THE HIGH COURT

COMMERCIAL

[2020 No. 4034 P.]

BETWEEN

BRUSHFIELD LIMITED (T/A THE CLARENCE HOTEL)

PLAINTIFF

AND

ARACHAS CORPORATE BROKERS LIMITED and AXA INSURANCE DESIGNATED ACTIVITY COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 19th April, 2021

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Introduction

1. This judgment addresses a number of specific issues relating to the interpretation of certain clauses in the business interruption section of a policy of insurance issued by the second named defendant ("AXA") in respect of the Clarence Hotel on Wellington Quay in Dublin 2 together with the Octagon Bar operated within the hotel. The parties have agreed that these issues of interpretation should be addressed first and that any further issues that arise between either the plaintiff and the first named defendant (which acted as insurance broker on behalf of the plaintiff) or as between the plaintiff and AXA should be deferred until a later stage in these proceedings. The issues of interpretation arise solely as between the plaintiff and AXA and, for that reason, they were the only parties who participated in the hearing which took place before me in January, 2021.

2. Although additional evidence was given in relation to insurance practice and in relation to certain medical issues, the hearing in January, 2021 proceeded largely on the basis of agreed facts. These agreed facts are set out in paras. 3 to 43 below. With the exception of para. 12 below, the language used in these paragraphs is substantially that agreed between the parties themselves.

The parties

3. The plaintiff is a private limited company incorporated in Ireland under Company Registration Number 181338 and with a registered address at 41A Pleasant Street, Dublin 8. It operates from premises at The Clarence Hotel, 6-8 Wellington Quay, 2/8 East Essex Street Dublin 2 and 10 East Essex Street, Temple Bar, Dublin 2. It trades under the style and title of "*The Clarence Hotel*".

4. The plaintiff is a part of the Press Up Entertainment Group of companies (the "*Group*"). The Group centrally arranged insurance for all companies in the Group including the plaintiff.

5. The first named defendant is a private limited company incorporated in Ireland under Companies Registration Number 379157 and with a registered office at The Courtyard, Carmanhall Road, Sandyford Business Park, Sandyford, Dublin. It is licensed and regulated as an insurance broker by the Central Bank of Ireland.

6. AXA is a designated activity company incorporated in Ireland under Companies Registration Number 136155 and with a registered office at Wolfe Tone House, 39-51 Wolfe Tone Street, Dublin 1. It is licensed and regulated as an insurer by the Central Bank of Ireland.

Contractual relationship between parties

7. The plaintiff and AXA entered into an insurance contract with policy number 04/50/150312952 (the "*policy*") which incepted on 1st April, 2019. The Policy consisted of:-

(a) AXA's Enterprise Insurance Policy Document dated February, 2018 (the "*policy document*"); and

(b) a policy schedule containing the details of the cover specific to the plaintiff. An updated policy schedule was issued on 29th August, 2019 (the "*policy schedule*").

8. The policyholder on the policy Schedule is Brushfield Limited.

9. The plaintiff does not operate the Liquor Rooms or Anne's Bar and Hardware (formerly known as the Garage Bar) which are operated by the Workman's Club Limited (a company in the Press Up Group) or Cleaver East, which is operated by a third party. These businesses are insured by other insurance providers who are not parties to these proceedings.

10. The policy was placed by the first named defendant, there was no direct contact between the plaintiff and AXA on the placement.

11. The policy included cover in respect of business interruption, as confirmed by the terms of the policy schedule.

12. The policy includes two non-damage business interruption extensions. These are the murder, suicide or disease clause (the "*MSDE clause*") and the denial of access (non-damage) cover extension (the "*the denial of* access *clause*"). For completeness, I should explain, at this point, that the policy contains two denial of access clauses, one of which responds where a loss of business is sustained as a consequence of physical damage to nearby property and the other (strictly a *"denial of access non-damage clause"* in insurance jargon) which responds even where there is no physical damage to nearby property. It is the latter which is relevant for present purposes together with the MSDE clause.

13. The MSDE Clause contains a list of specified human infectious or human contagious diseases as follows:-

> *"Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chicken Pox, Cholera, Diphtheria, Dysentery, Legionellosis, Legionnaires Disease, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Opthalmia* (sic) *Neonatorum, Paratyphoid fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever".*

14. COVID-19, SARS, severe acute respiratory syndrome coronavirus 2 or SARS-CoV-2 are not included in the list of specified human infectious or human contagious diseases in the MSDE clause.

<u>The public health emergency</u>

15. On 31st December, 2019, the World Health Organization ("*WHO*") was informed of pneumonia cases of unknown cause in the city of Wuhan, in the Hubei province in China.

16. On 12th January, 2020, WHO announced that a novel coronavirus had been identified in samples obtained from cases in China.

17. The virus was named severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, and the associated disease was named COVID-19.

18. On 30th January, 2020, WHO declared the outbreak of COVID-19 a "Public Health Emergency of International Concern".

19. On 20th February, 2020 pursuant to the Infectious Diseases (Amendment) Regulations, 2020, COVID-19 was made a notifiable disease for the purposes of the Infectious Diseases Regulations, 1981.

20. On 27th February, the first case on the island of Ireland was announced – a woman from Belfast who had travelled from Northern Italy through Dublin Airport.

21. The first confirmed case of COVID-19 in the State was announced by the National Public Health Emergency Team ("*NPHET*") on 29th February, 2020.

22. On 11th March, 2020, WHO officially declared the outbreak of COVID-19 to constitute a pandemic.

23. On 12th March, 2020, Taoiseach Leo Varadkar, acting on advice from NPHET, announced the closure of all schools, colleges and childcare facilities until 29th March, 2020.

24. On 15th March, 2020, Taoiseach Leo Varadkar, acting on advice from NPHET, advised all public houses and bars (including hotel bars) to close from that evening until 29th March, 2020.

25. While this is not an agreed fact, the parties have agreed to assume for the purposes of these proceedings that the Clarence Hotel, Cleaver East, the Octagon Bar, the Liquor Rooms and Anne's Bar and Hardware (formerly known as the Garage Bar) were closed on that date. The period of closure is to be determined in the quantum module.

26. On 20th March, 2020, the Health Act, 1947 was amended by virtue of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020, which empowered the Minister for Health to introduce regulations specifically designed to combat the spread of COVID-19.

27. On 24th March, 2020, Taoiseach Leo Varadkar announced that all cafes and restaurants were to limit their supply to take away food and delivery and all hotels were to limit occupancy to essential non-social and non-tourist reasons.

28. On 27th March, 2020, the Central Bank of Ireland issued a "*Dear CEO*" letter to insurers stating that *"the Central Bank is of the view that where a claim can be made because a business has closed, as a result of a Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction"*. On 27th March, 2020, Taoiseach Leo Varadkar, advised the public of "*stay at home measures*" whereby everyone should stay at home or within two kilometres of their homes, subject to limited exceptions.

29. On 8th April, 2020, the Health Act, 1947 (Affected Areas) Order, 2020 (S.I. No. 120 of 2020) was enacted and the entire country was declared an area where there is known or thought to be sustained human transmission of COVID-19. On the same day, the Minister for Health enacted the Health Act, 1947 (Section 31A -Temporary Restrictions) (Covid-19) Regulations, 2020 (S.I. No. 121 of 2020). The duration of the latter was extended on 10th April, 2020 pursuant to the Health Act, 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) Regulations, 2020 (S.I. 128 of 2020).

30. On 2nd May, 2020, the Health Act, 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) (No. 2) Regulations, 2020 (S.I. 153 of 2020) were enacted, further extending the duration of restrictions.

31. On 18th May, 2020, the Health Act, 1947 (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) (No. 3) Regulations, 2020 (S.I. 174 of 2020) came into operation further extending the duration of restrictions.

32. On 8th June, 2020, the Health Act, 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 2) Regulations, 2020 (S.I. No. 206 of 2020) were enacted, extending the

duration of the restrictions on the opening of public houses and bars until 29th June, 2020. The previous Regulations were revoked and replaced with the requirements for certain specified businesses or services to restrict access of the public to their premises.

33. On 29th June, 2020, the restrictions on most businesses including pubs and bars serving substantial meals, were eased. However, the restrictions remained in force for the businesses specified in the Health Act, 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 3) Regulations, 2020 (S.I. No. 234 of 2020).

