very much at the margin.

184. Of course, it may be the case that improvements or refinements could be made to the method of assessment suggested by me. I am conscious that my suggested methodology was not the subject of debate or discussion at the July hearing. It only occurred to me in the course of preparing this judgment as I analysed the evidence and

reflected on the various methodologies proposed by Mr. Roulston and Mr. O'Brien. In those circumstances, if adjustments can be made to address those periods when the proportion of the drink spend attributable to the bar counter is likely to be greater or less than the proportion at periods of maximum capacity, I am prepared to consider any reasonable and workable suggestions that the parties may have. For that purpose, I could envisage circumstances where some limited additional expert or factual evidence might properly be given but I wish to make it clear that this is not to be treated as *carte blanche* for the giving of evidence that should, more appropriately, have been given at the July hearing. In particular, it should not be treated as an invitation to the principals of the Dublin pubs to give evidence of the kind envisaged in the closing written submissions furnished on behalf of Sinnotts and the Leopardstown Inn. Quite apart from the objection raised by FBD, I frankly cannot see that either Mr. Kelly or Mr. Cooney could be of much assistance on this issue. They are not personally present in their respective premises on a sufficiently regular basis to provide first hand evidence of the rises and falls (if any) from time to time in the proportion of business attributable to the bar counter. Mr. Anderson of Lemon & Duke is in a somewhat different position given his very regular presence on the premises.

185. I am also conscious that the methodology proposed by me addresses drink sales only and does not capture sales of food to diners seated at the bar counter. However, the approach taken by both Mr. Roulston and Mr. O'Brien was to concentrate on drink sales. As Mr. Roulston confirmed in para. 3.3.37 of his report in relation to Lemon & Duke, his understanding is that the bar counter *"would have primarily been popular with drink customers".* Nothing was said in the evidence of either the factual or expert witnesses to undermine that view or to suggest that it did

not apply equally to all three of the Dublin pubs. In addition, it must be borne in mind that the closure of the bar counter is unlikely to have led to a dip in food sales. Anyone who wished to dine could still do so elsewhere in the pubs. As discussed at an earlier stage in this judgment, food sales in Sinnotts (and also on Saturday nights in Lemon & Duke) actually increased in 2020 over the equivalent period in 2019.

186. Subject to the any workable modifications or adjustments that may be shown to be reasonable or necessary, it seems to me that the methodology proposed in paras. 176 to 181 above will provide a fair and reasonable basis on which to assess and measure the bar counter losses of the Dublin pubs. In turn, it seems to me that this resolves the concern expressed by me in paras. 110 to 111 above arising from the case made by Sinnotts and the Leopardstown Inn that the losses stemming from the closure of the bar counter are not capable of being separately identified. In turn, the resolution of that concern allows a conclusion to be safely reached that extension 1(d) was intended to provide cover for losses suffered by the Dublin pubs as a consequence of the closure of the bar counter.

Staff wages

187. In broad terms, the issue that arises here relates to whether the plaintiffs are entitled to an indemnity from FBD in respect of staff wages. This issue arises in respect of two categories of staff namely (a) those who were retained on the plaintiffs' payroll during the periods of closure and (b) those who were laid off during those periods. Issue 7 in the Schedule below relates to the former category while issue 8 relates to the latter. That said, counsel for the three Dublin pubs suggested on Day 1 of the July hearing that the issues as formulated in the issue paper do not *"catch exactly"* the questions in dispute between the parties in relation to staff costs. They may not fully do so but the questions have been agreed between the parties and the

questions treat employees on the payroll as being in a different category to those who have been laid off. In the absence of any application to vary or modify the issue paper, my task is to address the issues which the parties, in the agreed issue paper, have put before the court for determination.

188. It should also be noted that there is some crossover between this issue and the questions identified in the issue paper in relation to government supports and subsidies. It has been agreed between the parties that those questions should be left over to a later module for determination and senior counsel for the three Dublin pubs suggested, in the course of his opening statement, that it might make more sense to defer any determination of the former issue until the next module. Nonetheless, extensive evidence was given in the course of the July hearing in relation to the issue of staff wages and all parties also addressed the issue in detail in their oral and written submissions. Furthermore, while FBD characterised the issues relating to retained staff as an issue of fact (which will depend on the individual evidence in each of the four cases), FBD argued that the question relating to laid off staff raises an important issue of principle of general application which should be given some priority by the court. Nonetheless, in its closing submissions, FBD accepted that the *"finalisation"* of the issue could be deferred to the next module to be addressed in conjunction with the issue of government subsidies and supports. In the meantime, I have been asked by the parties to give such guidance as I can in relation to the issues that arise in relation to the wages and salaries claims in respect of both retained staff and laid off staff. In particular, on Day 2 of the July hearing, I was informed that I should make such findings as are necessary in relation to whether the retention of employees or the agreement to pay employees could be said to be reasonable or unreasonable. The way it was put by counsel for the Dublin pubs was that the plaintiffs would confine their

evidence to identifying the staff that they say were essential and explain why this is so. In turn, FBD would either accept or challenge that case and, in the latter event, I would be required to rule on it.

189. Before turning to the evidence on this issue, there are a number of aspects of the FBD policy which are relevant. In the first place, it is important to recall that the policy provides an indemnity in respect of loss of gross profit which is defined as: *"The money (less discounts allowed) paid or payable to the Insured for good sold and delivered (less the net purchase price of such goods) and for services rendered in the course of the business at the premises".* There is no express provision suggesting that FBD is entitled to make a deduction from that indemnity in respect of wages. Thus, as FBD has accepted, all wages are *prima facie* covered. However, FBD has drawn attention to two other features of the policy which are relevant:

(a) First, FBD has correctly identified that the policy provides that a deduction should be made in respect of *"any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage".* Thus, any staff wages that are saved during the indemnity period plainly fall into the category of *"charges and expenses ... as may cease or be reduced in consequence of the damage".*

(b) Secondly, FBD has stressed that, under general condition 8(iii), the insured is required to take reasonable precautions to prevent loss or damage. On that basis, FBD argues that, to the extent that the insured can diminish loss by reducing the wage roll, the insured is contractually obliged to do so. FBD further argues that this contractual obligation is an explicit recognition of the well-established principle that a plaintiff is obliged to mitigate loss. This

principle has the effect that a plaintiff is not entitled to recover losses that could be avoided by taking reasonable steps following the occurrence of an event exposing the plaintiff to loss. As the case law discussed below shows, this principle applies to insurance claims.

190. Subject to the plaintiffs explaining the reasons for retaining staff, FBD accepts that the burden is on it to demonstrate that the plaintiffs were unreasonable in their conduct in failing to mitigate their loss. However, FBD argues that different considerations arise in relation to retained staff and laid off staff. In so far as the former are concerned, FBD accepts that it was reasonable for the plaintiffs to retain certain staff during the periods of closure. Thus, FBD has expressly conceded that deductions will not be made in respect of remuneration which has been paid to proprietary directors. FBD has also accepted in the issue paper that deductions will not be made in respect of non-proprietary directors where it is shown that their services were needed during the periods of closure. In its opening written submissions, it went somewhat further and accepted that it is possible that it was reasonable for the plaintiffs to retain all of their retained staff but that, in advance of hearing their evidence, it did not have sufficient information available to reach a conclusion on the issue. FBD submitted that it was incumbent on the plaintiffs to put forward some evidence on the reasonableness of retaining staff. In support of this proposition, FBD cited the decision of Eder J. in *Sugar Hut Group v. A J Insurance* [2014] EWHC 3352 (Comm). That case concerned a business interruption claim following a fire at a nightclub made famous by the television series *"The Only Way is Essex".* The claim made by the insured included a claim for wages paid to staff who were not laid off following the fire. A director of the insured gave evidence that he did not want to lose the skills of the retained staff. However, at para. 46, Eder J. held that

the insured's claim in relation to staff costs was irrecoverable in circumstances where the insured did not give evidence to explain the nature of the work done by the relevant staff both before and after the fire. He characterised the evidence as *"severely lacking".* FBD also cited *Brit Inns v. BDW Trading Ltd.* [2012] EWHC 2143 (TCC), where, at para. 289, Coulson J. disallowed a claim for the cost of re-engaging staff in the period September to October 2006 in circumstances where the insured premises could not have re-opened until mid-December 2006 at the earliest.

191. FBD submitted that the plaintiffs, at the time staffing decisions were made, had an obligation to act as a *"prudent uninsured"* – i.e. that they could not make decisions on the assumption that their losses would be covered by the FBD policy. FBD relied, in this regard, on *Sheehan v. FBD Insurance Ltd.* (Supreme Court, unreported, 20 July, 1999).That case involved a challenge to the validity of an arbitrator's award on the ground that the arbitrator was in error in so far as he had found that the claimant, following the occurrence of loss, had an obligation to act at all times as though he was uninsured. In the Supreme Court, Keane J. (as he then was) upheld the approach of the arbitrator. At p. 23, Keane J. expressly agreed that a passage from *Hickmott's "Principles & Practice of Interruption Insurance"* represented a correct statement of law. In that passage, *Hickmott* stated that, during the indemnity period, the insured is *"act as reasonably and diligently as though uninsured. He must therefore take all possible steps to minimise loss as, in the circumstances, ought to be taken by reasonable men. The law casts this duty upon him ...".*

192. Against that background, Keane J. held that the arbitrator, in using the phrase that there was a duty to act as a prudent uninsured, was simply seeking to encapsulate the principle summarised by *Hickmott.* At p. 26, Keane J. said: *"... it is perfectly clear*

that the sentence [in the award] *is merely stating in condensed form the proposition that the insured person, if he wishes to recover compensation for consequential loss resulting from the closure of his premises, must be in a position to show that he has acted reasonably and diligently so as to minimise the loss. While he may close the premises for as long as he likes and indeed never reopen them … it is both law and good sense that he cannot expect to hold the insurers liable for the business losses which he sustains as a result of choosing to do so."* As counsel for FBD noted in his closing oral submissions, the decision of the Supreme Court in *Sheehan* suggests that the onus lies on the insured to establish that it acted reasonably. Nonetheless, counsel acknowledged that, in so far as the retained staff are concerned, FBD has accepted that it bears the burden of establishing that their retention is unreasonable.

193. Against the backdrop of the decision in *Sheehan*, FBD has argued that some of the plaintiffs' decisions to retain staff were taken on the basis that the financial consequences of doing so would be covered by insurance. For example, FBD went so far as to suggest that the decision by Sinnotts in December, 2020 to retain 17 members of staff was likely to have been motivated, in the wake of the Divisional Court's judgment in the *FCA* case, by confidence that it would have the benefit of insurance cover rather than by any perceived need to retain to those staff. That suggestion was roundly rejected by counsel for Sinnotts who pointed out that the decision to retain the staff was made at a time when the Divisional Court's judgment was under appeal and where FBD had argued, at the October 2020 hearing, that the decision was wrong and should not be followed in this jurisdiction.

194. In contrast, the plaintiffs have stressed that their objective in retaining staff was to ensure that they would have the capacity to re-open their premises as soon as it was legally permissible to do so. It should be noted, however, that, as explained in

more detail below, there are stark differences in the approach taken by each of the plaintiffs in relation to the retention of staff. These range from the approach taken by Lemon & Duke to retain only a small number of staff for quite limited purposes and for narrowly defined periods to the decision taken by Sinnotts in December 2020 to retain 17 staff from managers to kitchen porters.

195. The Dublin pubs also stressed that they did open to the maximum extent possible once they were permitted to do so and they make the point that, had they failed to trade when permitted to do so, FBD would inevitably have reduced the indemnity payable to them for any day that they remained shut. They suggest that it is therefore deeply ironic that FBD should criticise them for taking steps which were taken at a highly volatile stage of the pandemic and which they say they believed to be reasonable in order to ensure that they should be able to trade to the greatest extent possible following the imposed closure.

196. The plaintiffs rely in this context on the observations of Lord MacMillan in *Banco du Portugal v. Waterlow* [1932] A.C. 452, at p.506, to the effect that: *"It is often easy after an emergency has passed to criticise the steps … taken to meet it, but such criticism does not come well from those who have … created the emergency. The law is satisfied if the party placed in a difficult position by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."* Those observations were cited with approval by Finlay Geoghegan J. in the Court of Appeal in *Hyland v. Dundalk Racing* [2017] IECA 172. In that case, she said that the standard by which the innocent party is to be judged is *"not an unduly harsh one".*

197. In addition, the plaintiffs rely on the guidance given by *Riley on Business Interruption Insurance* (10th ed., 2016) at p. 349 where the author says: *"From the employer's perspective there may be a reluctance to make long serving, loyal staff redundant. Staff retention must, however, be based upon the economics of the situation, balanced against the requirements and best interests of the business when operations are resumed. In this latter context, the retention of key staff, even if a resumption of operations will not be achieved until near the end, or even after the end, of the indemnity period is not unreasonable. Thus, the rehabilitation of the business must be the primary consideration in any decisions about the retention of employees."*

198. In so far as laid off staff are concerned, FBD has argued that, where staff were laid off, their services cannot be said to have been necessary or essential to the businesses of the plaintiffs during the period of closure. FBD submitted that, in laying off such staff, the plaintiffs acted in accordance with their duty to mitigate their loss which arises under general condition 8(iii) and, as *Sheehan* demonstrates, would have arisen in any event even in the absence of such a general condition. FBD also made the case that it is highly likely that such staff, during the periods of closure were in receipt of pandemic unemployment payment (*"PUP"*) or earnings from other jobs. On that basis, FBD submitted that any indemnity in relation to their salaries and wages would involve an impermissible windfall gain. In addition, in so far as any of the plaintiffs may have made a promise to laid off staff that they would be paid in the future, FBD argued that any such promise does not bind it.

199. In so far as Sinnotts and the Leopardstown Inn are concerned, they made a claim for accrued wages for laid off staff in circumstances where they say that, on the basis that such staff kept themselves available for work on re-opening, they made

commitments to pay them when it was financially possible to do so. They highlighted that such commitments were recorded in company financial statements drawn up prior to the delivery of the principal judgment. All of the plaintiffs rely in this context on the same authorities as those noted in paras. 196 to 197 above. However, FBD contends that there is a clear distinction to be made between those staff who were laid off and those who were retained and paid and it suggests that the former cannot be said to have been essential to the business.

200. I deal below, in turn, with each of the individual claims made by the plaintiffs in respect of staff costs. As each claim turns on its own facts, I must address each claim individually. Before doing so, I should identify the legal principles which I believe should be applied

The relevant principles applicable to the staff wages claims

201. In addressing the claims in relation to retained staff, I bear in mind that, as conceded by it, FBD has the burden of showing that the retention of staff was unreasonable. However, as the decision in *Sheehan* and general condition 8(iii) show, the insured has an obligation to mitigate loss and, thus, one would ordinarily expect that, faced with a period of closure, an insured would decide to lay off staff who would be expected to be idle during that period. As a consequence (and this is well illustrated by the decision in the *Sugar Hut* case) an insured must provide evidence to enable a court to understand the basis on which the insured considered it necessary to retain employees during a period of closure. Accordingly, where a claim is made in relation to staff retained during a period of closure, the insured must provide sufficient evidence to explain the nature of the work done by the employees in question and to explain why it was considered necessary to retain them for the benefit of a business notwithstanding that the business was not operational during that period. Without

those basic details, the court will be unable to determine whether there is a proper basis for the claim.

202. In cases, where sufficient detail is provided to understand the rationale for retaining staff, an assessment can then be made as to whether the retention of staff was reasonable or unreasonable, the onus lying on FBD in that context. In assessing reasonableness, one of the most important criteria to be applied is whether the retention of the staff members concerned was necessary to enable the business to continue in the future and reopen successfully. As *Riley* explains, the rehabilitation of the business is the primary consideration in any decision about the retention of employees. Thus, for example, the re-engagement of staff in advance of re-opening to put the premises and the business in a state of readiness would usually be considered to be reasonable. It also appears to be the case that long-term retention of truly key staff members may be regarded as reasonable where the staff members are crucial to the business and there is a plausible basis to think that they might be lost to another employer if they were not retained. That said, the question of what is reasonable will always be a fact specific exercise which will require consideration of all of the circumstances including, where relevant, the behaviour of others in the same market.

203. It is also important to keep in mind that the court, in considering whether an insured has acted reasonably, will also take account of any difficulties that may have operated at the time the insured had to make decisions of this kind. As the decision of the Court of Appeal in *Hyland v. Dundalk Racing* demonstrates, the court will not impose an unrealistically high standard that fails to acknowledge the pressures that may have existed at the time such decisions fell to be made. Thus, for example, a decision to retain staff at a time when a period of closure was thought likely to be very short might well be held to be reasonable even where it subsequently transpired that

the period was more prolonged. On the other hand, the longer a period of closure continues, the less likely it will be that the retention of staff will be considered to be reasonable unless the staff are truly key in the sense explained above and where there are grounds to think that they might be lost to other employment in the event that they were not retained.

204. The position in relation to laid off staff is addressed further in paras. 218 to 221 below. As noted in para. 218 below, I have not been referred to any authority which suggests that an insured is entitled to maintain a claim in relation to laid off staff even where a promise has been made to such staff that the employer will pay them their accrued wages in the future. On the face of it, the fact that staff have been laid off suggests that they are not required for the business and that the insured, in laying them off, was acting in manner designed to mitigate loss. Similarly, again on the face of it, a commitment to make a payment to staff while there is no work for them to do is not consistent with the duty on an insured to mitigate loss. In addition, as FBD has submitted, such a claim may raise issues in relation to double recovery where the staff have been in receipt of other income while laid off by the insured. All of that said, I do not think that, as a matter of principle, one could altogether exclude such a claim if, in all of the circumstances, there is a reasonable basis for it. In any individual case, it will be necessary to consider the particular factors that motivated the decision to make a commitment of this kind and to consider the arguments made by the parties in relation to it.

The staff wages claim made by Sean's Bar

205. I will start by examining the claim advanced on behalf of Sean's Bar. FBD has accepted that this claim is made solely in respect of retained staff. According to Mr. Philip Byrne, Sean's Bar employed approximately 30 full time staff prior to the

pandemic of which roughly half were full time employees. He confirmed in his witness statement that some of the staff had worked on the premises for more than 20 years and some staff were the children of long serving staff or former staff. Mr. Byrne said in his witness statement that, during the periods when Sean's Bar was closed, *"certain employees … essential staff have been retained on an ad hoc basis to carry out tasks such as cleaning the bar, maintenance, security…".* Mr. Byrne provided no further details of the staff concerned but, in her expert report on behalf of Sean's Bar, Ms. Anne O'Dwyer, chartered accountant, identified that six employees had been retained on the payroll together with two directors. In the written opening submissions, it was stated that for a period of one month in August 2020, the number of staff on the payroll increased from six to seven. However, in the course of Mr. Byrne's evidence on Day 4 of the July hearing, a schedule was produced for the first time with the names of six staff members in addition to the proprietary directors. Thus, the claim must be confined to those six. It was also clarified on Day 4 that, throughout the period of closure, the employees in question were paid the difference between the wage subsidies available to employers from the government and their normal salary. In broad terms, as I understand it, these subsidies were available to employers in respect of employees who were kept on the payroll during periods of closure. They are to be contrasted with the government payment available to employees who were laid off. It should be noted that there is nothing to suggest that the decision to retain these six staff members (out of a total of 30) was made on the assumption that FBD would ultimately cover the cost of doing so.

206. In his oral testimony on Day 4 of the July hearing, Mr. Byrne provided some further details about the retention of the six staff members. First, he explained that there was significant uncertainty as to when wet pubs would be allowed to open. He

said: *"You know, we were expecting to be open after maybe another month and maybe another month. We didn't know from the end of the week to the other when we were going to be open ...So, that's the reason you took on staff, in order to be able to open back up again".* By reference to the schedule, he then identified six members of staff together with the two proprietary directors namely Mr. Byrne and his wife, Ms. Catherine Byrne. FBD has confirmed that no issue arises in relation to either Mr. Byrne or his wife. FBD accepts that Sean's Bar is entitled to an indemnity in respect of their salaries. FBD also accepts that the bar manager, Mr. Declan Delaney is in the same position. However, FBD contests the claim in relation to the other five members of staff named in the schedule on the basis that it was *"manifestly unreasonable"* to retain them particularly for such a prolonged period of time running from March 2020 to June 2021.

207. Of the five remaining staff members, Mr. Byrne gave evidence that two of them were full time assistant managers namely Mr. Paul Donovan and Mr. Timmy Donovan who had a long and well-known association with the bar having previously been involved in a family business which owned the bar prior to its acquisition by Mr. Byrne's company in 2014. Mr. Byrne said that they had been associated with the bar for a period of 45 years and that *"they're vital to this business. And you know, if we hadn't been keeping them on the time when we did open and if they weren't around, the business would've been hugely affected".* Mr. Byrne further explained that during the periods of imposed closure, the Donovans were not idle. They were tending to the *"thousands of pieces of memorabilia all over the pub".* This appears to have included maintenance work such as varnishing. He said that, pre-COVID, they had been working 50-60 hours per week. He also said that these long serving staff are customer favourites and that they hold *"extensive and invaluable knowledge about the long*

history and traditions of the pub". Their role is to meet the tours and *"give them ... a storytelling ... kind of questions and answers about Sean's Bar, a walk-around tour".* In this regard, it is important to recall that Sean's Bar claims to be the oldest bar in Ireland and it is extensively marketed on that basis. In those circumstances, it is easy to understand that the roles played by Mr. Paul and Mr. Timmy Donovan are very important to the business.

208. The only challenge to the evidence of Mr. Byrne in relation to the retention of Paul and Timmy Donovan was that, from December 2020, it must have been clear to him that the pubs would be closed for many months. In response, Mr. Byrne conceded that this was so from January 2021 although he also acknowledged that in October 2020, the prospect of re-opening diminished. His evidence was that, at other times, the hope of reopening sooner was very much alive. FBD has also relied on the evidence given by Mr. O'Brien that, from his experience as an accountant working with clients in the hospitality sector, the vast majority of publicans he dealt with had laid off staff. Under cross-examination, Mr. O'Brien gave evidence that he had dealt with *"north of* 20" pubs. I acknowledge that, in so far as he gave evidence as to those 20 pubs Mr. O'Brien's experience is relevant to the question of reasonableness even though he, as an expert witness, very properly accepted that he was not offering a view that the conduct of the plaintiffs was unreasonable. However, Mr. O'Brien conceded that, in some of those 20 cases, a small number of employees had been retained where *"there was a clear rationale for it".* That seems to me to be very relevant in the context of the decision made by Mr. Byrne to retain Mr. Paul and Mr. Timmy Donovan. It is clear, on the evidence, that they play a unique and invaluable role in the attraction of custom to Sean's Bar. Having regard to Mr. Byrne's evidence, there was a clear rationale for retaining them. I appreciate that their retention continued over what

transpired to be a very prolonged period but, having regard to their special importance to the business, it seems to me that their retention cannot be criticised. While I believe that it would ordinarily be very difficult to justify the retention of staff members for such a long period of closure, the positions occupied by the Donovan brothers are so important to the business of Sean's Bar that I cannot conclude that it was unreasonable to keep them on the payroll. In my view, the evidence shows that they were vital to the rehabilitation of the business on reopening and their retention seems to me to have been at least as important as the retention of the bar manager, Mr. Delaney (whose retention has been conceded by FBD to be reasonable).

209. The position is less clear in the case of the remaining three employees. The first of these is a part time employee, Mr. Adam Donovan who is a son of Mr. Paul Donovan. He has been employed since 2019 but Mr. Byrne made the point that he had previously worked in the family business before the pub was acquired by Mr. Byrne's company. He was described in Mr. Byrne's schedule merely as a *"bar employee"* but, in his oral testimony, Mr. Byrne gave some further details and said that, during the closure, Adam Donovan was involved in general cleaning and also assisted in letting workmen into the property while the building works (described at a later point in this judgment) were being carried out. He would also attend to lock up after the workmen left in the evening. Later, under cross-examination, Mr. Byrne expanded on this somewhat and said that: *"I think he was doing a lot of cleaning and painting – we had tons of furniture and he was helping with that and basically maintaining, making sure everything was clean and there was no rubbish lying around the place."* He denied that this was all necessitated by the building work being done and said that it was *"not just that, but keeping the place maintained and helping his dad and uncle as well. So you know, 20 different things, as we would say."*

210. I have come to the conclusion that the evidence given in relation to the role played by Adam Donovan is simply too broad brush and general to allow me to understand why it was considered necessary to the maintenance of the business of Sean's Bar to keep him on the payroll. In the circumstances, I believe that, like the evidence reviewed by Eder J in the *Sugar Hut* case, the evidence of Mr. Byrne does not provide sufficient detail to enable me to understand why the retention of Mr. Adam Donovan was considered necessary. I fully appreciate that during a period of closure, some maintenance work might require to be done from time to time. However, as outlined above, Mr. Byrne gave evidence that Mr. Paul and Mr. Timmy Donovan were also involved in tending to the premises and its contents. He went so far as to say that, during the period of closure, they were involved in varnishing memorabilia at the bar and doing *"every … single thing that they could do to make the pub better going forward".* No sufficient explanation has been put forward as to why it was considered necessary to keep Mr. Adam Donovan on the payroll as well. This is especially so given that, as explained below, a cleaner was also kept on the payroll who plainly would have been in a position to keep the premises clean while it was closed thus minimising the need for maintenance that might otherwise arise from wear and tear due to day to day use. I have therefore concluded that, in light of the lack of any sufficient explanation as to why Adam Donovan's retention was necessary to the continuance of the business, FBD can readily demonstrate that his retention was not reasonable.

211. The next person on Mr. Byrne's schedule was a part time cleaner, Ms Denise Loughnane. On Day 4 of the July hearing, Mr. Byrne was asked to explain *"why it was necessary or why Denise was integral to the business".* Having initially made a somewhat flippant reference to the Mrs. Doyle character in *"Father Ted",* Mr. Byrne

went on to explain that the reason he needed to keep Ms. Loughnane on the payroll was that: *"when we reopened back up again, to try and look for somebody as confident that you could hand keys to and trust with keys etc. I find them people impossible to get. That's why I wanted to keep her on. And it was only part-time we kept her on, but I didn't want to lose her."* Later, under cross-examination, he returned to the subject in the following terms in response to a question that he always wanted to be in a position to re-open: *"Absolutely, always ready to open and always conscious of the fact that it'd be very hard, and we'd always found it very hard, to get a good cleaner that you can trust and that loved the premises. And we definitely didn't want to lose her, because she'd be gone very quick to another job".* Thereafter, Mr. Byrne's evidence to that effect was not challenged by FBD other than in relation to the dawning of a realisation that the pub was likely to be subject to a lengthy period of closure. However, in the course of counsel's closing submissions on Day 8, it was forcefully submitted that it was an unsustainable proposition to suggest that it was essential for a publican to retain *"unskilled workers"* such as cleaners or kitchen porters and that this was especially so in the period after January, 2021. Counsel submitted that it was very difficult to accept that *"somehow the four plaintiffs here of all the pubs in Ireland have got uniquely qualified staff, they're the best barmen in the country, they're the best chefs, in the country ... irreplaceable ... barmen, cleaners, kitchen porters".*

212. I acknowledge the force of what was said by counsel for FBD. I also accept that, at first sight, it may appear counterintuitive to suggest that a relatively unskilled person such as a cleaner is so important to a pub business that it is necessary to keep that cleaner on the payroll during a prolonged period of closure. However, I have to decide this case on the evidence which I have heard and against the backdrop that

FBD has conceded that it bears the burden of establishing unreasonableness, at least where the plaintiff has adduced evidence as to why the retention of a staff member was considered necessary. In the case of Ms. Loughnane (in contrast to the case of Adam Donovan), Mr. Byrne has put evidence before the court of the particular importance of retaining her and the concern that he had that she would be snapped up by another employer were he to let her go. Moreover, Mr. Byrne has supported that evidence by his unchallenged explanation of the difficulty that he had encountered in finding a cleaner who could be trusted with the keys of a premises. I bear in mind in this context that this consideration is particularly significant in the case of a retail premises such as a public house with all of its wares readily available to anyone working there alone. Mr Byrne has also emphasised that Ms. Loughnane was retained on a part time basis only and it is clear from his evidence that the work of cleaning and maintaining the premises continued during the period of closure. It was up to FBD in those circumstances to establish that the retention of Ms. Loughnane was unreasonable. I do not believe that FBD has discharged that burden. Other than the evidence given by Mr. O'Brien (which was not put to Mr. Byrne in the context of Ms. Loughnane's retention), there was no countervailing evidence called by FBD. Mr. O'Brien was not specific about what kinds of roles were retained in the case of the 20 or so public houses with which he was familiar. Furthermore, there was no evidence called about the ready availability of trustworthy cleaners although one would think that evidence, for example, from local or countrywide cleaning agencies could have been called to address the issue if FBD wished to discharge the burden that it accepts lay upon it. I stress that this does not mean that every public house insured by FBD under its public house policy was entitled to keep a part time cleaner on the payroll. This finding is confined to the very particular position of Ms. Loughnane and is

reached by me in light of the individual evidence in this case and the approach taken by FBD in its cross-examination of Mr. Byrne. The position adopted by FBD in relation to this aspect of the Sean's Bar claim was undoubtedly hampered by the fact that details in relation to the staff claim were not originally given in Mr. Byrne's witness statement and were only provided by him in the course of his oral testimony or in the schedule circulated immediately prior to giving that testimony. That is not how proceedings in the Commercial Court should be run and it is a tribute to FBD's legal team that they did not insist, in the circumstances, on more time being given to them to address the issue following the very belated provision of any level of detail from Sean's Bar. Had they sought time to investigate the matter further, this would inevitably, have disrupted the July hearing and led to further delay.

213. A claim is also made in relation to Eric Lynch who is described in Mr. Byrne's schedule as a full time *"bar employee".* The only evidence that was given by Mr. Byrne in relation to Eric Lynch was that, during the period of closure, Mr. Lynch was *"... helping Declan, I suppose, with online when they were trying to set up the new online website and stuff like that. So, he'd be a very technical guy, he would've qualified in computers and Declan was trying to bring him on to look after that kind of work as well and maybe give Declan a bit of a, step back a bit from it and concentrate on other things. So that was the main thing with Eric,* ***I suppose he was learning the ropes****"* (emphasis added). In my view, that evidence fails to disclose any basis on which to understand why it was considered necessary to retain Mr. Lynch on the payroll. On the contrary, it suggests that Mr. Lynch was simply being trained in. It is not suggested, for example, that Mr. Lynch was someone who, in the words of Mr. Byrne in para. 43 of his witness statement, *"holds extensive and invaluable knowledge about the long history and traditions of the pub"* or who had, as described

in para. 44, *"built up relationships with customers to such an extent that certain customers will call in advance to see if certain bar staff are working that day/night".* It is true that Mr Byrne did explain that Mr. Lynch undertook work in relation to setting up a website but I have not been told what was involved in that project or how long the project lasted. As previously noted in the context of Ms. Loughnane, I must decide the issue on the basis of the evidence which I have heard. In these circumstances, in light of the lack of any evidence to explain why it was considered necessary to keep Mr. Lynch on the payroll, it seems to me that I am compelled to find that FBD is correct in its contention that his retention was unreasonable.

214. As outlined above, I take a different view in relation to Mr. Paul Donovan, Mr. Timmy Donovan and Ms. Loughnane. I am not satisfied that FBD has established that their retention was unreasonable. However, I will defer any ruling on the amount to be paid to Sean's Bar in relation to their salaries until I have heard the issue that arises in relation to government subsidies. As previously, noted Sean's Bar paid the retained personnel the difference between the government subsidies and their normal salaries. In this regard, Sean's Bar has received payments of subsidies under the Temporary Wage Subsidy Scheme (*"TWSS"*) and the Employment Wage Subsidy Scheme (*"EWSS"*). At this point, I do not know what submissions will be made to me in relation to the impact of the subsidies on the plaintiffs' claims in respect of staff salaries although I note that, in its closing written submissions, FBD has stated openly that it has made an offer to each of the plaintiffs to the effect that it will indemnify them *"for any government subsidies deducted from the indemnity payment made to them".* I have not seen the details of that offer and have heard no argument in relation to it. Nor do I know whether the State may seek to be heard in relation to that issue. In all of these circumstances., I believe that I should leave over the quantification of this

element of the claim until I have heard all parties entitled to be heard in relation to the subsidies.