34. On 18th July, 2020, the restrictions were extended to 10th August by the Health Act, 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 3) Regulations, 2020 (S.I. No. 252 of 2020).

The plaintiff's claim

35. The plaintiff made a claim under the policy on 3rd April, 2020 for loss of business income under the denial of access-non damage cover.

36. Cover was declined by AXA for the claim on 8th April, 2020.

37. There has been no physical damage to the insured premises.

38. There have been no orders of a public authority regarding a defect in the drains of the Clarence Hotel.

39. There have been no orders of a public authority regarding the sanitary arrangements of the Clarence Hotel.

40. There has been no occurrence of COVID-19 or confirmed case of COVID-19 on the premises of the Clarence Hotel.

41. There was no premises specific restriction, order, regulation or direction made in relation to the Clarence Hotel (as opposed to general measures imposed nationwide).

42. It is agreed for the purpose of this claim that there was an occurrence of COVID-19 within 25 miles of the Clarence Hotel.

43. Brushfield Limited is not a "*consumer*" for the purposes of the Central Bank Consumer Protection Code, 2012.

The issues which I am asked to address

44. In advance of the hearing, the parties had agreed a list of issues to be determined at this point in these proceedings. Those issues are set out in paras. 45 and 47 to 62 below. In addition, during the course of the hearing, a further question was agreed to be determined and that is the question which is identified in para. 46 below.

Questions which arise in relation to the MSDE clause

45. Does the MSDE clause provide cover in principle for business interruption losses caused by the occurrence of COVID-19 in circumstances where neither COVID-19 (nor any variant thereof) is included in the list of specified diseases listed in the MSDE clause?

46. Does the MSDE clause provide cover for business interruption losses caused as a result of the occurrence of acute encephalitis induced by COVID-19 which is manifested by any person within a 25-mile radius of the premises?

47. Does COVID-19 constitute a *"defect in the drains or other sanitary arrangement at the premises"* within the meaning of the MSDE clause?

48. If the answer to the last question is yes, is the policyholder required to prove there was a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises?

Questions in relation to the denial of access cover

49. For the purposes of the denial of access clause, what constitutes an interruption of or interference with the business?

50. Does COVID-19 constitute a *"danger or disturbance"* within the meaning of the denial of access clause in the context of the cover provided under the Enterprise Policy?

51. If COVID-19 is capable of constituting a *"danger or disturbance"*:-

(a) does the outbreak of Covid-19 have to be specific to the premises or an area within a 1-mile radius thereof; and

(b) do there have to be actions taken by the police or any other statutory body in response to the occurrence of Covid-19 at the premises or within a 1-mile radius?

52. Alternatively, can any of the government measures and restrictions, which were introduced in response to the pandemic (the "*measures*") and which are national and of general application rather than being in response to a particular danger or disturbance, amount to an action taken by the police or statutory body in response to an outbreak of Covid-19 at or within 1 mile of an insured premises?

53. If so, do any of the measures constitute action taken by the police or any statutory body in response to a danger or disturbance within 1 mile of the Clarence Hotel?

54. Does *"action"* require a measure which is mandatory and/or has the force of law?

55. If the answer to the last question is yes, which measures, if any, were mandatory in nature and/or had the force of law?

56. If COVID-19 constitutes a danger or disturbance within the meaning of the Denial of Access clause, does closure following Government advice on 12th March, 2020 or thereafter meet the requirements of the denial of access clause of an action in response to an outbreak of COVID-19 at or within 1 mile of the premises? Were the measures an *"action of the police or a statutory body"*?

57. In order for cover to be triggered under the denial of access clause, is the policyholder required to demonstrate that a specific occurrence of COVID-19 within a 1-mile radius of the premises led to the relevant *"action of the police or statutory body"*?

58. What constitutes a prevention or hindrance of access within the meaning of the denial of access clause?

59. Can there be a prevention of or hindrance of access within the meaning of the denial of access clause where a premises or part of a premises was in use for a limited purpose during the period for which it was otherwise closed?

60. Can cover be triggered under the denial of access clause in relation to business interruption losses arising from COVID-19 where the scope of cover under the denial of access clause does not extend to actions where the insured has been given prior notice?

Questions in relation to the limits of the indemnity and in relation to the indemnity period

61. What are the limits of indemnity applicable to the MSDE and denial of access clauses? Is there a limit of €50,000 applicable to the denial of access clause?

62. What is the indemnity period applicable to claims under the MSDE and denial of access clauses?

Relevant terms of the policy

63. In order to put the questions listed above in context, it is necessary to describe the relevant features of the AXA Enterprise Policy. It provides cover in respect of a number of different risks including material damage, money and personal assault, computer equipment, goods in transit, fidelity, business interruption, employer's liability and public and products liability and commercial legal expenses. On p. 2 of the policy, it states in clear terms that the policy:-

> *"describes the cover for which we have accepted your premium. The policy wording, schedule and any endorsements must be read together."*

The same page also explains that defined terms are used throughout the policy and that such defined terms are highlighted in bold blue print. For completeness, it should, nonetheless, be noted that, on occasion, there are some words which appear in bold blue print in the policy which are not defined or are incompletely defined. It is also explained on p. 2 that

information on the insurance provided appears under the heading *"What is covered"* wherever that heading is to be found in the policy. It is further explained that this must be read with what is said under the heading *"What is not covered"* and that this must also be read with the policy conditions and any specific conditions of cover that are applied under each heading. The reader is informed that, under that heading, AXA draws attention to *"what is excluded"* under the policy. For the reasons discussed further below, that is of some relevance in the context of whether a particular para. of the MSDE clause constitutes an exclusion clause.

64. On p. 7, it is stated that the policy is governed by and is to be construed in accordance with the laws of *"the Republic of Ireland"*. General policy exclusions are set out on pp. 8-9 of the policy. Material damage is addressed in considerable detail on pp. 10 to 25 of the policy. It should be noted that, on p. 24, there is a requirement to notify An Garda Síochána of any loss or damage by theft or attempted theft of the property covered by the material damage section of the policy. This reference to An Garda Síochána should be contrasted with the reference to *"police"* which appears in the denial of access clause. It should also be noted that there is an express exclusion in the material damage section of the policy in respect of business interruption. Business interruption cover is separately addressed in the business interruption section of the policy which runs from pp. 45 to 54 and which contains both the MSDE and the denial of access clauses.

65. In the business interruption section, it is again stated, at p.45, that definitions are shown in bold blue print. On the same page, note 3 states that adjustments will be made as necessary for trends of the business and for variations and other circumstances affecting the business *"either before or after the **incident** or which would have affected the **business** had the **incident** not occurred…"*. For reasons which will become clear at a later stage in this

judgment, it should be noted that some emphasis was placed by counsel for AXA on the use of the word *"incident"* here.

66. The term *"Business interruption"* is defined on p. 46 of the policy as:-

> *"Loss, resulting from interruption of or interference with the* ***business*** *carried on by* ***you*** *at the* ***premises*** *as a result of* ***damage*** *to property used by* ***you*** *at the* ***premises*** *for the purpose of the* ***business****."* (bold in original)

67. As counsel for the plaintiff observed, this definition is not all encompassing. As will be seen further below, cover is not confined to business interruption arising from physical damage to property used by the insured. In particular, further aspects of business interruption cover are provided under a number of extensions and the plaintiff seeks to rely on two of these extensions namely the MSDE and denial of access clauses. The extension of business interruption cover in this way is a fairly common feature of policies of this kind and is not peculiar to the AXA policy.

68. *"Incident"* is defined on the same page as meaning *"****Damage*** *to property used by* ***you*** *at the* ***premises*** *for the purpose of the* ***business****"* (bold in original). A definition of *"Indemnity period"* is also given on the same page where it is defined by reference to the period during which the business is affected *"starting on the date the* ***incident*** *occurred"*. Again, counsel for AXA placed some emphasis on the reference to the word *"incident"* in that definition.