The staff wages claim made by Lemon & Duke

215. There is no longer any dispute between Lemon & Duke and FBD in relation to salaries or wages paid to retained staff. The issue of retained staff had not been addressed in any detail by Mr. Anderson in his witness statement. However, a number of key staff were identified in Appendix J to Mr. Roulston's report. Furthermore, in the course of his oral testimony, Mr. Anderson gave very helpful details of those staff who had been retained or re-engaged from time to time during the periods of closure. In this context, it is clear that, unlike the Sean's Bar claim, the claim made by Lemon & Duke in relation to retained staff does not relate to the whole of the periods of closure. In terms of numbers of staff, it is also a much narrower claim than that made by Sinnotts or, even more starkly, by the Leopardstown Inn. It is confined to a number of identified periods during which a small number of staff were kept on the payroll for very specific reasons. The staff in question comprised Ms. Emma Smith, head of sales and marketing who was retained for a short period after the first closure to deal with staff issues. She was also brought back in advance of the re-openings to deal with the telephone calls and emails that the bar was *"inundated with".* In addition, in advance of the December 2020 re-opening, Ms. Smith was assisted by Ms. Sarah Kray. In advance of that re-opening. Mr. Anderson said that it was necessary to employ staff to manage booking enquiries and to sell hampers and cocktail kits that were important in keeping *"the brand alive".* Mr. Anderson also explained that, it was necessary to re-engage staff in advance of re-opening in order to get ready to *"hit the ground running"* and that he has learned that, for that purpose, *"it is not just straightforward to turn a key in the door and open the premises".*

Against that backdrop, Mr. Anderson said that Mr. Domagoj Orecic was re-engaged as floor manager and Mr. Colm Ryan was re-engaged as bar manager a short time in advance of re-opening. For similar reasons, Mr. Vasile Gritunic was re-engaged as chef in advance of re-opening. Mr. Anderson's evidence was that each of these personnel were particularly integral to the survival of the business and that their roles were key to the business such that they needed to be in place in advance of re-opening. In light of Mr. Anderson's very clear evidence, it is unsurprising that FBD, in their closing written submissions accepted that, in addition to salaries paid to the proprietary directors, Lemon & Duke is entitled to be indemnified in respect of the salaries of these personnel during the periods they were retained and were brought back to perform functions for the business.

216. Again, as in the case of Sean's Bar, I will defer the issue of the quantification of the agreed claim made in relation to retained staff until the subsidies issue is heard and determined.

217. In addition, Lemon & Duke has made a claim in relation to staff who were laid off. Mr. Anderson has explained that, following the closure on 15th March 2020, he made a promise to staff that he would seek to recover their wages through these proceedings against FBD. In its closing written submissions, Lemon & Duke has clarified that its claim in this regard is for the difference between the sum the relevant employees would have received by way of PUP payments and the salaries or wages they would have received had there been no COVID-19 pandemic. Mr. Anderson has confined the claim to those staff who returned to Lemon & Duke and he has confirmed that no claim is made in respect of those staff who have left the business.

218. Mr. Anderson explained that his understanding was at all times that the salaries and wages of the Lemon & Duke staff were covered by the FBD policy and

FBD submits that it is clear that his promise to the staff was made on that basis. However, Mr. Anderson's understanding cannot form the legal basis for a claim under the policy. The issue which arises here must be decided by reference to the terms of the policy and the principles which I have previously outlined in so far as they are applicable. As noted above, I was not referred to any specific authority for the proposition that an insured is entitled to recover staff wages which, while subject to a promise of payment made to the staff, had never, in fact, been paid by the employer. In short, I was not referred to any precedent under which an employer was held entitled to recover the wages of staff who have been laid off. However, as previously noted, the plaintiffs (including Lemon & Duke) placed some emphasis on the *Banco de Portugal* principle that the duty to act reasonably should not prevent the innocent party from recovering the cost of measures taken by that party following a loss, even where the party in breach can point to other less costly measures that could have been taken. It was also argued that it was necessary to make promises to key staff that their wages would be paid in order to ensure that they would be available whenever bars were allowed to re-open.

219. In response, FBD has argued that, where staff have been laid off, it is self-evident that their services could not be said to have been essential to the business of the plaintiffs during periods of closure. FBD has also argued that laying off staff by an insured during a period of closure was necessary in order to mitigate loss and FBD has strongly relied on the Supreme Court decision in *Sheehan* in relation to the duty to mitigate.

220. Although Mr. Anderson said that his promise to the staff was made in March 2020, the obligation to perform that promise was not recorded in the books and records of Lemon & Duke until November 2020. This was confirmed by Mr. Roulston

on Day 5 of the July hearing. Mr Roulston said that *"the reason, as I understand it, that they weren't accrued before that was because they shut down on 15th March, but they re-opened on 3rd July and they were open then for the period until mid-September. And there was no wages accruals, no wages accruing because staff were working and were being paid… there arguably should've been a wages accrual from March until they re-opened on 3rd July. But after they had to close again in September and … then had to close outside in October, all of the staff were laid off and … that wage accrual then becomes something that is more significant at that stage."* Mr. Roulston further explained that November was the quarter end after the October closure which is why the accrual was entered in the books at that stage. There is no evidence that a fresh promise was made to the staff at that point.

221. In fact, there is very little evidence about the promise made or the rationale for it. In this context, it seems to me that the starting proposition must be that, as FBD, has submitted, if staff are laid off, that must mean that *prima facie* they are not essential to the business for the period during which they were laid off. In my view, FBD is also correct in its submission that, faced with a period of closure during which staff will be idle, an insured, in order to fulfil the duty to mitigate loss, will ordinarily be required to lay off staff. The logical consequence is that, if an insured wishes to suggest the contrary, there must be some evidence to explain why that should be so.

222. In Lemon & Duke's case, Mr. Anderson has confined the claim in respect of the full-time staff who were laid off and he has also confined it to those that returned to work. With the exception of Ms. Sarah Kray, the full-time staff are all named on Schedule J to Mr. Roulston's report. However, on Day 3 of the July hearing, Mr. Anderson gave evidence that several of the personnel on that list did not return to the business. These include both of the head chefs. In fact, Mr. Anderson's evidence as to

the importance to the business of staff members on that list was confined to those five individuals described in para. 215 above and his evidence was focused on the need to re-engage them for the particular purposes described in that paragraph. In particular, I do not have any evidence as to why, in March 2020, it was considered necessary to make a promise to any of these named individuals to pay their salaries at a future point in order to ensure that they would be available for work at Lemon & Duke when it re-opened. Mr. Anderson gave evidence about the difficulty he encountered in succeeding months in re-engaging staff and about the scarcity of workers in the hospitality industry which had become apparent by the time of the July hearing. But the evidence about the position in March 2020 (when this promise was made) is very limited. It is true that Mr. Anderson did say that a lot of non-national workers went home and that *"everybody got pretty afraid at the start and went home to their own countries. And they couldn't afford to pay the rents on the 350".* I understand the reference to the *"350"* to be to the amount of the PUP payment.

223. However, the evidence does not address why, in the case of the five staff members named by Mr. Anderson, it was considered necessary to make a commitment to pay their salaries in order to secure their return when needed. This must be seen against the backdrop that the closure which commenced on 15th March 2020 affected all public house premises. Furthermore, on 24th March, that closure extended to all retailers (other than essential retailers). Four days later, everyone was instructed to remain within a two-kilometre radius of their homes. The nation was in lockdown. That extended to construction workers (other than those working on certain types of developments of particular importance). No explanation has been proffered as to why, in those particular circumstances, it was thought that the only way to secure the return of the five employees now in issue was by making the promise in question.

On the face of it, the circumstances were such as to suggest that the employees in question were unlikely to be able to find alternative employment while the lockdown continued. While Mr. Anderson did say in very general terms that many non-Irish workers returned home and could not afford to pay rents on the PUP, that is very general and broad brush and I have no detail at all in relation to the specific situations of these five individuals in March 2020 and as to why it may have been thought, at that time, that, in the absence of such a promise, they might not be available for work at Lemon & Duke in the future. What I do have is quite firm evidence to the effect that Mr. Anderson believed that staff salaries would be covered by the policy and that provides a very plausible basis on which to understand why Mr. Anderson made such a promise in March 2020. However, that belief is not a basis on which Lemon & Duke can advance this element of its staff wages claim. As previously outlined, what is required is some detail as to why it was considered necessary to make a promise of this kind for the benefit of the business.

224. In the absence of detail of that kind as to the circumstances of the March 2020 promise, I believe that there is no basis on which I could form the view that, as between insurer and insured, the making of this promise was reasonable. I should make clear that this is no reflection on the veracity of Mr. Anderson. At all times in these proceedings, I have found Mr. Anderson to be an impressive witness who clearly feels very strongly that he has been badly served by FBD with whom (uniquely in the case of Lemon & Duke) a policy was put in place after COVID-19 had emerged as a significant threat. The difficulty is that, as I have previously stressed, I have to decide this case on the basis of the evidence which has been given. On the face of it, a commitment to make a payment to staff while there is no work for them to do is not consistent with the duty on an insured to mitigate loss. What was

required in this case in order to overcome that difficulty was some level of detail to explain why the promise to staff in March 2020 was thought to be necessary for maintaining the business of Lemon & Duke. In the absence of such detail, the position is similar to the *Sugar Hut* case. There is insufficient material before the court to explain why it was thought to be necessary in March 2020 to make a promise which was increasing the liabilities of the insured. Without such explanation, FBD can readily say that such a payment is unreasonable as between it and Lemon & Duke. I cannot therefore hold that FBD is required to indemnify Lemon & Duke In the circumstances, it is unnecessary to consider whether the Lemon & Duke claim in respect of the periods of closure between March and October 2020 is undermined by the fact that no accrual was recorded in its accounts in respect of wages until November, 2020.

225. For completeness, it should be noted that there was evidence given at the July 2021 hearing in respect of the difficulty in filling roles at that time but that is of no assistance in relation to the Lemon & Duke claim in so far as the March 2020 promise is concerned. In addition, some evidence was given at the October 2020 hearing by Mr. Byrne of Sean's Bar about the difficulty in securing staff in Athlone in September 2020 to enable that bar to re-open at that time. That evidence is specific to Athlone and appears to be confined to part time staff. Mr. Byrne said that *"like anyone on the COVID payments, they just don't want to work, they're getting 300 quid a week and it's just nearly impossible. Any of our guys that we had are quite happy to stay in college and get their €300 and they don't want to be doing 20 hours for me for 200… We were advertising in the UK for staff … it's just impossible to get staff …".* Evidence of that kind in relation to full time staff in the Dublin area might be relevant if a fresh promise had been made to staff in the autumn of 2020 when Dublin bars

were required to close for indoor use. However, in so far as I can see, no claim has been made that any further promise was made to Lemon & Duke staff at that time and I therefore do not believe that it is necessary for me to consider whether a claim in respect of the periods of closure subsequent to that time could be said to be reasonable or unreasonable.

The staff wages claim of Sinnotts

226. By way of background, Mr. Kelly explained on Day 2 of the July hearing that Sinnotts employs between 32 and 35 staff, of whom 12 are full-time employees and the balance are part-time. All of these staff were laid off by Sinnotts in March 2020 at the outset of the first closure period but, as explained below, some of them were re-engaged from time to time. As further explained below, 17 employees were brought back on the payroll in January 2021 and this was confirmed by Mr. O'Brien in the course of his evidence on Day 6 of the July hearing.

227. There is no dispute between Sinnotts and FBD in relation to a number of the staff retained by Sinnotts' payroll for relatively short periods in the course of 2020. FBD accepts the claim made by Sinnotts that, prior to the reopening in June 2020, it was necessary to reinstate one chef and one manager and that it was also necessary to reinstate a number of further staff to get the venue ready for the resumption of trading. In addition, FBD accepts that, during the period from 21st September 2020 to 21st October 2020, one staff member was retained and that Sinnotts has a valid claim in respect of that cost. Furthermore, while criticising what it contends is the lack of rationale given by Mr. Kelly, FBD accepts the claim made by Sinnotts in para. 95 of his witness statement in relation to the reinstatement of additional staff from 2nd November 2020. It appears to be implicit in FBD's approach that it is accepted that the reinstatement of these staff in November was necessary in light of the imminent

re-opening in December 2020. But, FBD contests the reasonableness of the subsequent decision made by Sinnotts at the end of December 2020 to retain 17 staff on the payroll comprising a payroll administrator, four chefs, four managers, four senior bar staff, two floor staff and two kitchen porters. Having regard to Mr. O'Brien's evidence, that decision took effect in January 2021.

228. As previously noted, it was suggested at one point that the December decision was motivated by confidence that Sinnotts would succeed in its claim in these proceedings and that, accordingly, it could not be said that this was the decision of a prudent uninsured. However, I do not believe that any such conclusion could properly be reached. I believe that counsel for Sinnotts was fully justified in suggesting that it is without foundation. While Sinnotts was aware in December, 2020 of the favourable Divisional Court decision in the *FCA* case, it had no assurance that the decision would be followed in Ireland or that it would be upheld on appeal by the U.K. Supreme Court. Mr. Kelly would have been well aware of the weighty submissions that had been made on behalf of FBD at the October, 2020 hearing to the effect that the decision of the Divisional Court had been reached without the benefit of any evidence in relation to the factual matrix and that, in contrast, the court in these proceedings had available important evidence that was said to be coercive in FBD's favour. As a consequence, there is no basis on which to infer that the decision to keep these 17 employees on the payroll at the end of December 2020 was motivated by confidence that Sinnotts would be successful in its claim.

229. Accordingly, the issue of the retention of these 17 staff falls to be determined solely by reference to whether it was reasonable to do so, the burden being on FBD to establish that it was unreasonable (subject to the requirement that Sinnotts provide evidence as to the circumstances of the decision). In this context, FBD places

significant weight on the timing of the decision in the context of a sharp rise in COVID infections when there was great uncertainty as to when pubs would be permitted to reopen.

230. There is also a dispute between the parties in relation to the claim made by Mr. Kelly in para. 100 of his witness statement in relation to an earlier decision to accrue the salaries that would have been payable to 12 full-time employees. In para. 100 of his witness statement, Mr. Kelly said that he needed these staff *"to continue working for me if the business was to re-open".* He agreed with them that he could not pay them their salaries at that time but that he would do so when he could. In the meantime, he said that their salaries were accrued in Sinnotts' accounts. According to a schedule attached to his witness statement, the 12 employees concerned comprised three chefs, a payroll administrator, four managers and four senior bar staff. Mr. Kelly also took the same approach in relation to his own salary as a director. There appears to be some overlap between the 12 staff members identified in the schedule and the 17 employees who were the subject of the subsequent decision in December 2020 discussed above.

231. It was unclear from Mr. Kelly's witness statement as to when Sinnotts made the decision to accrue the salaries of the 12 staff members. In para. 101, Mr. Kelly merely said that: *"my financial staff and I took those decisions in 2020…".* In the course of his direct evidence on Day 2 of the July hearing, he said that he made the decision *"back in March* [2020]*".* However, on cross-examination, counsel for FBD pressed him in relation to when the agreement was reached with the 12 staff members to accrue their wages and Mr. Kelly's rather imprecise answer was: *"I made this agreement at the start of March of March/April of 2020".* Doing the best I can on the basis of this evidence, it would appear probable that the agreement (and the relevant

decision by Sinnotts to enter into it) must have been made towards the end of March or the beginning of April 2020. Given that the date of the government decision to require public houses to close was not taken until 15th March 2020 and given that the staff were laid off initially, the decision cannot have been taken in early March. Mr. Kelly was asked whether there is a written note of the agreement, and he conceded that there was none but he suggested that the salaries had been accrued in Sinnotts' management accounts for March, 2020 and subsequent periods and that they had also been included in the draft 2020 financial statements which were with the auditors at the time of the July hearing. It was later clarified in Mr. Jacobs' evidence that the timing of the first accrual was in April/May 2020. This would tie in with Mr. Kelly's evidence as to the timing of the agreement in March/April. On that basis, I believe that it is probable that Mr. Kelly is mistaken in so far as he suggested that the accruals date back to March 2020.