69. On pp. 49 to 52, a number of extensions of cover in respect of business interruption are provided. These include denial of access cover which arises from interruption to the business as a result of damage to property. That is not the form of denial of access cover which is relevant for present purposes. As noted in para. 12 above, there are two forms of cover which are potentially relevant, namely denial of access (non-damage) cover (which, for the purposes of brevity, I have referred to simply as *"denial of access cover"*) and *"Murder,*

suicide or disease cover" (which, as previously noted, I have referred to in this judgment as "*MSDE*" cover).

<u>The relevant denial of access cover</u>

70. The relevant extension in respect of denial of access is in the following terms:-

*"**Denial of Access (Non Damage) Cover***

***We** will cover **you** for any loss insured by this section resulting from interruption of or interference with the **business** where access to **your premises** is restricted or hindered for more than 24 hours arising directly from*

1.** the actions taken by the police or any other statutory body in response to a danger or disturbance at **your premises** or within a 1 mile radius of **your premises

***2.** the unlawful occupation of **your premises** by third parties.*

Provided that

***1.** the insurance provided by this cover shall only apply for the period starting with the restriction or hindrance and ending after 12 weeks during which time the results of the **business** are affected*

***2.** **our** liability for any one claim will not exceed €50,000.*

***We** will not cover **you** where access to **your premises** is restricted or hindered as a result of*

***1.** physical **damage** to property at **your premises** or elsewhere*

***2.** strikes, picketing, labour disturbances or trade disputes*

3.** the condition of or the **business** conducting within **your premises** or any other **premises** owned or occupied by **you

***4.** notifiable diseases as detailed in the Murder, suicide or disease cover*

5. *actions where* ***you*** *have been given prior notice."* (bold in original)

71. It will be necessary, in due course, to analyse the provisions of this clause in more detail. It is sufficient, at this point, to draw attention to the following aspects of the clause:-

(a) There is potentially a very modest limit of liability under the clause insofar as it provides for a limit of liability of €50,000 *"for any one claim"*. This may explain why, in the proceedings, the plaintiffs have sought to place more significant reliance on the MSDE clause (considered further below);

(b) There is an exclusion of cover where access to the premises is restricted or hindered as a result of *"notifiable diseases as detailed in the Murder, suicide or disease cover"*. Thus, in the written submissions delivered on behalf of the plaintiff, it is conceded that, if COVID-19 is to be regarded as a notifiable or infectious disease as detailed in the MSDE clause, this exclusion will apply and the plaintiff will not be covered by the denial of access clause. However, in the alternative, the plaintiff maintains that, if AXA is successful in its submission that COVID-19 is not covered by the MSDE clause, it must follow that this exclusion cannot apply;

(c) The plaintiff also argues that the existence of the exclusion described at (b) above is a recognition that, absent this exclusion, the denial of access clause is capable of applying in the context of a contagious disease;

(d) The plaintiff maintains that the outbreak of COVID-19 constitutes a *"danger or disturbance"* within the meaning of the clause and that neither the actions of the authorities nor the danger or disturbance have to be specific to a radius of one mile of the hotel in order to attract coverage. The plaintiff also contends that the actions taken by the authorities (as described in paras. 23 to 24 and 26 to 34 above) constitute actions taken within a one-mile radius of the premises

notwithstanding their general and national nature and, furthermore, that the plaintiff need not demonstrate that a specific occurrence of COVID-19 has arisen within a one-mile radius of the premises so as long as the measures occurring within that radius arose as a result of COVID-19 more generally;

(e) In addition, the plaintiff maintains that the hindrance or restriction on the use of the hotel and the Octagon Bar does not have to constitute a physical impediment to entering the property;

(f) In contrast, AXA argued that the clause is directed at disturbances or dangerous incidents at or in the immediate locality of the premises of the insured as a consequence of which access to the premises is restricted or hindered. AXA submitted that the clause was intended to deal with incidents such as riots, protest marches, a serious road accident, a gas leak in the vicinity of the premises or the closing down of a street for the purposes of investigation of a crime scene;

(g) According to AXA, the clause is not designed or intended to cover national measures such as those put in place in Ireland to address the COVID-19 pandemic.

(h) AXA stressed that the clause requires action to be taken by the police or a statutory body which causes a restriction on access to the premises;

(i) With regard to the Government advice of 15th March, 2020 and the introduction of restrictions by means of statutory instrument, AXA accepted that these were mandatory measures that have the force of law but contended that they could not be described as *"actions taken by the police or any other statutory body"*;

(j) AXA submitted that it cannot have been the intention of the policy to provide cover in respect of a notifiable disease under the denial of access clause. AXA makes the case that the term *"notifiable diseases"* in para. 4 of the list of matters excluded from the ambit of the denial of access cover is much broader than the *"closed list"* of diseases set out in the MSDE clause; and

(k) In addition, AXA contended that the prior notice exclusion contained in para. 5 of the same list of exclusions applies. AXA submits that the plaintiff had prior notice of the various Government actions and that, accordingly, cover is excluded.

(l) AXA does not accept that the Government advice or the subsequent Regulations required the hotel (as distinct from the Octagon bar) to close.

72. In the context of the denial of access clause in the AXA policy, it should be borne in mind that, as the case law discussed below confirms, these clauses represent a more recent extension of clauses that formerly only responded where access to the insured's premises was restricted as a consequence of damage done to nearby buildings, the classic examples being a fire or bomb explosion which made neighbouring property unsafe and which required the evacuation of the surrounding area. This was confirmed in the evidence of Mr. Peter Mills (who was proffered by the plaintiff as an expert in the insurance industry) discussed in para. 172 below. A denial of access clause such as that in issue in the AXA policy further extended cover to cases where access to the insured premises is hindered by events which do not involve physical damage to nearby property.

The MSDE Clause

73. The list of diseases covered by the MSDE clause have already been set out in para. 13 above. It is, therefore, unnecessary, at this point, to set out the MSDE clause in full. Omitting the list of diseases, the clause is in the following terms:-

*"**Murder, Suicide or Disease Cover***

1. ***We** will cover **you** for any **business interruption** insured by this section as a result of the occurrence of any of the following specified human infectious or human contagious diseases: …manifested by any person whilst at the **premises** or within a 25 mile radius of it*
2. *murder or suicide at the **premises***
3. *injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided at the **premises***
4. *the discovery of **vermin** in the **building**(s) that prevents the use of or part use of the **building**(s) by order of the public authority*
5. *the closing of the whole or part of the **premises** by order of the public authority as a result of a defect in the drains or other sanitary arrangements at the **premises**.*

*This cover will only apply for the period starting with the occurrence of the loss and ending after 12 weeks, during which time the results of the **business** are affected…"*

(bold in original)

74. It is important to note that, in the list of diseases which are specified in para. 1 of the MSDE clause, no mention is made of COVID-19 or of the virus which causes COVID-19, namely SARS-CoV-2. However, the first item on the list of specified human infectious or human contagious diseases is *"Acute Encephalitis"*. At the hearing, the plaintiff sought to rely on the reference to acute encephalitis on the basis that it is a possible incident of COVID-19 and thus could be said to trigger cover under the MSDE clause. For completeness, it should be noted that this is a new argument on the plaintiff's part. The plaintiff did not seek to rely on this clause in its letter of claim of 3rd April, 2020 (which cited the denial of access clause only) and did not subsequently refer to acute encephalitis in its statement of claim in

these proceedings. However, the plaintiff now contends that acute encephalitis is caused by a large variety of pathogens including COVID-19 and that the MSDE clause provides cover in principle for business interruption losses caused by the occurrence of COVID-19 provided that it is proved, at the hearing of the next module of these proceedings that there was an occurrence of acute encephalitis in a COVID-19 patient manifested by a person within a 25-mile radius of the hotel. The plaintiff further says that, if it is in a position to prove that COVID-19 induced encephalitis forms part of the *"indivisible cause"* constituted by the COVID-19 emergency more generally, the plaintiff should be entitled to recover under para. 1 of the MSDE clause.

75. In the alternative, the plaintiff maintains that cover is available under para. 5 of the MSDE clause. For this purpose, the plaintiff relies on the evidence of Prof. Paul Moynagh, professor of immunology at Maynooth University, for the purpose of contending that there was a defect in the sanitary arrangements at the hotel within the meaning of para. 5. The plaintiff submits that this *"defect"* was the inability to facilitate effective social distancing on the premises. The plaintiff says that the prevailing view in March, 2020 was that there was no way of adequately ensuring that cleaning and precautions such as glove and mask-wearing would alleviate these defects in sanitary arrangements. The plaintiff relies on what was said by Prof. Moynagh in his report at p. 10 as follows:-

> *""Sanitary arrangements" refer to conditions affecting health, including precautions against disease. The first locations for public health information about COVID-19 included washing facilities. Closure of the premises was undoubtedly due to a number of factors, including the inability to put "other sanitary arrangements" in place that would suppress the above transmission patterns and dynamics and so would act as a high risk for transmission of SARS-CoV-2 and COVID-19. In my opinion, it is the case that the closure was linked at least in part to the "sanitary arrangements" and*

their inability to suppress transmission of the virus to a level acceptable to the public authority."

76. While the plaintiff accepts that, for para. 5 to apply, the premises must be closed by order of *"the public authority"*, the plaintiff submits that there is no requirement in para. 5 of the MSDE clause that the order of closure could not be one of general application. The plaintiff makes the case that no such requirement appears in the text of para. 5. The plaintiff further argues that such a requirement could not properly be implied. The plaintiff also contends that, in any event, the application of the *contra proferentem* principle would preclude such an interpretation.

77. AXA makes the case that the MSDE clause is expressly limited to business interruption as a result of the occurrence of any one of the specified diseases expressly listed in the MSDE clause (which AXA maintains is an exhaustive list) manifested by a person at or within a 25-mile radius of the premises. With regard to the attempt by the plaintiff to rely upon acute encephalitis (which is one of the conditions expressly specified in the MSDE clause), AXA highlights that, when the plaintiff was invited, in a request for further particulars of its claim, to identify the specified disease in the MSDE clause upon which it relies, the plaintiff initially declined to do so, maintaining instead that *"this is a matter for legal submission"*. AXA contends that the *"inability"* on the part of the plaintiff, at that time, to identify the specified disease is telling. With regard to the evidence of Prof. Moynagh (on which the plaintiff now relies), AXA submits that his evidence (taken at its height) is simply that there is *"an evidence base that encephalitis is one of the pathological features in some COVID-19 patients"*. AXA also relies on the evidence given by Prof. Mary Horgan, the President of the Royal College of Physicians of Ireland (who is also a consultant in infectious diseases currently involved in the care of COVID-19 patients) to the effect that encephalitis is a rare event in COVID-19 patients and is not itself an infectious disease. That might suggest

that Prof. Horgan accepted that encephalitis has been shown to be present on rare occasions in the brains of COVID-19 patients. However, my understanding of her evidence is that it has only been suspected to exist on rare occasions. Her evidence was to the effect that, before one could conclude that the SARS-Cov-2 virus can cause acute encephalitis, one would have to undertake brain biopsies of COVID-19 patients. In the absence of such evidence, she was not prepared to accept that there was an association between COVID-19 or the SAR-Cov-2 virus and inflammation of the brain. In addition, AXA draws attention to the evidence that encephalitis may be caused by a range of bacterial or viral infections including, for example, herpesviruses, mumps, measles, rabies and Ebola. AXA highlights that, on the plaintiff's thesis, the MSDE clause can be:-

> *"stretched to include any unnamed disease – including, for example, Ebola – as long as it* ***might*** *ultimately cause acute encephalitis. This would be to wholly undermine the purpose of having a list of specified diseases."* (emphasis in original)

78. In addition, AXA maintains that, even if acute encephalitis can be considered to potentially apply, the plaintiff must demonstrate that the claimed interruption in its business was *"as a result"* of the occurrence of acute encephalitis either within the Clarence Hotel itself or within a 25-mile radius of the hotel. In this context, AXA submits that that there is no evidence whatsoever that any of the Government advice or the measures taken by the Government were caused by the occurrence of acute encephalitis, whether nationally or locally. In this context, AXA highlights the evidence given by Prof. Patricia Fitzpatrick (who is head of Public Health Medicine in University College Dublin and a consultant in preventative medicine in St. Vincent's University Hospital) to the effect that the public health measures introduced by the Government were not directed at any disease other than COVID-19 and were not introduced to prevent acute encephalitis specifically. In all of the

circumstances, AXA submits that the plaintiff's *"attempt to shoehorn"* the present circumstances into para. 1 of the MSDE clause is *"completely untenable"*.

79. With regard to the attempt by the plaintiff to rely on para. 5 of the MSDE clause, AXA makes the point that the plaintiff is not entitled to rely on the evidence of Prof. Moynagh as to the interpretation of the policy. AXA submits that his evidence is inadmissible in circumstances where it is solely a matter for the court to interpret the policy. Secondly, AXA contends that the interpretation advocated by the plaintiff would give a wholly artificial meaning to the concept of *"sanitary arrangements"*. AXA submits that the reference in para. 5 of the MSDE clause to *"sanitary arrangements"* should be construed in conjunction with the word *"drains"* and that, when it is interpreted in this way, it cannot be extended to cover the inability of a premises, such as a bar or hotel, to suppress transmission of the COVID-19 virus to a level acceptable to the public authorities (as suggested by Prof. Moynagh). AXA also submits that there has been no order of a public authority regarding any defect in the sanitary arrangements of the Clarence Hotel. It submits that the MSDE clause, by its terms, is confined to defects at and closures of the premises specifically and, in the absence of a premises-specific order, the clause cannot apply.

The evidence before the court

80. Before proceeding further, I should first address the evidence that was tendered. For the purposes of this hearing, the following witnesses gave evidence, namely:-

(a) Mr. Peter Mills, who was called as an insurance expert on behalf of the plaintiff;

(b) Prof. Paul Moynagh, who, as noted above, is professor of immunology at Maynooth University. He was called as an expert on behalf of the plaintiff;

(c) Prof. Mary Horgan, who, as noted above, is President of the Royal College of Physicians in Ireland and also a consultant in infectious diseases. She has

front-line experience of the management of patients with COVID-19 at Cork University Hospital. Prof. Horgan was called as an expert by AXA; and

(d) Prof. Patricia Fitzpatrick, who, as noted above, is head of public health at University College Dublin. She is also professor of epidemiology & biomedical statistics at University College Dublin and a consultant in preventative medicine at St. Vincent's University Hospital.

The evidence in relation to the AXA policy

81. In the course of his evidence, Mr. Mills confirmed that the language of the AXA Enterprise Policy meets *"general insurance market standards in drafting and presentation"*. Mr. Mills also suggested that the policy was tailored to the hospitality market. However, there is nothing in the terms of the policy to suggest that this is so. In my view, the policy is clearly capable of having a much wider application. For example, on p. 18 of the policy (in the material damage section), there is cover provided in respect of *"patterns, jigs, models, templates, moulds, tools, dies, drawings or designs"*. That plainly envisages some form of manufacturing activity. It could not be said to be relevant to the hospitality sector. In addition, on p. 19, there is cover for *"trade samples… anywhere in Europe"*. Again, cover in respect of trade samples sent abroad would not be relevant to the hospitality market. Furthermore, the policy has a section (albeit not one which applies in the case of the plaintiff) which provides cover for goods in transit. This section provides cover, for example, for exports and also for goods on the premises of a *"packer"*. Such a clause would not be relevant to the hospitality market. It is unsurprising that, in these circumstances, Mr. Mills conceded, under cross-examination, that the AXA enterprise policy is not designed specifically for the hospitality sector.

82. Mr. Mills also gave evidence that the list of specified diseases in the MSDE clause is *"extraordinary by design"*. He said that the diseases listed are *"almost exclusively diseases*

that have known vaccines". In his report, Mr. Mills also made the point that *"every epidemic that has occurred in the 21st century"* has been omitted from the list. His conclusion was that the coverage afforded under the MSDE clause *"could never impact the plaintiff's business"* and that *"AXA have no intention of providing Business Interruption coverage due to disease under this policy"*. He suggested that, if AXA did not wish to provide coverage, it should have been done *"via a blanket exclusion on the policy"*. Alternatively, if it was the intention to provide coverage *"then it should have been provided on an all-risk basis in the form of a sublimit"*.