232. Mr. Kelly also stressed that the effect of the agreement was that the staff were to be paid at some point in the future irrespective of the outcome of the court's ruling on this issue. Mr. Kelly accepted that these staff members were laid off. Mr. Kelly did not know whether, in the meantime, these staff had been in receipt of the PUP. As I understand it, the PUP was available solely to employees who were laid off and who were not in receipt of any payment from their employers. That is an issue that will be explored further at the next hearing. At this point, it has not been explained how the payments to be made under the agreement with staff will take account of any PUP payments previously received by staff. If it is the case that the payments are to be made without taking account of any PUP payments received, the agreement would appear to be a particularly generous one.

233. In his evidence on Day 2, Mr. Kelly described the importance of the 12 staff members identified in the schedule to his witness statement. He said that the chefs were integral to the operation of Sinnotts' food operation and, in answer to a question as to how easy it might have been to replace them, he said that he could not have opened without them (which I understood to be a reference to the difficulty described by him earlier in his evidence about the departure of hospitality staff from the industry which had become apparent by the time he prepared his witness statement in May, 2021). According to Mr. Kelly's schedule accompanying his statement, the longest serving chef has been with Sinnotts since November 2012. The other two have been there since August 2017 and January 2019 respectively.

234. Mr. Kelly also explained why he believed that a payroll administrator was essential particularly *"with the legislation, with taking staff on and laying them off, the different subsidies which are changing so frequently …".* In Mr. Kelly's schedule, it is stated that this payroll administrator was first employed in March 2020. In so far as the managers are concerned, Mr. Kelly explained that Sinnotts opens as early as 10.30 a.m. and that it was necessary to have managers on the premises in different shifts throughout the day. His evidence was that, since he was unable to be present himself (having regard to the number of other units in which he is involved) *"these guys run the unit".* According to the schedule, the four managers have been with Sinnotts since June 2011, July 2012, May 2017 and March 2020 respectively. The point is also made in the schedule that it would not have been possible to train new managers during a period of closure while the pub was without customers.

235. With regard to the bar staff, his evidence was that *"they'd know the systems … they know how we operate, they know our customers. Like Kate would do the day shifts from ten to six and she's done that for years. All the customers know her, they*

like her. She does more than just being a bartender: you know, she can take in deliveries … she knows how to separate the different zones. And this is years of training of these people within my Group to the standards that I expect of my Group. And to lose those people would be catastrophic for my business". According to the schedule, *"Kate"* had been employed since 2006; the other three started respectively in April 2016, August 2018 and December 2018.

236. There was no equivalent detail given in relation to the 17 staff described in para. 96 of Mr. Kelly's witness statement. However, it appears likely that 12 of these 17 are the same 12 staff members discussed above and I will proceed to deal with the issue on that basis. The additional five staff members, the subject of the December 2020 decision, comprise one additional chef, two floor staff and the two kitchen porters. No individual explanation has been given by Mr. Kelly as to why he believed that these five members of staff needed to be retained as from January 2021. However, in para. 97 of his witness statement, Mr. Kelly said, with reference to all 17 staff members listed in para. 96, that it was necessary to retain them *"because we were losing staff. They were retraining or leaving the business and we will need those staff to begin operating again. We took the decision to pay those staff before we knew that we would be indemnified by FBD. We did this because this was the right thing for the business, to enable us to resume trading when permissible…".* Mr. Kelly went on to describe the difficulty which Sinnotts was experiencing in recruiting staff as of May 2021 (when his witness statement was furnished) and how only three of 48 applicants had bothered to turn up for interview. He said that he understood that many staff have decided to leave the industry and that many had changed to positions in the retail sector which have more sociable working hours.

237. One of the points stressed by FBD in relation to Sinnotts' staff wages claim is that, in so far as the 12 laid off staff described in Mr. Kelly's schedule are concerned, it could not have been foreseen in March 2020 that there would be such a loss of staff from the hospitality industry as was subsequently experienced. FBD has also sought to rely on Mr. O'Brien's evidence that, in the *"vast majority"* of the public houses he had come across, staff had not been retained. His evidence was that, in those cases of which he was aware in which staff had been retained, this had been *"on a very small basis and there's a very clear rationale to it".* With regard to the decision taken in December 2020 to retain 17 staff members, FBD has submitted that this is *"manifestly unreasonable"* and that it stands *"in stark contrast"* to the approach taken previously. In addition, in so far as Sinnotts' claim in respect of floor staff, kitchen porters and bar staff is concerned, FBD has strongly urged that such positions are so lacking in special skills that they cannot plausibly be regarded as key to its business.

238. In addressing this issue, it seems to me that different considerations arise in relation to the two decisions in question (i.e. the March/April 2020 decision and the subsequent decision in December 2020). In so far as the former is concerned, that addressed the position of laid off staff. I reiterate the considerations which I have outlined above in relation to the position of laid off staff in the case of Lemon & Duke. I do not have any sufficient evidence to establish that, as early as March/April 2020, there was any reason to think that there would be the loss of staff from the sector that was subsequently experienced. For similar reasons to those expressed above in relation to the claim made by Lemon & Duke, there is no sufficient detail given in the evidence to allow the court to conclude that such a loss was predictable at that time. On the contrary, the circumstances that existed in March/April would suggest that there would have been nowhere for staff to seek alternative employment

at that time. I can see no basis in the evidence to explain why publicans would have had a concern at that time that, if they did not make a promise to pay salary in the future, suitably qualified or experienced staff would not be available to them whenever they were permitted to re-open. The evidence which I have heard about the difficulty in finding staff relates to later periods and appears to be attributable, at least in part, to the sheer length of the periods of closure and the undermining of job security in the hospitality trade generated by the repeated closures of bars and restaurants. Accordingly, on the basis of the evidence which I have heard, I take the view that the difficulty in replacing staff could not be said to be a relevant factor at the time of the March/April 2020 decision. No plausible alternative explanation has been given for the promise said to be made at that time. In those circumstances, I do not believe that there is any alternative but to conclude that, as between Sinnotts and FBD, the promise made to staff in March/April 2020 was unreasonable and that this element of the Sinnotts' claim must fail.

239. I next turn to the claim made by Sinnotts in respect of the 17 staff members re-employed in January 2021 on foot of the December 2020 decision. Their wages and salaries have been paid thereafter. They accordingly fall into the same category as retained staff. No detail is given in Mr. Kelly's witness statement in relation to these 17 staff members. However, as noted above, it appears likely that 12 of the 17 in question are one and the same as the 12 employees described in the schedule delivered with the witness statement. Addressing Mr. Kelly's schedule on that assumption, I am satisfied that there is a sufficiently detailed and plausible explanation for the retention of a payroll administrator for a reasonable period of time. In particular, I believe that it was reasonable that she should be retained to deal with periods when it was necessary to process taking on and laying off of staff and to deal

with the accruals of pay for the other employees who were retained and also the accrual of Mr. Kelly's undrawn remuneration. It may also have been necessary that she should be retained to deal with any issues that would arise in relation to government subsidies to the extent that they are relevant to Sinnotts. However, no evidence has been given that would in any way explain why it was necessary for Sinnotts to employ a payroll administrator on a full-time basis during this period. The number of staff retained by Sinnotts would not suggest that this was necessary. Nor is there anything to suggest that there was any scarcity of expertise in this area at the time the decision to retain the administrator was made. For those reasons, it seems to me that the most I can do at this stage in relation to the payroll administrator is to give the general guidance outlined above and to leave it to the parties and their experts to work out the amount that is properly payable in respect of the services actually required during this period. If any dispute arises, it can, if necessary, be brought back before me.

240. In the case of the chefs, the decision to re-engage them is addressed in very broad terms in para. 97 of Mr. Kelly's witness statement (quoted above). That does not provide any level of detail in relation to the individual roles of the staff concerned or of their importance to the maintenance of Sinnotts' business. However, some of the roles were explained in Mr. Kelly's schedule dealing with the March/April 2020 agreement as amplified by Mr. Kelly in his oral testimony and it seems to me that regard can be had to that evidence on the assumption that the 12 employees described in the schedule are included in the 17 put back on the payroll in January, 2021. However, I have no detail at all in relation to the fourth chef. The schedule does not address the position of that chef in any way. In the absence of any detail in relation to the fourth chef, I believe that, similar to the position in the *Sugar Hut* case, FBD is

entitled to say that, as between it and Sinnotts, the retention of that staff member was unreasonable.

241. In so far as the other three chefs are concerned, it is stated in Mr. Kelly's schedule that the first is an executive chef who is *"essential to the development of the food business. Given the severe difficulty in the industry with chef recruitment, it was necessary to retain them."* In addition, Mr. Kelly gave evidence on Day 2 of the July hearing to the effect that the executive chef is integral to the food operation of the pubs operated by his group of companies. He devises the menus and deals with the hiring of other chefs. I can understand the importance of an executive chef to the food business operated by Sinnotts. As Mr. Kelly observed in the course of his evidence: *"we've all went (sic) to restaurants and had a bad meal, through a poor chef …; you don't go back, that's what happens."* That chimes with common experience. The quality of food preparation is key to any reputable food business. That seems to me to be an important feature to bear in mind. As against that, a significant issue arises as to whether it can ever be reasonable, as between insured and insurer, to retain a chef for a very long period of time while a food premises is closed. In ordinary circumstances, I do not believe that such retention could plausibly be considered to be reasonable unless, for example, there was evidence that the reputation of the pub's food offering rested on its association with that particular chef. In such circumstances, it would be easy to see why the retention of the chef was necessary to secure the future of the business. That would also be consistent with the guidance given by *Riley* in the extract quoted in para. 197 above. The evidence offered by Mr. Kelly does not go that far. However, I bear in mind that, by December 2020, it is likely that the difficulties in obtaining staff (described by Mr. Kelly in his schedule) had, at least, begun to be apparent. That said, there is very little detail in the evidence which could be said to be

specific to conditions in December 2020. In his schedule, Mr. Kelly used the present tense in describing the difficulty in recruitment. That schedule was produced in May 2021. I nonetheless believe that those difficulties are likely to have become apparent by December 2020. As noted above, the reason for the loss of staff appears to be attributable to the length of the periods of closure and the fact that the hospitality industry was beset with a number of closures in succession with only relatively brief periods in between during which pubs and restaurants were permitted to open. That pattern of recurring closures was already very apparent by December 2020 when the government directed a further closure to commence on Christmas Eve. Accordingly, I believe that it is appropriate to conclude that the drift of staff away from the hospitality sector had become apparent by the time the December 2020 decision to retain staff was made. On that basis, the loss of staff is an additional factor that should be borne in mind. When that factor is taken into account, it is more readily apparent why Sinnotts would decide to pay its executive chef during a period of closure in order to ensure that he would be available to it once the pub was permitted to re-open for business. On that basis, I think it would be inappropriate to characterise as unreasonable the decision to reinstate the executive chef on the payroll. To put it another way, I have not been persuaded by FBD that the retention of an executive chef was unreasonable. I therefore am of the view that Sinnotts is entitled to claim the salary of the executive chef from January 2021 to the extent that it is referable to his work for Sinnotts. In so far as he also works for other pubs in the group of companies controlled by Mr. Kelly, that is not a matter that falls within the ambit of these proceedings and cannot form part of the claim against FBD.

242. I take a similar view in relation to second chef named in Mr. Kelly's schedule where he is described as the head chef or senior chef. While Mr. Kelly does not

provide much detail in the schedule in relation to the reason for his reinstatement on the payroll, he is described as a *"long serving member of staff and also essential to the food business"* who has worked in Sinnott since November 2012. While that description is very general and lacking in detail, Mr. Kelly expanded on this on Day 2 of the July hearing when he said that this chef knows the kitchen and menu well; that he is an excellent chef and that he is trusted with the keys of the pub. In those circumstances, I believe that it is difficult to make a distinction between the executive chef and the head chef or senior chef who has worked at Sinnotts for such a long period of time. I can understand from the circumstances that it may well be essential for a pub with a food business to have two senior chefs in position in order to successfully operate that business. Given the drift of staff away from the hospitality sector, I do not believe that the decision to retain both of them could be said to have been unreasonable as of December 2020. I therefore believe that Sinnotts should be entitled to recover the salary of the head chef paid since January 2021.

243. However, it is less obvious why it was considered necessary to re-engage a third chef while the premises was closed. In my view, that requires explanation particularly in circumstances where the period of closure was very lengthy. On Day 2 of the July hearing, Mr. Kelly said that the third chef knows the operation and the food and the way Sinnotts want the food produced. He was described as an integral member of staff who is also trained in the operation of *"Procure Wizard",* the purchasing system used for the kitchen. That description of the job done by the third chef is helpful in so far as it goes but it is not very detailed. Moreover, the third chef has only been working at Sinnotts since January 2019. Having regard to the above considerations, this seems to me to be a borderline case. Nonetheless, I must bear in mind the importance of a chef to the business of a pub with a food offering. I must

also keep in mind the likelihood that, by December 2020, the difficulty in replacing qualified and experienced staff had become apparent. With some hesitation, I have come to the conclusion that his re-engagement in January 2021 has not been shown by FBD to be unreasonable. Accordingly, I believe that the claim for the salary of the third chef paid since January 2021 should be allowed.

244. In so far as four managers were retained, it seems to me that, with the exception of the manager who only started in March, 2020, the bulk of the claim made in respect of the remaining three managers should be allowed, given their experience and given the additional factors outlined below. In this context, I again bear in mind that, by December 2020, the drift of staff away from the hospitality sector is likely to have begun to become apparent. I also accept that, given the breadth of Mr. Kelly's business interests, he is not able to fulfil a direct managerial role himself on the premises. I also accept that it is necessary to have an experienced manager available on the premises at all times and that, because the bar opens at 10.30, more than one shift a day is necessary. Those factors go some way to explaining why a publican such as Mr Kelly would consider it necessary for the future re-opening of the business to restore them to the payroll in January 2021 notwithstanding the closure of Sinnotts at that time. While the detail given by Mr. Kelly in respect of their roles is relatively brief, their position is similar to that of the manager of Sean's Bar whose retainer on the payroll is accepted by FBD to have been reasonable. In my view, an experienced manager is well capable of falling within the category of *"key staff"* described by *Riley* in the extract quoted in para. 197 above and FBD has not shown that the retention of three experienced managers was unreasonable. That said, no explanation has been given by Mr. Kelly as to why the fourth manager was key to the business. That person was only employed for the first time in March 2020. In my view, some

explanation was required from Mr. Kelly as to the basis on which it was believed that a relatively newly employed manager was key to the business of Sinnotts. In the absence of that explanation, FBD is entitled to contend that his retention was not reasonable. Moreover, Mr. Kelly has not explained why four managers are necessary to ensure that one is present in the bar at all times. In this context, I am conscious that, as noted above, Sinnotts opens as early as 10.30 a.m. However, even if one were to assume that the premises is open 7 days a week for 15 hours a day, that would only require a total of 105 managerial hours per week. That falls far short of four working weeks of 40 hours per manager. It even falls short of three working weeks of 40 hours. It would equate to three working weeks of 35 hours per manager. No basis has been put forward to explain the claim for four managers. Consequently, I believe that FBD is entitled to reject the claim in relation to the fourth manager. Conversely, it seems to me that the claim in respect for the remaining three managers is reasonable although some adjustment may need to be made if, between them, they do not work for three full time working weeks. That is an issue that can be vouched in due course.