83. Under cross-examination, Mr. Mills did not accept that he went so far, in this section of his report, as to suggest that cover in respect of diseases under the policy was *"illusory"* but he said that *"remote"* is *"probably a better word"*. Mr. Mills accepted that he does not have any expertise in relation to the transmission of infectious diseases and that he does not have any expertise in relation to vaccines. In the course of his cross-examination, counsel for AXA probed Mr. Mills as to what he meant by his suggestion that the list of diseases is *"extraordinary by design"*. His response was that he believes that *"it's a collection of diseases that are highly unlikely to produce an insured loss under this policy"*. As it transpires, Mr. Mills was proved to be wrong insofar as he suggested that the list is almost exclusively confined to diseases that have known vaccines. It was established in the evidence that there are no vaccines for at least nine of the diseases on the list specified in the MSDE clause. Furthermore, there are a number of diseases on the list which, the evidence establishes, are relatively common in Ireland. These include measles, chicken pox, viral hepatitis and mumps.

84. In the course of her very helpful evidence, Prof. Mary Horgan made clear that the existence of a vaccine does not, in any event, mean that an outbreak of one of the diseases on the list specified in the MSDE clause is unlikely to arise. Prof. Horgan also confirmed that

there is no vaccine for leprosy, leptospirosis in humans, malaria, legionellosis or legionnaires' disease. Prof. Horgan noted that there are ongoing outbreaks of mumps in Ireland, albeit that those outbreaks have abated since the introduction of social distancing as a means of combatting the spread of COVID-19. Prof. Horgan expressed the view that, contrary to the suggestion made by Mr. Mills in his report, there is no vaccine for paratyphoid fever, scarlet fever and for three forms of viral hepatitis, namely hepatitis C, D and E. Prof. Horgan confirmed that these are diseases which are present in Ireland.

The evidence in relation to acute encephalitis

85. As noted above, Prof. Moynagh also gave evidence on behalf of the plaintiff. Prof. Moynagh explained that acute encephalitis is inflammation of the brain with associated neurological dysfunction due to infection or autoimmunity. It can be caused by viral or bacterial infection. Patients can present with low levels of consciousness, seizures, fever and indicators of central nervous inflammation including white blood cell infiltration and pro-inflammatory cytokine proteins. Encephalitis can be caused by a number of viral causative agents including herpes viruses, arboviruses, enteroviruses, parechoviruses, varicella, mumps, measles, rabies, Ebola, lymphocytic choriomeningitis virus and henipaviruses. Prof. Moynagh gave evidence (and this was not disputed by Prof. Horgan) that acute encephalitis is different to most of the diseases on the list specified in the MSDE clause. Acute encephalitis is not a disease in itself. It is caused by a large variety of viruses and bacteria. Prof. Moynagh suggested, in his report, that recent studies and data indicate some cases of patients infected with COVID-19 have been diagnosed with encephalitis. He suggested that SARS-CoV-2 RNA has been detected in the cerebrospinal fluid in the brains of COVID-19 patients. He further suggested that there was a reported case of a COVID-19 patient who died with severe encephalitis without any respiratory involvement.

86. In his report, Prof. Moynagh said that the *"high percentage of COVID-19 patients that display neurological symptoms that are consistent with encephalitis coupled with growing numbers of reports using more objective clinical, molecular and imaging approaches that also diagnose encephalitis in COVID-19 provides an evidence base that encephalitis is one of the pathological features in some COVID-19 patients"*. He also stated that the potential of SARS-CoV-2 to drive inflammation in encephalitis may also be related to loss of smell that is frequently observed as an early symptom of COVID-19.

87. Under cross-examination, Prof. Moynagh confirmed that there have been no reported incidents of COVID-19 related encephalitis in Ireland. Prof. Moynagh also accepted, under cross-examination, that at the time the Government issued its advice to close pubs on 15th March, 2020, there was no mention of acute encephalitis. He further accepted that the advisory was issued in response to the highly contagious nature of the virus.

88. In addition, Prof. Moynagh accepted, under cross-examination, that as of 15th March, 2020, there was no association between COVID-19 and acute encephalitis. Likewise, he accepted that, at the time the claim was made by the plaintiff under the policy on 3rd April, 2020, the association between encephalitis and COVID-19 had not been brought to anybody's attention. Prof. Moynagh agreed that the scientific articles on which he relied in his report are all dated later in April, 2020 and in May, 2020.

89. Prof. Horgan disagreed with Prof. Moynagh in relation to the claimed association between COVID-19 and acute encephalitis. In her report, she explained that acute encephalitis is a sudden inflammation of the brain tissue as a consequence of either an infectious or autoinflammatory disease. Prof. Horgan stressed that acute encephalitis is a manifestation of a disease. If acute encephalitis is caused by an infection, the encephalitis is the pathology (i.e. the damage caused) and is not itself transmissible from one person to another.

90. Prof. Horgan also said in her report that she did not agree with Prof. Moynagh's opinion that a high proportion of COVID-19 patients display neurological symptoms that are *"consistent with encephalitis…"*. Prof. Horgan said that encephalitis is a rare event in COVID-19 patients with the first suspected case reported in May, 2020. As noted in para. 77 above, I understood her evidence to be that these cases are merely suspected but not proved. She referred, in this context, to a report published in September, 2020 by Solomon and others on the neuropathological features of COVID-19 in the brains of infected people. She highlighted that the report found hypoxic changes and did not show encephalitis or other specific brain changes referable to the virus. In the course of her report and the course of her oral testimony, Prof. Horgan strongly maintained that a diagnosis of acute encephalitis could not be made with any degree of certainty unless a brain biopsy is undertaken to determine whether the virus has invaded the brain. In her evidence, Prof. Horgan, with reference to the Solomon study, said that *"we should go to the gold standard which is evidence of the virus in the brain tissue, and the study that was published in New England Journal… looked at autopsies of eighteen people who died of COVID-19 and they found no evidence… of virus within the brain tissue but did notice hypoxia"*. However, at a later point, during the course of cross-examination, she accepted that the study did show low levels of virus in six brain sections obtained from five patients but the studies did not see any damage that a virus would be expected to cause to brain tissue. With regard to the studies cited by Prof. Moynagh, Prof. Horgan said that these were based not on biopsies but on a surrogate, namely the level of pro-inflammatory cytokines in the cerebrospinal fluid ("*CSF*"). Prof. Horgan's evidence was :-

> *"Given that there are nearly 100 million cases in the world, very few of even the CSF samples that were analysed in the papers that* [Prof. Moynagh] *produced had evidence of virus. And from what I can read, there were two in one case and then*

there were two other separate case reports. So that's four patients in, I suppose, nearly 100 million cases…"

Prof. Horgan also confirmed that she was not aware of any case of acute encephalitis in patients in Ireland.

91. Under cross-examination, Prof. Horgan explained that she was unaware whether autopsies are currently being carried out on patients who died with COVID-19. Prof. Horgan agreed that COVID-19 is associated with neurological problems and she instanced, in that context, loss of a sense of smell or sense of taste. However, she continued to strongly maintain that one would need to have evidence of immunohistological damage to brain tissue in order to be confident that COVID-19 is a cause of acute encephalitis.

92. Prof. Horgan also accepted that medical science is at an early understanding of a lot of the aspects of SARS-CoV-2 and COVID-19 and that includes neurological impacts. She explained that she did not suggest that there is no evidence of neurological issues but she stressed that a lot of the neurological symptoms do not arise from the virus. She said:-

"They're the impact of hypoxia, the impact of loads of other medical conditions and you'll see that in the papers that Professor Moynagh had, many had diabetes, hypertension, dementia and other neurological conditions, all of which will have an impact on how people present and the outcomes of the tests that are done on them."

93. In the course of the cross-examination of Prof. Horgan, counsel for the plaintiff put a series of papers to her which suggested an association between COVID-19 and encephalitis. Prof. Horgan characterised the conclusions drawn by the authors of those papers as having been based on *"proxy markers"* and she repeated that autopsy or biopsy examination of brain tissue was required in order to reach a conclusion. Prof. Horgan also highlighted the fact that the authors of one of the studies to which she was referred expressly stated that the absence of autopsy evidence was a limitation on the study.