245. Next, it is necessary to consider the claim in relation to four bar counter staff. There is no doubt that Mr. Kelly has provided an explanation as to why *"Kate"* was considered to be integral to the business. I have already outlined his evidence to that effect. Against the backdrop of the loss of staff from the sector, that evidence seems to me to provide a plausible basis for the decision to retain her as from January 2021, notwithstanding the closure of the pub at that time. Nothing has been said by FBD which demonstrates that the decision to retain her was unreasonable. While FBD has argued that bar staff are not indispensable and are not highly qualified, it seems to me that a sufficient case has been made to explain why, in light of the way in which staff were drifting away from hospitality, the retainer of *"Kate"* would have been

considered to be necessary for the future re-opening of the business. Mr. Kelly has explained her particular skills and qualities and his evidence allows an assessment to be made as to her importance to the business. In light of that evidence, I have not been persuaded by FBD that her retainer could be said to be unreasonable.

246. However, Mr. Kelly did not provide the same level of detail in relation to the remaining three bar employees. In this context, I should clarify that I do not accept the submission made by FBD that bar staff should be regarded as unskilled. I do not believe that one can properly make such a sweeping suggestion. Experience shows that many bar staff have considerable skills in dealing with the huge variety of circumstances that they encounter in their work Nonetheless, I believe that, before a conclusion could be reached as to whether an individual bar employee is key to a business (such as to justify retention on the payroll even during a period of closure), some evidence is required which explains why this is so. In the absence of such evidence from Mr. Kelly, I do not believe that there is any sufficient basis to regard such employees as sufficiently key to justify their retention. The only explanation which Mr. Kelly has given for the retention of the three bar employees in question is that they know the systems and the customers and how Sinnotts operates. However, that evidence is very general and does not provide the necessary level of detail either as to the significance of these three individuals or as to the extent of the difficulty that might arise in seeking to replace them. I appreciate that Mr. Kelly has also said that patrons will not return to premises if they get a poor level of service but that is why the presence of managers is so vital. Managers should be in a position to ensure that a proper level of service is provided by bar staff. I have already allowed the claim in relation to three managers.

247. While Mr. Kelly has said that to lose *"these people"* would be *"catastrophic"* for the business, I am of the view that more detail would be required specific to the three employees concerned to enable the court to form a view on their importance. In this context, it is important to recall that the significance of the requirement to provide detail in relation to the retention of staff was highlighted in FBD's opening submissions furnished in advance of the July hearing and Sinnotts was therefore on notice that some level of detail would require to be given if the approach taken in the *Sugar Hut* case was to be avoided.

248. Unfortunately, for Sinnotts, the same problem arises in relation to the claim made in respect of the retention of two floor staff and two kitchen porters on the payroll in January 2021. No sufficient level of detail has been provided about the importance of these four individuals to the business. Similarly, it has not been explained why it was considered that they could not be replaced or re-hired once the pub was permitted to re-open. I have not lost sight of the concern about the drift of employees away from the hospitality sector but I have no evidence to suggest that floor staff or kitchen porters have any special skills. I appreciate that these roles are necessary in order to run a business like Sinnotts. I also appreciate that some evidence was given by both Mr. Cooney on behalf of the Leopardstown Inn and Mr. Anderson of Lemon & Duke in relation to kitchen porters. Mr. Cooney described how kitchen porters keep the kitchen clean and safe and, using the present tense on Day 2 of the hearing, he also said that it is very hard to find good kitchen porters in Dublin. Mr. Anderson gave evidence on Day 3 of the July hearing that one of the hardest people to get *"at the moment"* in the industry are kitchen porters but that does not address the position as of December 2020 when the decision in issue was made. However, that evidence is again very general and the difficulty remains that Mr. Kelly has provided

no information to allow me to understand why roles of this kind could not be filled, when the pub re-opened, by people without previous experience in the sector. Without any explanation to the contrary, the tasks involved seem to me to be so basic that it is difficult to see why previous experience would be required. Furthermore, a kitchen porter will be under the supervision of the chefs who will be able to instruct them as to the tasks to be done; while the floor staff will have on-site managers to instruct them. Thus, the drift of experienced staff away from the sector does not appear to me to explain the necessity to retain these particular roles during a period of closure. Again, I stress that I must decide this issue on the basis of the evidence which I have heard. I have already drawn attention to the fact that Sinnotts was not on notice from the FBD submissions of the approach taken in the *Sugar Hut* case. In the absence of any detail from Mr. Kelly in relation to these four individuals and the rationale for retaining them on the payroll while the pub was closed, I am forced to conclude that FBD is correct in its submission that their retention was unreasonable.

249. For all of the reasons outlined above, I conclude that Sinnotts' claim in respect of the March/April 2020 agreement must fail. On the other hand, I am satisfied that, with the exception of one manager, one chef, three bar counter employees, two floor staff and two kitchen porters, it has a good claim to be indemnified in respect of wages and salaries paid pursuant to the December 2020 agreement. The quantification of that claim can be vouched in due course and, in the event of disagreement between the parties, can, if necessary, be assessed by the court at a future hearing.

The staff wages claim of the Leopardstown Inn

250. I found this aspect of the Leopardstown Inn claim to be very difficult to follow. In his witness statement. Mr. Cooney explained that the Loyola Group (of which the Leopardstown Inn is part) places great emphasis on staff training and

quality and that one of the factors that led him and his co-directors to purchase the pub was the quality of its staff. In para. 127, he said that the Leopardstown Inn retained as many staff as it possibly could. In para. 120, he said that *"key staff"* including bar managers, *"key"* bar tenders, the head chef, *"key"* chefs and kitchen porters and *"group admin staff"* were retained. He also said in para. 131 that some administrative staff worked on a short time basis during periods of closure to help reduce cost and that other staff *"initially laid off"* were re-hired when possible for those periods when government restrictions were eased. Those paras. of Mr. Cooney's witness statement gave me the impression that key staff were retained on the payroll but that non-key staff were laid off subject to the extent that it was necessary to bring them back on the payroll from time to time principally during periods when the premises were open on one form or another. However, in para. 133 of his statement, Mr. Cooney said that the amounts due to staff had been accrued in the management accounts of the company. That seemed to suggest that salaries and wages had not been paid but had simply been accrued in the accounts. In turn, that would suggest that staff must have been laid off rather than retained.

251. No details were provided in Mr. Cooney's statement in relation to any of the staff in issue. When he came to commence his oral testimony on Day 2 of the July hearing, Mr. Cooney produced a schedule with the names of 37 full time employees ranging from bar managers to kitchen porters. But on Day 3 he confirmed that the manager of the off-licence had been included in error in that list. Mr. Cooney confirmed that, while his company had closed the off-licence for a period after the government announcement on 15th March 2020, it was subsequently re-opened following legal advice that they were entitled to do so. Mr. Cooney characterised the remaining 36 employees on the list as essential to the business and as *"almost*

irreplaceable" such that their *"retention"* was necessary. However, on cross-examination, it ultimately became clear that the staff members concerned had, in fact been laid off and that, similar to the Sinnotts' claim in respect of the March/April 2020 agreement, the claim was based on a promise made to staff that they would be paid in the future. The evidence in relation to that promise is addressed further below. It also now seems to be the case that the reference in para. 133 of Mr. Cooney's witness statement to the accrual of wages in the company's accounts was intended to relate to the promise made to the full-time employees on the schedule. I consider below the rather imprecise evidence that was given by Mr. Cooney in relation to the decision to accrue.

252. Under cross-examination on Day 3, Mr. Cooney acknowledged that, following the closure order of 15th March 2020, *"we laid off nearly everybody".* He also acknowledged that no accrual was made in relation to staff wages in the first period of closure running from March to June 2020. In light of Mr. Cooney's acknowledgement that almost all staff were laid off, the references in Mr. Cooney's witness statement (and in his evidence in chief) to staff being retained should be read subject to that important qualification. In reality, subject to those occasions when staff were re-engaged and paid their salaries in accordance with the requirements of the Payment of Wages Act 1991, the Leopardstown Inn claim is made on foot of the promise to pay staff in the future the salaries that would have been payable during the periods of closure, had they not been laid off. It is therefore of the same character as the claims made by both Lemon & Duke and Sinnotts in respect of laid off staff.

253. This conclusion is reinforced by the evidence given by Mr. Cooney with regard to the promise made to staff. Under cross-examination on Day 3, Mr. Cooney said: *"So, I would have told the managers that we were insured, that I had been told*

we were insured and that we were going to get the wages for them when we get the insurance money … and my instructions were that they could relay that message on to staff". For completeness, it should be noted that Mr. Cooney also referred to statements alleged to have been made to him by Mr. Fox of FBD. However, it was clarified by counsel that no claim of misrepresentation is made against FBD and, on that basis, I do not believe that I can have any regard to anything that Mr. Cooney contends was said to him by Mr. Fox as to the ambit of cover. Moreover, because no misrepresentation claim was advanced by the Leopardstown Inn, FBD did not call Mr. Fox as a witness at the July hearing and it would be unfair in the circumstances if I were to rely on Mr. Cooney's evidence in relation to his exchanges with Mr. Fox. What is important for present purposes is Mr. Cooney's evidence that the promise was made to staff on the basis that it was believed that staff wages would be covered under the policy. This evidence is consistent with that previously given at the October 2020 hearing as summarised in para. 6.2 of his witness statement dated 1st September 2020. However, as previously observed in relation to Mr. Anderson's evidence to similar effect, such a belief does not, as between insured and insurer, provide a relevant rationale for an agreement to pay wages to staff during a period when the staff are not working. On the face of it, such an agreement is contrary to the duty imposed on the insured under general condition 8(iii) or the duty to mitigate which arises even where no such condition is included in an insurance policy. For that reason, if the Leopardstown Inn is to be entitled to an indemnity in respect of its promise to pay staff wages, some other basis would have to be identified to explain why the promise was necessary for the maintenance of the business.

254. Two other bases are identified by Mr. Cooney for the decision. First, in the course of his evidence on Day 2 of the July hearing, he said that his group of

companies is very loyal to its staff who, in turn are very loyal to the group. From a purely human perspective, that is very laudable. However, as between insurer and insured, it would not constitute a reasonable basis on which to pay staff who had no work to do. Thus, no indemnity would be available if this is the reason why the promise in issue was made. Secondly, Mr. Cooney on both Day 2 and Day 3 stressed the need to retain all of the full-time staff at the pub. Under cross-examination on Day 3, he suggested that all of the full-time staff were integral to the business. Previously, on Day 2, he had also given some evidence in relation to the importance of particular categories of staff on the list of 36. He also gave evidence about the difficulties experienced in replacing staff. In this context, he had gone into some detail in his witness statement about the loss of *"10 key staff"* in the group *"as a direct result of FBD's failure to admit and pay our claim in a timely manner"* and the expense incurred and the difficulty encountered by the group in replacing those staff. However, it emerged under cross-examination on Day 3, that none of those staff was employed at the Leopardstown Inn apart from the manager of the off-licence (which was not subject to an imposed closure). It is therefore difficult to fathom how any failure by FBD to honour its obligations under the policy for the Leopardstown Inn can be said to have been the cause of the loss of the 10 staff members in question. More pertinently, there is no evidence that there was any basis to think that, as of March 2020, (when the promise to the managers was made), there would be a movement of staff away from the hospitality sector. While Mr. Cooney gave evidence about the difficulty encountered in replacing staff in the group, there is nothing to suggest that this difficulty was apparent in March 2020. In my view, the position is the same in relation to the promise made by the Leopardstown Inn and those made at roughly the same time by Mr. Anderson to the staff of Lemon & Duke and by Mr.

Kelly to the staff of Sinnotts. If anything, the claim of the Leopardstown Inn is even weaker than the claims made by the other two Dublin pubs. In the case of the Leopardstown Inn, the sheer number of beneficiaries of the promise raises questions about its reasonableness. In addition, the fact that the principal criterion used – that the staff concerned were full-time – also raises similar questions. Furthermore, as outlined above, loyalty appears to have been a significant factor in the approach taken by the Leopardstown Inn. This is reinforced by the rather striking evidence given by Mr. Cooney on Day 3 of the hearing. In response to a question from FBD's counsel asking him to confirm that none of the staff on the list of 36 had gone off to other areas, Mr. Cooney said: *"And that's largely due … because there's such a large – there's so many of them in such a large, a longer length of service."* This plainly suggests that the full-time staff of the Leopardstown Inn were disinclined to seek alternative employment.

255. Even if the additional factors outlined above are left out of consideration, I do not believe that the claim made by the Leopardstown Inn can succeed. In this context, I reiterate the considerations previously outlined by me in relation to the claim made by Lemon & Duke and by Sinnotts in respect of laid off staff. In circumstances where there is no evidence to suggest that a loss of staff from the hospitality sector was predictable in March 2020, I cannot conclude that the difficulty in replacing staff was the motivating factor underlying the promise made. Accordingly, I am driven to the conclusion that FBD is correct in its contention that such a promise was unreasonable.

256. In the circumstances, it is not strictly necessary to address the subsidiary issue that arose in relation to the accrual of staff wages. Nonetheless, in the event of an appeal, it may assist if I set out the position in relation to accrual. As noted above, Mr Cooney, in his witness statement, said that the accruals were recorded in the

management accounts of the company *"before the Court gave judgment in the liability module…".* That judgment was given in February 2021, so that statement by Mr Cooney did not assist in pinpointing the relevant date when the accrual was first made. It could have been at any time between March 2020 and January 2021. Unsurprisingly, he was pressed on this issue by counsel for FBD. In response, he said that the accruals *"have been earmarked long ago …".* When counsel probed further, Mr Cooney turned to me and said: *"You see, the problem here, Judge, is this is really a matter between my financial controller and Mr. Jacobs, is it not".* I responded to say that, given the scale of the number of staff, there must have been some discussion between the directors as to how the company was going to accrue the wages, I also ruled that it was not a matter solely for Mr. Jacobs who was attending as an expert and not as a witness of fact. Ultimately, Mr. Cooney answered: *"so it would have happened very shortly after kind of August/September … of last year. We would have said that we're going to accrue going forward when we couldn't pay the staff".* Up to that point, it appears that no decision was made to accrue unpaid wages. It subsequently emerged from Mr. Jacobs' evidence that the accruals were first *"booked"* in February 2021 in respect of the 2020 statutory accounts. Mr. Jacobs confirmed that there was no record of the accruals in the books and records which he had seen prior to February 2021. However, he also said that *"I have had this client since September of last year"* and that he thought that *"right from the get-go I knew there was an accrual."* I should add that I believe that Mr. Jacobs may have used the word *"client"* a little loosely. I do not think that Mr. Jacobs intended to suggest that the Leopardstown Inn was in any way a client in the normal sense of that word. I think he merely used that word as shorthand to explain that he had been retained as an expert by this plaintiff in September 2020.

257. The evidence in relation to the accrual is therefore very imprecise. The best that can be said from the perspective of the Leopardstown Inn is that a discussion took place in the autumn of 2020 about accruing the liability in respect of the unpaid wages but that the accrual was not subsequently actioned until February 2021. In the closing written submissions on behalf of the Leopardstown Inn, the case is made that the issue relating to accrual was not within Mr. Cooney's area of business. I do not believe that this can be accepted as an explanation. Mr. Cooney was the only witness as to fact tendered by the Leopardstown Inn. A substantial element of his witness statement was devoted to the staff wages claim. It contained a very imprecise statement as to when the decision to accrue was made. It was inevitable that he would be cross-examined in relation to this element of the claim. Moreover, he is one of only three proprietary directors of the company and a decision to accrue a liability of this scale is one that I would expect would require discussion at board level. He also confirmed in his witness statement that he is in charge of legal matters in the business and that he oversees the finance department led by the financial controller.

258. For completeness, I should also record that the case is made in the closing submissions that the insured here had to make decisions in very uncertain and stressful circumstances and that this was exacerbated by the fact that FBD offered no engagement or guidance at that time. I can well understand the pressures imposed on the insured in circumstances where FBD had refused to accept any liability under the policy. However, it is clear that the Leopardstown Inn had the benefit of legal advice from a very early stage, the first letter of claim being written on its behalf by its solicitors as early as 19th March 2020. This was confirmed by Mr. Cooney in paras. 14 and 15 of his affidavit sworn on 20th May 2020 grounding the application to have these proceedings admitted into the Commercial List.