94. Prof. Horgan explained why she was of the view that autopsy-based evidence or biopsy evidence was necessary in the following terms:-

> *"I think it's absolutely essential for a new disease. If you have a new disease you have to prove what the pathology is. When you do that, then you can align it to the surrogate markers we can use, like CSF, like brain imaging and like the clinical. And that is whether it's COVID-19, or whatever new virus is coming round, until you can see the pathology, the histopathology shows the virus has caused damage to the cell, that's why all these papers don't come out and say definitively* [but] *say may cause by direct infection of the brain, because you need to look at that for a new disease to prove that that's the case."*

95. Prof. Horgan, nonetheless, accepted that COVID-19 drives a very strong inflammatory response which can be systemic and which can cause inflammatory disease in various organs. However, in relation to encephalitis, she continued to maintain that evidence from biopsies of the brain was required in order to form a conclusion as to whether COVID-19 causes acute encephalitis. She maintained that the medical evidence, so far, does not show that acute encephalitis is caused by COVID-19; her view was that the studies carried out to date show evidence of hypoxia which, in her view, is the result of the primary lung damage that some COVID-19 patients experience.

96. Prof. Mary Fitzpatrick gave evidence that, having reviewed all of the minutes of the NPHET meetings and also the public health measures introduced since March, 2020 and also the statements by members of the Government, she found no evidence that the restrictions that were introduced in 2020 were prompted by advice in relation to acute encephalitis. According to Prof. Fitzpatrick, there was no mention of acute encephalitis. All of the measures were introduced to prevent the transmission of SARS-CoV-2 and not in respect of any other disease or any other infection or any other virus.

97. With regard to the issue of acute encephalitis, Prof. Fitzpatrick, in para. 5.5 of her report, referred to a paper by Haider *et al* published in October, 2020 which she said concludes that *"the evidence on the central nervous system involvement and neurological manifestations of COVID-19 is scarce and of low quality"*. In the same paragraph, she also described a conclusion reached by the European Centre for Disease Prevention and Control ("*ECDC*") published in June, 2020 which noted that encephalitis has been reported *"in rare cases"*. Under cross-examination, it was highlighted that the statement did not appear in the abstract of the report which Prof. Fitzpatrick confirmed addressed a single case which was reviewed by the authors. Prof. Fitzpatrick emphasised that the authors did not have a biopsy of the brain of the patient reviewed in the report. It was put to Prof. Fitzpatrick that the report stated that a study that investigated neurological manifestations exhibited by patients suffering from COVID-19 *"documented that 36% of the hospitalised patients with a confirmed diagnosis of an acute respiratory syndrome from COVID-19 infection had some neurological manifestations"*. However, Prof. Fitzpatrick responded by referring to the evidence given by Prof. Horgan that hypoxia can cause confusion, delirium, problems in the central nervous system and loss of taste and smell. Her view was that the evidence for acute encephalitis is:-

> *"not clear, because although there are some cases, they haven't had the definitive diagnosis. And other things can cause confusion and can cause apparent brain malfunction and predominantly hypoxia, which is a big feature of patients with COVID-19 who are sick in hospital."*

98. Prof. Fitzpatrick agreed, under cross-examination, that acute encephalitis is not an infectious disease and that it can be caused by a number of different pathogens. In re-examination, Prof. Fitzpatrick noted that the paper by Haider also stated that it is essential to collect reliable data on short and long term neurological manifestations and that there were no

specific findings by reference to EEG, or on CT or MRI head scans. Prof. Fitzpatrick concluded her evidence by saying that reliable evidence is required before any conclusion can be reached.

The evidence in relation to *"sanitary arrangements"*

99. In his report, Prof. Moynagh described the way in which non-pharmaceutical interventions (*"NPIs*") have been introduced in an attempt to suppress the COVID-19 pandemic. Prof. Moynagh explained that NPIs range from the use of masks, physical distancing, hand and respiratory hygiene to closure of non-essential business and limitations on travel from one's home. Prof. Moynagh then continued in the following terms:-

> *""Sanitary Arrangements" refer to conditions affecting health, including precautions against disease. The first locations for public health information about COVID-19 included washing facilities. Closure of the premises was undoubtedly due to a number of factors, including the inability to put "other sanitary arrangements" in place that would suppress the above transmission patterns and dynamics and so would act as a high risk for transmission of SAR-CoV-2 and COVID-19. In my opinion, it is the case that the closure was linked at least in part to the "sanitary arrangements" and their inability to suppress transmission of the virus to a level acceptable to the public authority."*

100. Prof. Moynagh was cross-examined as to why he had any reason, as a medical expert, to consider the terms of the AXA policy and, in particular, the clause relating to sanitary arrangements. In response, Prof. Moynagh said that he had interpreted sanitary arrangements *"quite broadly"* and that he gave his opinion in terms of *"the relevance of sanitary arrangements and… how they relate to limiting control in viral transmission and disease"*. He accepted that, if the court was to interpret sanitary arrangements as relating to pipe work or *"all the accoutrements associated with sanitation"*, such arrangements could not be

considered to be a basis for the closure of premises by a public authority. When pressed by counsel for AXA, Prof. Moynagh accepted that his definition of *"sanitary arrangements"* as set out in his report was not based on anything other than his own opinion. He further explained that his interpretation, in the specific context of SAR-CoV-2 related to:-

> *"arrangements that would prevent the spread by droplet and aerosol… So that would mostly be in terms of social distancing. So my interpretation is – again my understanding would be that in order to prevent transmission of the virus, sanitary arrangements would be required to prevent that transmission."*

101. However, Prof. Moynagh confirmed that he had no idea what arrangements had been in place at the Clarence Hotel either prior to or subsequent to its closure. Having made that admission, Prof. Moynagh was asked by counsel for AXA how he had come to the conclusion, in those circumstances, that there had been an inability to put appropriate sanitary arrangements in place. His response was:-

> *"Well, my conclusion there would be based on the fact that if sanitary arrangements could be put in place to suppress transmission of the virus to the required rate then the premises wouldn't need to be closed."*

102. When pressed as to what evidence he had that the arrangements in place in the hotel was not acceptable to a public authority, Prof. Moynagh's response was:-

> *"Well, in my context… is sort of a broader context in terms of such premises in terms of there being wide closures is on the basis that those premises cannot put in place arrangements that can suppress transmission of the virus at the required level, otherwise closures would not take place."*

103. Prof. Fitzpatrick gave evidence that she could see nothing in any of the public health measures introduced since March, 2020 and related materials which referred in any way to sanitary arrangements save to the extent that numbers of people in small indoor areas

including toilets were limited. In her report, Prof. Fitzpatrick stated that, since the start of the pandemic, the sole focus of public health advice has been respiratory hygiene, wearing of masks, washing hands and social distancing. The restrictions which have been put in place were motivated by a public health concern to limit the community spread of the virus through close contact with other people in an indoor location. In her evidence, Prof. Fitzpatrick also stressed that:-

> *"People being close together is the key point, but indoors, when you have a confined space, the droplets spread and there's also some aerosolisation, so the virus can hang in the air... So the measures that have been brought in have been to try to reduce people congregating together in indoor settings."*

104. In the sanitary context, Prof. Fitzpatrick also drew attention to the conclusion reached by WHO that, to date, there is no evidence of COVID-19 transmission via the oral-faecal route. While COVID-19 has been found in faecal matter, there is uncertainty as to whether this facilitates transmission. She also referred to the advice by the Health Protection Surveillance Centre which concluded that, while the virus has been detected in faeces, urine, blood and saliva samples from infected individuals, it is not clear that these represent a significant transmission risk. She also highlighted that there is no mention of the oral-faecal route in relation to transmission in any of the minutes of NPHET and her evidence was that the public health measures introduced by the Government were not directed at oral-faecal transmission of COVID-19.