259. It is ultimately unnecessary to make any finding as to whether the lateness of the decision to accrue or the delay in recording the accrual affects the claim in respect of unpaid wages to laid off staff. For the reasons previously outlined, it seems to me that the claim cannot succeed. Furthermore, although Mr. Cooney suggested that the decision to accrue wages was made in August/September 2020, there is no evidence that any fresh promise was made to staff at that time and, in so far as I can see, there is no claim made to that effect.

260. I am conscious, however, that there may also be a claim by the Leopardstown Inn in respect of wages actually paid to staff who were re-engaged from time to time. Under cross-examination, Mr. Cooney adverted to this, albeit, again, in very imprecise terms. On Day 3, with regard to the March-June 2020 period, he said that *"... when it came to the TWSS, I think we took some of them back, because arising out of my conversation with* [Minister] *Doherty, we were able to reduce their salary, so then we were able to pay them back in".* Unfortunately, I have no evidence as to who was brought back, or for how long they were brought back, or as to the reasons why it was considered necessary for any individual employee to be brought. I am therefore not in a position to make any findings in relation to whether it was reasonable or unreasonable to re-engage any such staff. The most I can do is to ask the parties to liaise in relation to the issue and to see whether they can reach agreement in relation to any claim that the Leopardstown Inn may have. In so far as this judgment addresses similar claims of the other plaintiffs, it may provide some guidance to assist the parties.

The trend and other circumstances

261. This issue arises in the context of the provisions of the policy dealing with the quantification of the indemnity to be made available by FBD. The business

interruption section of the policy provides that FBD is to indemnify the insured in respect of the loss of gross profit during the indemnity period and that this is to be calculated by comparing the gross profit earned during that period against the gross profit earned during the corresponding period in the previous year *"adjusted for the trend and other circumstances affecting the business".*

262. There is a dispute between the parties as to precisely what is captured by *"the trend"* and by the term *"other circumstances"*. On behalf of Sinnotts and the Leopardstown Inn, it was argued that the court should have regard to a number of sporting events which had been scheduled to take place in 2020. They also maintained that there were strong reasons to believe that their business would have grown in 2020 and they also contend that they would have increased their prices in 2020. It should be noted, however, that, in response to questions from me, it was confirmed that there were no written financial projections prepared in respect of either planned price increases or profit growth in 2020. For completeness, it should be noted that, at the conclusion of his evidence on Day 2, Mr. Kelly had given me the impression that documents did exist which would be made available to me but, on Day 6, I was informed that no such written records exist.

263. In the case of Lemon & Duke, the case was made that a number of matters required to be taken into account including:

(a) The fact that, by 2020, construction works on Molesworth St. were now complete and the LUAS tramline on Dawson St. was said to be *"now well established"*;

(b) The fact that Allied Irish Banks plc (*"AIB"*) had opened headquarters on Molesworth St. moving 400 to 500 staff into close proximity with Lemon & Duke;

(c) Quarterly management accounts for the period ended 29th February 2020 indicated that Lemon & Duke had achieved a 10% growth in that quarter when compared with the same period in 2019. It was also contended that there was a high level of booking enquiries in late 2019 and early 2020;

(d) Tourism was said to be growing;

(e) Lemon & Duke would have benefitted from fans attending particular sporting events in Dublin in 2020;

(f) It was also contended that there was an expectation of strong demand for Christmas parties in 2020.

264. On behalf of Lemon & Duke, Mr. Roulston gave evidence that, because Lemon & Duke is a *"relatively new pub"*, being less than four years old, it was appropriate to have regard to the three-month period, December 2019 to February 2020, for the purposes of demonstrating a trend. He also offered the view that it was appropriate, in its case, to take into account a number of specific issues such as the construction works mentioned above in calculating gross profit. Mr. O'Brien did not agree with this approach.

265. FBD contends the plaintiffs' experts have taken an *"excessively granular"* approach in seeking to identify and measure the relevant trend and the effect of other circumstances on the business. FBD submits that *"trend"* should be interpreted as a pattern established over a sufficient period of time to be able to smooth out the vagaries of a business cycle. FBD suggests that, in the context of *"a cyclical and seasonal business"* such as a public house, a period of at least 12 months should be considered. FBD argues that a detailed exercise in which *"every possible annual change, such as … annual sporting events"* is not envisaged by the policy. With regard to the case advanced by some of the plaintiffs in respect of an expectation of

improved future revenues, FBD submits that objective evidence is required to support such claims. Even where such evidence is available, FBD argues that, in most cases the steps available to publicans (such as proposed price increases or cost savings) are *"just part of the general trends of the business and shouldn't result in an uplift or reduction for a trend".*

266. In so far as *"other circumstances"* are concerned, FBD argues that a circumstance must be assessed on a case by case basis; that it is fact specific and that it is *"something entirely out of the ordinary, such as an irregular event or the gaining of guaranteed new business".* On that basis, FBD, in its written closing submissions, accepted the following as falling within the ambit of a circumstances:

(a) The UEFA European Championship 2021 (*"the EUROS"*) which takes place once every four years and which, in normal time, would be a significant generator of additional business for many publicans;

(b) An exclusive contract entered into between Sean's Bar and CIE Tours International in 2019 but which related to 2020 and which was predicted to have the effect of more than quadrupling the business from CIE coach tours for 2020.

267. However, as highlighted in the Sinnotts and Leopardstown Inn closing written submissions, Mr. Jacobs and Mr. O'Brien went further in their joint memoranda dated 6th July 2020 in so far as those two premises are concerned. In para. 11 of the joint memorandum in respect of Sinnotts, they agreed that two further events qualified as *"other circumstances"* namely:

(a) The 2020 Ryder Cup which had been scheduled to take place on 25th to 27th September in Whistling Straits, Wisconsin; and

(b) The 2020 Autumn Rugby International matches. By way of background, I should explain that the Irish team had been due to play Japan, Australia, Canada and South Africa in Dublin in that series.

268. It should be noted that, with regard to Sinnotts, Mr. O'Brien had gone even further in his report of 17th June 2020. At para. 6.10.1, he identified one additional event as falling within *"other circumstances"* namely the American Football match due to be played in Dublin in August 2020. As I understand it, this is a reference to the match that was due to take place in Lansdowne Road on 29th August 2020 between Notre Dame University of Indiana and the U.S. Navy team which was cancelled in light of the pandemic. It was not addressed in any detail at the July hearing but Mr. Kelly, in paras. 49 to 50 of his witness statement, described how, over the weekend of previous games in 2012, 2014 and 2016, Sinnotts had been busy and that, given the involvement of Notre Dame, it was expected that the 2020 match would be particularly lucrative. On Day 2, Mr. Anderson also explained that, as in the case of a pop concert, *"people came to town for that".* He referred, in his witness statement, to a Grant Thornton estimate that each such game was worth €65 million to the Irish economy. Mr. Cooney also emphasised the importance of the American game to the Bath Bar in the shadow of the Lansdowne Road stadium but did not give any detailed evidence to support his contention that the Leopardstown Inn expected a 50% increase in turnover over the course of that weekend in 2020.

269. In the case of the Leopardstown Inn, the experts agreed, in para. 16 of their joint memorandum, that the Autumn Rugby Internationals fell within the *"other circumstances"* category. It should also be noted that, in the case of Lemon & Duke, Mr. Roulston and Mr. O'Brien stated, in para. 1.5.5 of their joint memorandum dated 6th July 2021 that Mr. O'Brien had identified both the EUROS and the Autumn

Internationals as *"being events that would likely have given rise to additional revenues during the indemnified period".* Mr. O'Brien went so far as to quantify the additional gross margin that these events would have generated.

270. Having set out the respective positions of the parties, it is important to note that, at this stage, I am not asked by the parties to make findings of fact or to quantify the effect of the trend or other circumstances. Instead I am asked to deal with the concepts of *"the trend"* and *"other circumstances"* in the abstract and to give guidance as to what those terms mean and how they are to be applied. In the case of Sean's Bar, there is no longer any dispute between it and FBD. As noted above, it has been agreed that the CIE Tours contract constitutes a circumstance for the purposes of calculating gross profit and it was also confirmed on Day 6 that agreement has also been reached in relation to the trend. The guidance which follows is therefore confined to the position as between the Dublin pubs and FBD.

271. As observed in para. 236 of the principal judgment, the purpose of the trend and other circumstances clause is to ensure that the adjusted figures reflect the financial results which, but for the occurrence of the insured peril, would have been achieved during the indemnity period. The clause envisages that the assessment of loss will take account not only of the results of the business for the same period in the preceding year but also any other factors that would have affected the business during the period of indemnity. Thus, if the gross profit of the business was showing an upward or a downward trend that was likely to continue, that is something that should be taken into account in order to replicate as closely as possible the position the business would have been in had the peril not eventuated. For similar reasons, the clause is intended to take into account any additional matters that would have affected the business during the indemnity period had it been operational at that time.

272. There is no definition in the policy of either *"the trend"* or *"other circumstances".* Some very general assistance as to the approach to be taken can be found in *Hickmott* (*op. cit.* at pp 509-510) where the author says: *"The object of the adjustment clause is to uphold the principle of indemnity. The policy indemnifies the insured only in respect of a reduction of earnings arising in consequence of the insured peril. Consequently steps must be taken to ascertain as nearly as possible what the earnings of the business would have been during the indemnity period had no interruption … occurred. … To arrive at the trend of the business will necessitate comparison between financial and operating statements for successive periods prior to the interruption. Variations in operating results should be studied and the meaning behind the figures should be elucidated. … Further, the adjuster should note during the indemnity period any event or circumstance the happening of which is independent of the event giving rise to the interruption … but which affects or might affect either the turnover or the rate of gross profit earned – such as, for instance, a strike of work-people, an epidemic, rationing or cuts in power supply, changes in currency values or rates of exchange, alterations in trade agreements or import or export controls, etc. The possible effect of any special event during the indemnity period must be assessed and enquiries in similar trades or businesses made if necessary. It is essential to ascertain as accurately as practicable the hypothetical results which the business … would have produced apart from the … peril… so as to determine just what adjustments in the rate of gross profit … would be equitable."*

273. The extract from *Hickmott* is useful in that it confirms that, when the clause speaks of *"the trend",* it is the trend of the business that is in mind. Thus, although the clause here does not expressly use the words *"the trend of the business",* that is clearly what the clause envisaged. That conclusion is reinforced by the use of the

definite article and more especially by the use of the singular *"trend"* rather than the plural *"trends".* In my view, the trend is not focused on individual events affecting the business but on the trend of the business which emerges from its performance over a period of time. For the purpose of assessing the trend of a business, it is plainly necessary to take a sufficiently lengthy period of assessment. Otherwise, seasonal and cyclical factors – or their absence – may artificially skew the assessment. There is much to be said for FBD's submission that a period of 12 months would be an appropriate period of assessment. By its very nature, such a period will usually be sufficiently long to identify and take account of seasonal and cyclical factors and to arrive at a reasonably robust overall trend for the business and to assess whether that trend was likely to have continued into the period of indemnity. In this context, it is important to recall that all of the plaintiffs in this case have drawn attention to periods that are especially busy for them such as Christmastime, St. Patricks Day and the Six Nations Championship. These are part of an annual cycle. They are periods when the gross profit of public houses is likely to increase but, assessed on their own, they will not give an accurate picture of the overall trend of the business. In order to assess that trend, it is necessary to take into account both the busy and the less busy periods. A period of 12 months should capture all of the cyclical and seasonal variations in a business.

274. A 12-month period is also consistent with the approach taken in company accounting and in the sphere of taxation. Under s. 290(1) of the Companies Act 2014, directors of a company are required to prepare financial statements on an annual basis. Company directors are therefore well used to forming views about the state of financial health of a company on an annual basis. Similarly, both companies and

individual traders are required to make tax returns to the Revenue Commissioners on an annual basis.

275. However, while I believe that a 12-month period should generally be taken, that does not exclude the possibility that, depending on the individual circumstances of a business, it might be more appropriate to take a shorter, or indeed a longer, period. In this context, counsel for the Dublin pubs, in his closing submission, took the example of a village pub which is destroyed by fire. For the first 9 months of the preceding 12-month period, the premises had been the only pub in the village but, at the beginning of month 10, a rival pub opened its doors which halved its trade. Counsel suggested that, in such circumstances, the insurer, for the purposes of predicting the level of trade that would have been earned had there not been a fire, would wish to rely on the final three months of the 12 -month period as giving rise to a relevant trend. I have to say that there could well be scope for debate about that. The trend derived from that three-month period might well suggest a more extreme drop in business than would have proved to be the case in the absence of the fire. That drop in business might have become less stark once the novelty factor of the new bar wore off. Ms. O'Dwyer, the expert called by Sean's Bar, suggested that a period of eight months was not long enough to establish a trend following the opening of a new bar in the vicinity. In her report, she said that, based on her discussions with Mr. Byrne, the opening of a new pub invariably affects an existing pub negatively for the initial period but the trend evens out over time. Mr. Byrne is a very experienced publican who has frequently been engaged to assist in the management of other premises. It seems to me that, in counsel's example, the expected impact, during the indemnity period, of the opening of the new pub may well be more appropriately addressed

under the heading of *"other circumstances"* rather than by reference to the concept of *"the trend"*.

276. Counsel for the Dublin pubs also submitted that, at the October, 2020 hearing, Mr. O'Brien had sought to rely on the three-day period prior to the closure on 15th March 2020 as giving rise to a trend but it is clear from his evidence on Day 6, at pp. 18-19, of the transcript of that hearing that counsel is in error in that regard. Mr. O'Brien treated the three-day period in question as a circumstance. That said, while I find it difficult to envisage that such a short period could ever be sufficient for the purposes of assessing the trend of a business, I cannot altogether exclude the possibility that a shorter period than 12 months might suffice, in particular circumstances, to establish a trend. However, in my view, any such period would have to be objectively justified and would have to be shown to be capable of taking account of any seasonal or cyclical factors that may be relevant to the business.

277. The extract from *Hickmott* quoted above also illustrates that, in some cases, it may be appropriate to go back over several financial periods, in order to assess the trend of a business. The author suggests that it may be necessary to consider *"financial and operating statements* ***for successive*** *periods"* (emphasis added). Whether that is appropriate in any individual case will depend on the facts. Because it is fact dependent, I do not believe that I can offer any guidance as to the circumstances in which it might be appropriate to take that course. All I can say is that, as a matter of principle, one could not rule out that a longer period than 12 months may be appropriate in a particular case.

278. Nonetheless, subject to those cases where individual factors may suggest a longer or a shorter period of assessment, a period of 12 months should, in most cases, be appropriate to smooth out any seasonal or cyclical issues and to identify the overall

trend of the business. In looking at the trend of the business over that 12-month period, one would have regard to all of the usual events which occur on an annual basis. However, there may be some circumstances which are out of the ordinary and which, if included, could artificially skew the trend either upwards or downwards. A unique event that is unlikely to arise in a typical 12-month period should not be included in the trend. For example, if a pub happened, in the period of assessment, to be given exclusive access for a three-week period to a new Guinness product that attracted large crowds to the premises, that could not be said to form part of the trend of the business unless it was likely to be repeated in the following year. If not excluded, such a rare or one-off event would artificially inflate the trend. Conversely, the closure of the premises for a 7-day period by reason of a once-off breach of hygiene regulations would not be taken into account. It would artificially deflate the trend. The position might be different if, on examination of the insured's track record, it is apparent that such breaches occurred from time to time. In such circumstances, they would be part of the normal cycle of the business and would properly fall within the ambit of the trend.

279. Given that I have been asked to address the issue of *"the trend"* at a purely abstract level, I do not believe that I can make any ruling, at this point, in relation to the case made by Lemon & Duke that the three-month period from December 2019 to February 2020 should be used for the purpose of assessing the trend of its business. Counsel for FBD characterised the approach as an attempt to get a 10% uplift based on the performance during that period which he argued was not representative. On behalf of FBD, Mr. O'Brien also identified that there was an additional Friday in that period and that it included 29th February (2020 being a leap year). I make no finding in relation to any of these matters. All I will say is that, as a matter of principle, that

period seems very short and is capable of being skewed, for example, by the inclusion of December (which all of the evidence shows is a particularly busy period). That said, the months of January and February are often said to be very poor months for the licensed trade and I do not exclude the possibility that Lemon & Duke may be in a position to justify the approach proposed. I am conscious that it relies on a number of different factors in this context including the carrying out of construction works on Royal Hibernian Way. Its case would have to be fully argued and carefully considered. An alternative approach might also be appropriate in its case. As suggested by counsel for FBD, in his closing submission, there may be merit in Lemon & Duke's case in looking at a longer period than 12 months in order to ensure that factors such as the impact of construction works do not distort the exercise.

280. The extract from *Hickmott* also provides some assistance in understanding the concept of *"other circumstances"*. The author says that account must be taken of events or circumstances which arise independently of the peril during the indemnity period. A number of examples are given including a strike, an epidemic, cuts in power supply and alterations in trade agreements. The last in that list would, depending on its terms, be capable of increasing – or decreasing – the estimate of gross profit. A good example of a trade agreement that will lead to an uplift in the calculation is the exclusive contract between CIE Tours and Sean's Bar that would have led to a very substantial increase in visits to the bar by tourist coaches during the indemnity period. On the other hand, most of the other items listed by *Hickmott* would tend to lower the estimate. For example, a prolonged general strike, during the indemnity period, by delivery drivers of all of the suppliers of alcohol in the State would require some adjustment to be made to take account of the likely lost sales that would ensue.

281. It is also clear from the extract from *Hickmott*, that a circumstance is something that is not captured by the trend. The author uses the language *"special event"* when addressing the concept of other circumstances, thus signalling that, what is involved, is something outside the normal cycle of trade. It seems to me that the EUROS are a good example of a circumstance that is capable of falling within that category. They only occur every four years and could not therefore be captured by a trend based on the preceding 12-month period. Moreover, it had been intended that some of the games due to take place in 2020 would be held in Dublin.

282. Of course, in an individual case, it is also necessary to show that the pub concerned would have benefitted from the EUROS or other sports event in question. The mere fact that a major event might have been scheduled to take place in 2020 is not sufficient in itself. An individual pub would have to show that it was likely to have secured additional custom as a result. A pub located in the vicinity of the relevant venue would be an obvious candidate for extra business but a pub located some distance away without a television screen would be a less likely candidate.

283. On the other hand, in so far as the Dublin pubs are concerned, I am not persuaded that a particular pop concert in the indemnity period falls within the *"other circumstance"* category. The reality is that pop concerts are part of the ordinary cycle of life in Dublin. They feature regularly in locations such as the Point Depot, the Royal Dublin Society, Marlay Park and Lansdowne Road and occasionally at Croke Park. Any additional income they bring in to venues such as the Dublin pubs will therefore be captured in the trend gleaned from the results of the relevant assessment period. It would lead to double counting, in my view, if those that were due to take place in 2020 were treated as falling within the *"other circumstance"* category. If the

concerts in 2019 have added to the trend in that year, the concerts in 2020 will be captured by that trend.

284. In my view, the same applies in relation to sporting events that take place on an annual basis. They should be captured in the trend of the business in which case it would lead to double counting if they were also brought into account in the indemnity period as *"other circumstances".* The reference to *"other circumstances"* is plainly intended to be an alternative to *"the trend".* For that reason, I believe an issue arises whether, as a matter of principle, it is appropriate to take the 2020 Rugby Autumn Internationals to be an *"other circumstance"* in the indemnity period. It is true that that series did not take place in 2019. However, that was because the Rugby World Cup took place in that year and, if that event, provided an equivalent level of business to the Dublin bars as the Autumn Internationals, it would be double counting to include the World Cup in the 2019 trend while also counting the Autumn Internationals as an *"other circumstance"* in the indemnity period. On the other hand, the fact that the World Cup took place in such a faraway time zone as Japan may have meant that the Dublin pubs did not get an equivalent level of business from the World Cup as the Autumn Internationals, in which case, it seems to me that the appropriate course to take is likely to be to exclude the World Cup from any consideration of the 2019 trend and instead to include the Autumn Internationals as an *"other circumstance"* for the purpose of the indemnity period. In that way, double counting will be avoided. In either case, it will, of course, be necessary for an individual bar to show a causal connection between the event and the level of its business.

285. In so far as the 2020 Ryder Cup is concerned, I believe that, subject to proof of a causal connection between the holding of that event and the business of an individual pub, the experts were right to agree it as an *"other circumstance".* That is a

biennial event. As a consequence, it would not be relevant to the trend of a business where that is gleaned from the 2019 year. It would accordingly qualify as an *"other circumstance".* I would take a similar view in relation to the Notre Dame game. It would not be captured by the trend measured by reference to the 2019 results of a pub business but, subject to the existence of the relevant causal connection, it would be appropriate to treat it as an *"other circumstance"* in 2020.

286. With regard to proposed price increases, it seems to me that subject to evidence, they may require to be factored into the equation. *Hickmott,* for example, lists changes in exchange rates as one category of *"other circumstance"* and it is difficult to see in those circumstances why price increases should not be treated in the same way, albeit that exchange rate fluctuations can be more readily established given that there should be objective information in the market evidencing their occurrence. Depending on the circumstances, price increases could conceivably fall into either category. Where they are part of an annual cycle of price increases, they are likely to fall into the trend of the business and to be captured in that way. However, if there is good reason to show that plans had been made to increase prices in 2020 in a way that is outside that annual cycle, then it seems to me that such a special price increase will not be captured by the trend and should, subject to proof, be treated as an *"other circumstance"* that would have affected the business. That said, I can see that there may be difficulties in proof where the price rise is pitched at a level that may provoke customer resistance.

287. I do not believe that I can go any further at this stage in relation to this issue. I have attempted to give such guidance as I can and it is up to the parties to explore what agreement can be reached between them in relation to the issues. I am convinced that, with a sensible approach on both sides, it should be possible for the parties to

reach agreement on the matters in dispute in relation to this issue and that it should not be necessary to spend any further court time on matters of detail.

Underinsurance

288. The next question which requires consideration is whether FBD is entitled to raise the issue of underinsurance in response to the claims made by certain of the plaintiffs. The issue does not arise in the case of Lemon & Duke. FBD has sought to raise it in the case of the remaining three plaintiffs. If FBD is found to be entitled to raise the issue, it would potentially reduce the amount that those plaintiffs could recover under the policy. In this context, general condition 5 of the FBD policy contains a relatively standard average clause. The clause has the effect that, if the sum insured does not represent the value of the property insured at the time of the loss, the insured will be deemed to be its own insurer for a proportionate share of the loss. This proportionate share will be measured by reference to the difference between the insured amount and the value of the property at the time of the loss. The existence and effect of this provision was flagged to the insured in the Features and Benefits Document and in the IPID both of which warned that, to avoid underinsurance, the insured should regularly review the sum insured under the policy.

289. This issue was never raised in the issue paper agreed between the parties in May 2021. In this context, it is important to recall that the issue paper in question was directed by Barniville J. with the intention that, in lieu of further pleadings, the parties would seek to identify the issues that required to be determined in order to assess the quantum of the plaintiffs' claims. Underinsurance is an issue that plainly has the potential to affect quantum. That is precisely why it was raised in the expert reports of Mr. O'Brien which were served on 17th and 18th June 2021. However, FBD contends that it did not think it necessary to include it in the issue paper in circumstances where

it took the view that it was such a mundane and well settled matter that it did not raise any issue of principle that required to be addressed by the court.

290. I cannot accept that FBD was entitled to proceed on that basis. It is essential to keep in mind that the purpose of the issue paper was to identify the issues that arise in relation to quantum. In other words, the paper was intended to identify all of the issues in dispute between the parties that the court would be required to resolve in order to bring the case to a conclusion. At the time the issue paper was prepared, the parties were proceeding on the basis that, in the so-called quantum module, the court would determine the amounts payable to each of the plaintiffs on foot of their claims against FBD. That would bring finality to each of the four proceedings. The only reason that did not happen was that, as the July hearing loomed, the parties realised that, having regard to the sheer extent of the disagreement between them, they would be unable to address all of the issues in the course of an eight-day hearing (which is all that could be accommodated by the court at that time).

291. In formulating the issue paper, the parties were therefore seeking to identify all of the issues that were likely to affect the quantification of the claims. The issue paper was not stated to be confined to issues of principle. Accordingly, given that underinsurance plainly has the capacity to affect quantification, it makes no sense that FBD would leave it out of the issue paper. The reason given for its omission does not withstand scrutiny. As explained earlier, the issue paper was put in place in lieu of pleadings. There is no doubt that, in court proceedings seeking payment on foot of an insurance claim, the insurer would be expected to plead in its defence all issues on which it relies in opposition to that claim. The same applies to an issue paper intended to take the place of pleadings.

292. I raised this with counsel for FBD on Day 8 of the hearing. On that day, counsel for FBD argued that underinsurance was such a pedestrian and universal part of the adjustment process that it *"goes without saying ... you'd always have to adjust for underinsurance".* My response was that such an argument presupposes that the adjustment in question is being undertaken not by the court but by the parties. Counsel did not engage further on the issue in his submission. The reality is that, in court proceedings, the parties are required to raise any issue that they believe is relevant to the court's determination of the matters in dispute. It was therefore necessary for FBD to raise any issue of alleged underinsurance in the issue paper. It could not plausibly proceed on the basis that it did not need to do so.

293. It is true that, in the issue paper, the parties reserved the right to address by way of a supplemental position paper any additional issues that might be raised in any expert reports to be delivered by the opposing party. However, this was an issue raised by FBD itself so that reservation of rights does not assist FBD. Moreover, after the direction had been made by Barniville J., the solicitors for Sinnotts and the Leopardstown Inn wrote on 30th April 2021 to the solicitors for FBD expressly querying whether FBD intended to raise the issue. Crucially, that letter was written in the context of the debate that took place between the parties in relation to the identification of issues. Thereafter, FBD's solicitors wrote a number of letters dealing with the issues but without responding in any way to the query. In particular, they wrote on 7th May 2020 attaching a number of proposed changes to the draft issue paper, none of which raised underinsurance. They also wrote on 12th May with the final version of the issue paper which again made no reference to underinsurance. They also forwarded the issue paper to the Commercial Court registrar for onward transmission to me in advance of a directions hearing on the following day. No

mention was made of underinsurance at that hearing. Instead I was informed that the issues set out in the issue paper had been agreed. In the face of the specific query raised in the letter of 30th April, the absence of any reference to underinsurance in the subsequent correspondence from FBD's solicitors reinforces my conclusion that FBD cannot now raise the issue. To permit it to do so would be wholly unfair and would undermine the orderly conduct of Commercial Court proceedings which the issue paper was designed to achieve. While I fully accept that errors can be made and that the courts generally take a liberal attitude to the amendment of pleadings, parties to Commercial Court proceedings are expected to approach the conduct of proceedings in a constructive way. No sufficient explanation has been put forward to address the obvious failure to respond to a specific query raised in the letter of 30th April 2020. At the very least, one would expect that, if FBD was of the view that underinsurance did not require to be included in the issue paper, its solicitors would have made that clear in advance of agreeing the issue paper.

294. Furthermore, there has been no application by FBD to amend the issue paper to include underinsurance. Instead, FBD has relied solely on the suggestion that the matter did not require to be included. For the reasons outlined above, I believe that this suggestion is wholly wrong. Thus, to the extent that underinsurance is raised in the reports of Mr. O'Brien, I am of the view that those aspects of Mr. O'Brien's reports must be excluded from consideration.

The applicable indemnity periods in respect of Sean's Bar

295. As outlined in para. 10 above, an issue arises as to whether FBD is entitled to raise a question in relation to the applicable indemnity periods in respect of the claim made by Sean's Bar, notwithstanding that, in the issue paper, FBD expressly accepted that Sean's Bar was the subject of two indemnity periods, the first commencing on

15th March, 2020 and ending on 21st September, 2020 (when wet pubs outside Dublin were permitted to re-open) and the second commencing on 7th October, 2020 (when wet pubs were again required to close). FBD seeks now to add a rider to the admission made by it in the issue paper to the effect that, if the Dublin pubs are correct in their case as to partial closure, it would follow that Sean's Bar was subject to a single period of imposed closure rather than two with the further consequence that there would be a single indemnity period commencing on 15th March, 2020 and ending on 15th March, 2021. In substance, that would significantly shorten the duration of the indemnity available for Sean's Bar and reduce the level of liability of FBD.

296. FBD raised this issue for the first time in a letter dated 29th June 2021 just one week before the July hearing was due to commence. It was raised after all of the witness statements, expert reports and written legal submissions had been exchanged. The solicitors for Sean's Bar responded to that letter very promptly and made clear that Sean's bar objected to this proposed change of course and they highlighted all of the steps that had been taken on the basis of the admission previously made by FBD in the issue paper. Counsel for both parties raised the issue on Day 1 of the hearing but, having heard broad outline submissions from both counsel (unsupported by any authority) I indicated that I would require further argument before I could determine whether FBD should be permitted to change its position in that way. I also suggested that, overnight, counsel might discuss how the issue was best addressed. Nothing was said by either side on the following day and the issue was not further addressed until FBD delivered written closing submissions towards the end of the hearing. The matter was addressed solely by way of submission. FBD did not bring an application by motion to amend the issue paper. FBD also did not adduce any evidence in support of its application.

297. In its closing written submissions, FBD referred, by analogy, to the law in relation to the amendment of pleadings. Under O. 28, r.1, the court is empowered at any stage of the proceedings to allow an amendment to pleadings where the amendment is necessary for the purpose of determining the real questions in controversy between the parties. Reliance was placed on the decisions of the Supreme Court in *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21, *Croke v. Waterford Crystal* [2005] 2 I.R. 383 and *Aer Rianta v. Walsh Western International Ltd.* [1997] 2 ILRM 45. The effect of those decisions can be summarised as follows: The discretion given to the court under O. 28, r.1 is a liberal one. The first issue to be determined is whether the proposed amendment is necessary to determine the real issues in dispute. If so, the next issue to be examined is whether the amendment can be made without causing prejudice to the other party. As Murphy J. made clear in *Aer Rianta,* prejudice in this context means that the opposing party will be put in a worse position in terms of the presentation of its case than that party would have been in, had the matter been pleaded properly at the outset; the fact that the amendment, if successful, may undermine the merits of the opposing party's case does not constitute prejudice for this purpose. The court will also consider whether any possible prejudice to the opposing party can be appropriately addressed by an order for costs. The *Aer Rianta* case also shows that an amendment can be made that has the effect of reversing an admission previously made in a pleading. Such an amendment is governed by the same principles as any other amendment. In addition, as the text of O. 28, r.1 suggests and as the decision in *Bell v. Pedersen* [1995] 3 I.R. 511 confirms, the court's power to amend pleadings can be exercised in the course of a trial.

298. Counsel for FBD argued that the proposed change of position by FBD was necessary in order to determine the real questions in controversy between FBD and

Sean's Bar. He stressed that the case brought by Sean's Bar had been treated as a test case in the context of wet pubs and expressed concern that, if FBD is not permitted to change course in this way, this could lead to internal inconsistencies in the judgment of the court. Counsel submitted that Sean's Bar could not claim to be prejudiced by the change of position. He highlighted that FBD had sent a letter in advance of the July hearing and, moreover, that, on Day 1 of that hearing, he had flagged that FBD would seek to make this case and had suggested that counsel for Sean's Bar *"can decide whether he wants to call evidence specifically to deal with this or whether he wants to leave the issue over".* Counsel also suggested that Mr. Byrne could have amplified his evidence to deal the issue and he also contended that it would be a straightforward matter for Ms. O'Dwyer to revise her report to deal with one indemnity period rather than two. He pointed to the transcript of her evidence where, in the course of cross-examination, she readily accepted that this could be done.