<u>Findings of fact based on the evidence</u>

105. Based on the evidence (which I have attempted to summarise above), it is clear that acute encephalitis is not itself an infectious or contagious disease. It is an inflammation of the brain which arises as a consequence of an infection caused by a pathogen. There is, as yet, no conclusive evidence that acute encephalitis is caused by COVID-19 or the SARS-CoV-2

virus. Many of the neurological symptoms which have been seen in some COVID-19 patients arise from hypoxia and cannot safely be attributed to acute encephalitis. However, a number of studies have suggested that acute encephalitis may occur in COVID-19 patients but, even on the assumption that acute encephalitis may be caused by COVID-19, it is clear, on the evidence, that the incidence of such a complication arising from COVID-19 is likely to be rare. Importantly for present purposes, there has been no reported case of acute encephalitis associated with COVID-19 in Ireland. Furthermore, as accepted by all the medical witnesses and as confirmed by a review of the relevant records (addressed further in paras. 123 to 132 below) there is no evidence that any of the measures taken by the Government or by the Minister for Health in response to the COVID-19 pandemic were prompted by concerns about acute encephalitis. While the plaintiff has sought to place some emphasis on the evidence given by Prof. Fitzpatrick that the measures were not motivated by acute encephalitis *"specifically",* I do not believe that anything turns on the use of that language by her. It is quite clear from the evidence and from the relevant records that acute encephalitis was not a factor in the decision taken by Government (or in the subsequent Regulations enacted by the Minister) in imposing restrictions on the operation of hotels or bars.

106. With regard to the evidence that was given in relation to sanitary arrangements, I do not believe that it is appropriate that I should make any findings of fact in respect of that evidence. While I have no doubt that Prof. Moynagh sought to assist the court in providing his opinion as to the meaning of the term *"sanitary arrangements"*, that is an issue of interpretation of the policy which is a matter for the court. It is, therefore, an issue that I will examine in the context of my consideration of the questions posed in paras. 47 and 48 above.

107. Insofar as the MSDE clause is concerned, it would be wrong to suggest that cover in respect of diseases under the policy is a remote possibility. I, therefore, reject the evidence of Mr. Mills to that effect. It is clear from the evidence of Prof. Horgan that a number of the

diseases listed in the MSDE clause are present in Ireland. It is also clear from her evidence that, contrary to the suggestion made by Mr. Mills, vaccines do not exist for all of the diseases specified on the list.

108. At later points in this judgment, it may be necessary to make further findings of fact. However, at this point, I believe it is sufficient to confine the findings of fact to those set out in paras. 105 to 107 above. For the purposes of this judgment, these facts, together with the further facts agreed between the parties (as set out in paras. 3 to 43 above) are relevant.

<u>The principles applicable to the interpretation of the AXA policy</u>

109. While it may be necessary at later points in this judgment to address further aspects of the applicable legal principles, it may be helpful, at this stage, to summarise the principles applicable to the interpretation of policies of insurance. The relevant principles are to be found in a number of cases including *Rohan Construction v. Insurance Corporation of Ireland* [1986] ILRM 419 (High Court) and [1988] ILRM 373 (Supreme Court), *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274 (which applied the principles formulated by Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896), *ICDL GCC Foundation v. European Computer Driving Licence Foundation* [2012] 3 I.R. 327, *Emo Oil Ltd v. Sun Alliance and London Insurance plc* [2009] IESC 2 and *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 ("*the MIBI case*").

110. The following principles emerge from those authorities:-

(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;

(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having

all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;

(c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;

(d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;

(e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As Lord Hoffmann explained in the *Investors Compensation Scheme* case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context. That said, in the present case, no argument was made about the relevant legal or regulatory context against which the policy of insurance was put in place;

(f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the

parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;

(g) As O'Donnell J. made clear in the *MIBI* case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-

> *"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."*;

(h) In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the *contra proferentem* rule. This principle was affirmed by the Supreme Court in *Analog Devices v. Zurich Insurance Company* and in *Emo Oil Ltd v. Sun Alliance & London Insurance plc*. In the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, *"usually be an approach of last resort"* albeit that he also stated that it may be *"more readily resorted to in respect of routine standard form commercial insurance policies"*. Later, in *Danske Bank v. McFadden* [2010] IEHC 116, Clarke J. (as he then was) explained the *contra proferentem* principle as follows, at paras. 4.1 to 4.2:-

> *"4.1 The… contra proferentem rule is… only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself*

unable to reach a sure conclusion on the construction of the provision in question…

4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: The Law of Insurance Contracts, 5th Ed.,… at para. 15-5:-

> *"In the past some courts were quick to find ambiguity in policies of insurance in order to apply the canon of construction contra proferentem, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentem ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First, there must be genuine ambiguity.""*;

(i) Where an insurer seeks to rely upon an exemption clause or exclusion clause in a policy, the insurer will bear the onus of establishing that the relevant exclusionary exemption applies. This was treated by the Supreme Court in *Analog Devices* as a separate principle to the *contra proferentem* rule. At pp. 283-284, Geoghegan J. explained the position as follows:-

"The second important general principle in relation to exclusions is that the onus is on the insurer to establish the application of the exclusion or exemption. Counsel for the plaintiffs cite in their written submissions… a passage from the judgment of Hanna J. in General Omnibus Co Ltd v. London General Insurance Co Ltd [1936] I.R. 596 which is in the following terms, at p. 598:-

> *"The first defence depends upon the interpretation and construction of the exclusions or exceptions as stated in exemption (e). The policy starts by giving an indemnity in general terms and then imposing exceptions. The law is that the Insurance Company must bring their case clearly and unambiguously within the exception under which they claim benefit, and if there is any ambiguity, it must be given against them on the principle of contra proferentes."*

On appeal the Supreme Court took a different view on the interpretation of the policy but it was not suggested that the general principle stated by Hanna J. was incorrect. In the same written submissions there is a passage from the standard work Ivamy, General Principles of Insurance Law (6th ed.) which is worth quoting… at p. 286:-

> *"Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost*

strictness. It is the duty of the insurers to accept their liability in clear and unambiguous terms."

(j) In the case of an insurance policy, it is also well settled (and was not in dispute in this case) that the use of words such as *"as a result of"* or *"resulting from"* are ordinarily construed as connoting proximate cause. This is consistent with the provisions of s. 55(1) of the Marine Insurance Act, 1906 ("*the 1906 Act*") which provides that, in the absence of an indication to the contrary in the terms of the policy, the insured must prove that his or her loss was proximately caused by an insured peril. Section 55 (1) states:-

> *"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."*

The meaning of "proximate cause" was explained as follows by Maguire C.J. in *Ashworth v. General Accident Fire and Life Assurance Corporation* [1955] I.R. 268 at p. 289:-

> *"...proximate cause has a special connotation in marine insurance cases. It does not mean the cause nearest in time. The cause which is truly proximate is that which is proximate in efficiency..."*

In that case, the Supreme Court adopted the approach taken by the House of Lords in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd* [1918] AC 350 where Lord Shaw explained at p. 369 that proximate cause was not to be construed in a temporal sense. He said:-

> *"What does "proximate" here mean? To treat proximate as if it was the cause which is proximate in point of time is... out of the question.*

> *The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."*

111. It may be necessary, at later points in this judgment, to return to the case law in order to address specific issues which arise in the context of the questions posed in paras. 45 to 60 above. However, subject to that rider, the applicable principles summarised above must be always kept in mind in approaching the court's response to those questions and in interpreting the language used in the AXA policy - in particular the language used in the MSDE and denial of access clauses.

<u>Consideration of the questions posed in paras. 45 to 60 above</u>

112. I now turn to the individual questions identified in paras. 45 to 60. For the most part, I deal with each of them in turn. It is nonetheless important to keep in mind that, while these questions focus on very specific aspects of the language used in the MSDE and denial of access clauses, those aspects must always be considered in the context of the policy as a whole and in the context of the relevant factual and legal background. It would be wrong to reach a conclusion as to the meaning of any aspect of the clauses in issue without regard to that wider context. It is also essential to recall the observations of O'Donnell J. in the *MIBI* case that it is wrong to attempt to construe the terms of a contract through the prism of the dispute that currently exists between the parties. Instead, the court must place itself in the position of the parties at the time the policy was put in place and construe its terms by reference to how they would be understood by a reasonable person in the position of the parties at that time.

Does the MSDE clause provide cover in principle for business interruption losses caused by the occurrence of COVID-19?

113. This question arises in the specific context of para. 1 of the MSDE clause. The full text of this question is set out at para. 45 above. It should be recalled that para. 1 provides cover for business interruption as the result of the *"occurrence"* of any of a list of *"specified human infectious or... contagious diseases"* (which range from measles to yellow fever) manifested by any person while at the premises or within a 25 mile radius. The question is posed in circumstances where neither COVID-19 nor the underlying SARS-Cov-2 virus is included in the list of specified diseases in the MSDE clause.