299. In so far as interim payments have already been made to Sean's Bar, counsel for FBD confirmed that FBD would not seek the return of those payments such that the proposed change of course by FBD would not put those payments in jeopardy. Furthermore, counsel suggested that there had been nothing to prevent Sean's Bar from making submissions on the issue of partial closure at the hearing but that it had chosen not to do so. He submitted that its decision to take that course was surprising in view of the *"unitary"* nature of these proceedings (by which I understood him to mean that all four cases have been heard together). Counsel argued that, in all of these circumstances, there could be no prejudice to Sean's Bar in allowing FBD to raise the issue relating to the indemnity period notwithstanding that FBD had expressly accepted in the issue paper that Sean's bar had been subject to two such periods. Counsel also recalled how FBD had permitted the three Dublin pubs to raise the issue

of partial closure even though the issue had never been pleaded and had not been raised at the liability hearing in October 2020. I can well understand why counsel would seek to rely on that fact. However, I do not believe that it is a factor to which any weight can be given. All credit is due to FBD for the approach taken by it in agreeing to address the issue of partial closure which had been raised so belatedly. However, that does not mean that the court can force another party to make a parallel concession. Moreover, it cannot be said that Sean's Bar is refusing unreasonably to reciprocate. No issue of reciprocation arises because it never sought to raise partial closure as an issue. I must, therefore, decide this issue by reference to the applicable principles.

300. I cannot accept that Sean's Bar would not suffer prejudice (in the sense explained by Murphy J. in the *Aer Rianta* case) if FBD is permitted to change course in the manner proposed by it. That prejudice was very clearly identified by counsel for Sean's Bar in her closing oral submissions on Day 8. As counsel highlighted, if Sean's Bar was to be in a position to address the issue of partial closure, it would be necessary for it to put before the court appropriate evidence relevant to its individual factual position not dissimilar to the evidence given by each of the three Dublin pubs. However, given its interest in preserving the advantage of two indemnity periods, it might have wished to argue against the proposition advanced by the three Dublin pubs in relation to partial closure and to call evidence with a view to undermining their case. It might also have wished to call evidence as to the local position in Athlone and the manner in which the guidelines were addressed by members of an Garda Síochána there. While FBD had argued that it would still be open to Sean's Bar to call that evidence at a different module in the future, counsel for Sean's Bar submitted that this was to entirely miss the point that, at this point in the proceedings, the court was being

asked by FBD and the Dublin pubs to rule on the partial closure issue and to do so in this judgment. Counsel highlighted that Sean's Bar has therefore missed the opportunity to participate in the debate and in the giving of evidence in relation to a crucial issue which is to be determined in this judgment. In my view, that is a very obvious prejudice to Sean's Bar in relation to the running of its case which is not capable of being satisfactorily remedied. The factual situation here is quite different to that addressed by Murphy J. in the Supreme Court in the *Aer Rianta* case. In *Aer Rianta,* the application to amend the defence to jettison an admission was made at an interlocutory stage well in advance of the trial. The plaintiff there had ample opportunity to address the amended case in its preparations for trial.

301. I have not lost sight, in this context, of the argument made by counsel for FBD that, in the course of the July hearing, Sean's Bar could have amplified its evidence and tailored its arguments and submissions to address the issue. However, I do not believe that it is either realistic or fair to expect a party, who has prepared a case in a particular way – in reliance on an admission made by the opposing party – to address, at such short notice, a wholly different case now sought to be advanced by the opposing party. At the time FBD's solicitors wrote on 29th June 2021, signalling its intention to reverse gear, all of the witness statements, expert reports and written submissions had been exchanged. The letter was written only a matter of days before the hearing was due to commence on 6th July. While I appreciate that parties should be well able to accommodate, at short notice, tweaks made by an opposing party to the latter's case, FBD's proposed change of position was no mere tweak. It was a radical change; what had previously been conceded was now to be contested. If successful, it would also have very significant consequences for Sean's Bar in reducing the indemnity available to it. While the latter consideration is not recognised

as a sufficient prejudice to refuse an amendment, it is very relevant in the context of the submission made by counsel for FBD that Sean's Bar could readily have tailored its evidence and legal submissions to address the matter at the July hearing. In my view, it would be wholly unfair to expect Sean's Bar to be in a position to prepare a case to address such a radical change of position within the very short period of time between 29th June 2021 and 6th July 2021.

302. In this regard, it is very important to keep in mind that, under the usual practice of the Commercial Court, there is a sequential exchange of pleadings, evidence and of written submissions. This is designed to ensure that both sides will be fully apprised of the opposing party's case in advance of the trial and that both sides will have an adequate opportunity to prepare for trial in a fully informed way. As Kelly J. (as he then was) observed in his foreword to the first edition of *Dowling's "The Commercial Court",* there can be little doubt that the Commercial Court introduced a *"new climate for the conduct of commercial litigation. Gone is the laissez approach to such litigation ... Gone also are the days of ... trial by ambush and a complete lack of engagement between parties to the litigation and their lawyers until the morning of the trial".* In this context, the pleadings play a vital role in identifying the issues which the parties will have to address both by way of evidence and legal submission. In this case, the parties very sensibly agreed that, in place of pleadings, the relevant issues and the parties' respective positions in relation to those issues would be set out in an issue paper. That approach is consistent with the provisions of O.63A which empower the court to fix issues for hearing. The purpose of the issue paper was not only to identify the issues that the court would have to determine but also to identify for the parties the issues that they would have to address by way of evidence and legal submission. In the case of the indemnity period, the

acceptance by FBD, in the issue paper, of the existence of two such periods meant that Sean's Bar was able to prepare its case on that basis. It knew that it did not have to concern itself with any issue in relation to indemnity periods. The issue paper was agreed on 12th May 2021 well in advance of the trial date in July 2021. That gave Sean's Bar an adequate opportunity to prepare for the hearing and to gather the evidence and to prepare the legal argument necessary to address the issues which were relevant to it. It is clear from the terms of the issue paper that Sean's Bar was not making the point made by each of the Dublin pubs in relation to partial closure. That was also clear from the witness statement of Mr. Byrne dated 25th May 2021 and from the subsequent report of Ms. O'Dwyer and the written legal submissions delivered in June. Likewise, nothing was raised by FBD in relation to the matter in the expert report of Mr. O'Brien furnished on 16th June 2021. On the contrary, he stated in para. 6.35 that it was common case that there were two periods of closure. Furthermore, the issue was not addressed in the detailed written submissions delivered on 2nd July 2020 by FBD. Thus, although Sean's Bar knew on 29th June 2020 that FBD was seeking to change its position, the FBD submissions did not address the legal case it sought to make. Nor did they set out the legal basis on which FBD contended that it should be permitted to change its position. With only one week to go before the hearing was due to commence, I cannot see how Sean's Bar and its legal team could reasonably be expected to assess the implications of the radical change of position by FBD and to decide on – and gather – the additional evidence that should be adduced in response.

303. Moreover, the hearing in July 2021 proceeded without any amendment being made to the issue paper at the outset of the hearing. FBD did not proceed with an application for leave to change its position until after all of the evidence had been given at the July hearing. In my view, that was not the appropriate way to proceed.

Even if it had been realistic to think that Sean's Bar could have addressed the change of position at the July hearing, it could not be said to have had any obligation to do so unless and until leave had been given by FBD to change its position. As noted above, while counsel for FBD raised the issue on Day 1 of the hearing, I indicated that I could not rule on it in the absence of full argument supported by authority. I suggested that counsel for the parties might speak about how to proceed and I assumed that I would hear on the following day how FBD proposed to proceed. However, no indication was given on the following day that FBD intended to proceed with its application. It seems to me that the fact that FBD did not pursue an application at that time has significant consequences. In the absence of a determination from the court that FBD should be entitled to change its stance on the indemnity period, Sean's Bar could not be said to have been under any obligation to call evidence or address argument on the partial closure issue in which, on the basis of the only form of issue paper in place during the currency of the July hearing, it had no interest.

304. I also believe that counsel for Sean's Bar was correct in her submission that, if FBD wished to proceed with an application of this kind, it should have done so on affidavit or other evidence. In each of *Aer Rianta*, *Croke v. Waterford Crystal* and *Bell v. Pedersen,* the application to amend pleadings was grounded on affidavit. That is to be expected. Ordinarily, in any contested application in which the court is asked to exercise a power or discretion, there must be appropriate evidence before the court to enable the court to make an informed decision and to satisfy itself that it is appropriate to make the order sought. Of course, there are occasions when it will become obvious from the evidence given in the course of a trial that some amendment may need to be made to pleadings. There are also circumstances (such as an error in the name of a party or a change in the name of a party) where it is immediately

apparent that an amendment should be made. The court will not always require a formal application to be made on affidavit and will be prepared, where appropriate, to take a pragmatic approach. However, here, the proposed amendment was of a fundamental nature. It was evident to FBD before the trial that Sean's Bar would strongly oppose any attempt to reverse gear. Furthermore, the circumstances were such as to call for an explanation for this very belated change of position. In my view, this was an application that required to be supported by affidavit.

305. In all the circumstances, I do not believe that FBD is entitled, as against Sean's Bar, to undo or reverse the admission made by it in the issue paper that two indemnity periods arise in relation to the claim made by Sean's Bar. I do not accept that this conclusion will have any of the dire consequences for FBD depicted by its counsel in the closing submissions. The admission was made solely in respect of the claim made by Sean's Bar. It was not framed in any wider way and did not purport to extend to wet pubs more generally. Thus, to the extent that FBD may wish to do so as against other policyholders, there is nothing to prevent FBD from seeking to rely on any aspect of this judgment dealing with partial closure.

The late payment claim

306. Unfortunately, as explained orally to the parties' legal teams on 21st December 2021 when these proceedings were listed for mention, I have been unable to reach a conclusion at this stage in relation to the late payment issue. While that issue may appear straightforward to a layperson, it raises very complex legal considerations which require further reflection by me. Although the issue has raised its head from time to time over a long period of years, it has never previously been addressed by an Irish court. Conflicting approaches have been adopted by the courts of Scotland, on the one hand, and the courts of England and Wales, on the other. Furthermore, a

significant consideration that was highlighted in the course of the debate at the July hearing is whether the issue should more properly be left to the Oireachtas. I will deliver a further judgment on the issue in due course. However, in the meantime, I have two judgments to write in respect of cases heard by me in June 2021. In light of the sheer number of policyholders insured under the FBD policy, I had prioritised this judgment over the cases heard in June, 2021 but it would be unfair to the parties in those cases if I were to defer the completion of the judgments in their cases any longer. I will return to the consideration of late payment issue once those judgments have been completed.

Summary of main conclusions

307. I do not propose to summarise all of the conclusions reached by me in this judgment. The parties will need to consider the judgment as a whole. Subject to that caveat, it may be helpful, at this point, to identify some of the principal conclusions. I am of the view that the Dublin pubs were subject to an early closing requirement in the period from 10th August 2020 and that this constitutes a government-imposed closure as a consequence of outbreaks of COVID-19. It therefore falls within the ambit of extension 1(d) of the policy in a similar way to the original closure on 15th March 2020. Subject to the respective indemnity periods applicable to them, the Dublin pubs are therefore entitled to be indemnified in respect of the losses suffered by them during the relevant periods as a consequence of the early closing requirements in place from time to time since 10th August 2020.

308. I have also concluded that, for the duration of the relevant periods, the bar counters of the three Dublin pubs were subject to a government-imposed closure in response to outbreaks of COVID-19. On the basis that the losses caused as a consequence of that closure can be assessed by reference to the methodology

described in paras. 176 to 183 above, I am of opinion that the closure of the bar counters falls within the ambit of extension 1(d). Accordingly, subject to the respective indemnity periods applicable to them, the Dublin pubs are entitled to be indemnified in respect of their losses during the relevant periods to be calculated in accordance with that methodology. The claims of Sinnotts and the Leopardstown Inn will be reduced to the extent identified in paras. 70 and 71 above.

309. As outlined in para. 184 above, I am prepared to consider any reasonable and workable suggestions that the parties may have to supplement the methodology proposed by me. It may, for example, be possible to make adjustments to the methodology to cater for occasions when the proportion of the drink spend at the bar counter (as defined in this judgment) is likely to be higher or lower than the proportion attributable to the bar counter at times of maximum occupancy of the pub.

310. With regard to the staff wages and salaries claims, each of the claims made by Sean's Bar, Sinnotts and Lemon & Duke have been successful in part. In the case of the Leopardstown Inn, I have been unable, in light of the evidence put before the court, to make a finding that any part of its claim should succeed. All I can do in its case is to ask the parties to liaise to see if any agreement can be reached in relation to any staff who were retained on its payroll when it was necessary to do so.

311. I do not believe that it is necessary to summarise my findings in relation to the trend and other circumstances. Those issues are addressed in paras. 261 to 287 above. For the reasons set out in paras. 288 to 294, I have concluded that FBD is not entitled to pursue any issue in relation to underinsurance. I have also formed the view that it should not be entitled, as against Sean's Bar, to reverse the admission made by it that Sean's Bar is subject to two indemnity periods. I stress, however, that this conclusion

is relevant solely to Sean's Bar and it does not purport to apply to wet pubs more generally.

Next steps

312. Going forward, I would urge the parties to make every effort to seek to resolve the outstanding issues in dispute between them. Enormous efforts have been expended to date by all sides in the pursuit and defence of this litigation. I am very strongly of the view that, with constructive engagement on all sides, many of the remaining issues in dispute can be resolved without the need for further court hearings. This is exemplified by the progress made between Sean's Bar and FBD in the course of the July hearing in reaching agreement on the issues identified in para. 8(h) above.

313. More immediately, I will list the matter remotely for mention on 17th February 2022 at 10.30 a.m. to consider the next steps that require to be taken on foot of this judgment. In the meantime, the parties should liaise together with a view to identifying any issues that may require debate arising from this judgment. A list of those issues should be set out in an email to the registrar to be sent not later than 4.00 p.m. on 15th February 2022.

SCHEDULE

1. Whether the restrictions imposed (i) on *"dry pubs"* located in Dublin for the periods between 29th June and 18th September, 2020 and between 1st December, 2020 and 24th December, 2020, and (ii) for *"wet pubs"* outside of Dublin between 21st September, 2020 and 7th October, 2020 amounted to the imposed closure of the said premises or a material part thereof within the meaning of the policy, giving rise to insurance cover pursuant to s. 3, clause 1(d) of the said policy; and whether a plaintiff whose premises was open for the purposes of serving beverages alongside 3 a

"substantial meal" was in any circumstances the subject of an *"imposed closure"* in respect of part of its premises.

2. Whether a plaintiff that is partially (rather than totally) closed is only entitled to an indemnity in respect of that part of its premises that is the subject of the "imposed closure" concerned, irrespective of any losses suffered by the other part(s) of its premises that were not the subject of the "imposed closure" concerned.

3. Whether any identifiable part of the plaintiffs' premises was closed or partially closed at any stage between 15th March, 2020 to date, and accordingly the dates on which each plaintiff was the subject of an "imposed closure" of all or part of its premises, rather than merely restrictions on its business.

4. Whether, and if so to what extent, any trend or circumstance impacts the indemnity owed to any of the plaintiffs' businesses, having regard to the judgment of the High Court on the meaning of the term "trends and circumstances.

5. Whether, and to what extent, the indemnity available for an *"increased cost of working"* covers significant one-off capital expenditure that will have a value subsequent to the indemnity period, and if so, whether the extent of the indemnity available should be limited proportionately to the usefulness of that item during the indemnity period.

6. Whether, and to what extent, an indemnity is available in respect of refurbishment works carried out to the premises.

7. The proper treatment of staff costs incurred by the plaintiffs, and whether the defendant is entitled to deduct from the indemnity due to the plaintiffs, as a "*sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage*", staff wages, other than proprietary directors' wages and (in larger public

house groups only) the wages of central financial controllers or other administrators whom it was necessary to retain on the payroll during the indemnity period, to be assessed on a case-by-case basis.

8. Whether any of the plaintiffs have a contractual obligation under their contracts of employment retroactively to pay their staffs' wages, and if so, whether and to what extent the plaintiffs are entitled to an indemnity under the Public House Policy (the "*policy*") in respect of same.

9. Whether the plaintiffs are entitled to damages from the defendant arising out of the additional losses which the plaintiffs have suffered because of the defendant's failure to indemnify the plaintiffs pursuant to the policy within a reasonable time.