114. The first aspect of the MSDE clause to be noted is that, insofar as it covers disease, there is no requirement under the clause that there should be an imposed closure of the hotel or bar premises. It is thus quite different to the clause which was considered in *Hyper-Trust Ltd v. FBD Insurance plc* [2021] IEHC 78 (*"the FBD case"*). The clause is properly characterised as a *"pure disease"* clause similar, for example, to the RSA 3 policy wording considered by the UK Supreme Court in *Financial Conduct Authority v. Arch Insurance (UK) Ltd* [2021] UKSC 1 ("*the FCA case*"). Thus, the MSDE clause provides insurance cover for business interruption loss caused by the occurrence of any one or more of the specified infectious or contagious diseases which are listed in the clause which occur either on the premises of the hotel or bar or within a 25-mile radius of the hotel.

115. The next aspect of the MSDE clause which is relevant is that, in contrast to some of the disease clauses considered by the UK Supreme Court in the *FCA* case, the clause in the AXA policy is restricted to the specific diseases listed. Business interruption which arises as a consequence of the occurrence of a disease which is not on that list will not give rise to cover under para. 1 of the MSDE clause. This is a crucially important aspect of the MSDE clause in the AXA policy. In terms of its specificity, the MSDE clause is different to a number of disease clauses to be found in other policies available on the Irish market at the

time this policy was put in place in April 2019. As the judgment in the *FBD* case illustrates, there were several policies available which covered business interruption caused by notifiable diseases without being prescriptive as to the specific diseases which were covered.

116. In the course of their submissions, counsel for the plaintiff highlighted that the experts who have given evidence in this case are all agreed that acute encephalitis (which is mentioned first on that list) is not itself a contagious or infectious disease. Counsel also stressed that AXA has failed to put forward any plausible explanation as to why a condition which is not itself infectious appears on a list of contagious diseases. The condition can arise not only as a consequence of a number of pathogens but also as an auto-immune response. As discussed further below, in the context of the next issue to be considered, the plaintiff makes the case that the most rational reason why acute encephalitis has been included in a list of infectious and contagious diseases is because it is a known consequence of or condition associated with a number of infectious human diseases.

117. Counsel for the plaintiff also urged that the word *"occurrence"* as used in the MSDE clause should be given the same meaning in the AXA policy as that given to the same word in the RSA 3 policy considered by the UK Supreme Court in the *FCA* case. In their judgment in that case, Lords Hamblen and Leggatt, at para. 67, treated *"occurrence"* as a synonym of *"event"* which has a widely recognised meaning in insurance law. They referred, in this context, to the meaning given to the word *"event"* by Lord Mustill in *Axa Reinsurance (UK) plc v. Field* [1996] 1 W.L.R. 1026 at p. 1035, where he said that event means *"something which happens at a particular time, at a particular place, in a particular way"*. In para. 68 of their judgment, Lords Hamblen and Leggatt took the view that the same meaning should be attributed to the word *"occurrence"* as used in the RSA 3 policy (which provided cover in respect of business interruption following *"any occurrence of a Notifiable Disease…"*). At

para. 69, they explained how an *"occurrence"* is to be read in the context of a disease. They said:-

> *"69. A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving differing symptoms of greater or less severity… If several members of a household were all infected with COVID-19 when a carrier of the disease visited their home on a particular day, that might arguably be described as one occurrence. But the same could not be said of the contraction of the disease by different individuals on different days in different towns and from different sources. Still less could it be said that all the cases of COVID-19 in England (or in the United Kingdom or throughout the world) which had arisen by any given date in March 2020 constituted one occurrence. On any reasonable or realistic view, those cases comprised thousands of separate occurrences of COVID-19. Some of those occurrences of the disease may have been within a radius of 25 miles of the insured premises whereas others undoubtedly will not have been. The interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence. On this basis there is no difficulty in principle and unlikely in most instances to be difficulty in practice in determining whether a particular occurrence was within or outside the specified geographical area."*

118. This interpretation of the word *"occurrence"* was not seriously challenged by AXA. I can see no reason to take a different view as to the meaning of that word. The logic of the passage quoted above is compelling. Thus, it seems to me that, for the purposes of the AXA policy, every case of COVID-19 within the relevant 25 mile radius of the hotel constitutes a

separate occurrence of disease for the purposes of para. 1 of the MSDE clause. However, in my view, that conclusion does not assist the plaintiff in relation to this element of its case. Critically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in para. 1 of the MSDE clause. In those circumstances, it seems to me to follow that, subject to what I say below in relation to the plaintiff's case based on acute encephalitis, para. 1 of the MSDE clause does not provide cover for business interruption losses caused by an occurrence of COVID-19 even where that occurs on the hotel premises or within a 25-mile radius of it. It cannot be disputed that the cover available under the first paragraph of the MSDE clause is limited to business interruption which arises as a consequence of the occurrence of one of the specific diseases expressly listed in the clause. In circumstances where COVID-19 is not listed, it must follow that there is no cover for business interruption losses which are attributable to cases of COVID-19 *per se* whether or not they manifested themselves either on the premises or within the relevant 25-mile radius.

Does the MSDE clause provide business interruption cover for losses caused as a result of the occurrence of acute encephalitis?

119. This question is raised in the context of the case now made by the plaintiff by reference to acute encephalitis. My consideration of this question runs from para. 120 to para. 147 below. The full text of this question is set out in para. 46 above and need not be repeated here. In essence, I am asked whether the MSDE clause provides cover for business interruption losses caused as a result of the occurrence of acute encephalitis induced by COVID-19 which is manifested by any person within a 25-mile radius of the Clarence Hotel.

120. While the parties have agreed that issues of causation would be addressed in a later hearing module, I have been asked to reach a conclusion on the evidence as to whether the closure on 15th March, 2020 (assuming that there was such a closure) and the subsequent regulatory measures enacted in April 2020 arose as a result of acute encephalitis. In this

context, it is important to bear in mind that, as the text of the first paragraph of the MSDE clause makes very clear, cover is only available for business interruption *"**as a result of** the occurrence of... Acute Encephalitis... manifested by any person whilst at the* [hotel] *or within a 25-mile radius of it"* (emphasis added). As noted in para. 110 (j) above, the use of the words *"as a result of"* connotes a proximate cause requirement. That means that, if the plaintiff is to succeed in relation to this aspect of its case, it must establish that the interruption to its business was proximately caused by an occurrence of acute encephalitis, i.e. it must prove that a case of acute encephalitis was the *"real and efficient"* cause of the closure which it is alleged occurred on 15th March, 2020 and/or the subsequent restrictions which have been imposed. This was very fairly acknowledged by counsel for the plaintiff in his closing submissions on Day 4 at p. 87.

121. As outlined in para. 115 above, the plaintiff's case is that acute encephalitis is now a known consequence of, or a condition associated with, a number of infectious diseases including COVID-19. While the plaintiff accepts that there is no mention of acute encephalitis in any of the relevant records (discussed further below), there is no doubt that the closure and the restrictions were prompted by concern about the spread of a dangerous and highly infectious disease. The plaintiff submits that, at the time the closures and restrictions arose, there was a lack of knowledge of the full detail of the impact and consequences of COVID-19. In circumstances where there was, in the words of counsel for the plaintiff, *"a huge amount of uncertainty in March"* in respect of COVID-19, the plaintiff made the case that the measures that were taken at that time were prompted by a concern to stop both the known and unknown consequences of COVID-19 from developing. It was argued that COVID-19 and its consequences (both known and unknown) constituted a single indivisible cause. Counsel for the plaintiff suggested that this is supported by the material contained in the relevant records which referred, for example, to a *"rapidly evolving"* situation and to

"uncharted territory". Counsel submitted that it was for this reason that Prof. Fitzpatrick, in her report, carefully stated that the closures and restrictions were not introduced *"specifically"* because of acute encephalitis. Counsel also referred to the evidence given by Prof. Moynagh to the effect that, by late April, 2020, there was a growing recognition that there may have been some neurological issues associated with COVID-19. Counsel referred, in this context, to the cross-examination of Prof. Moynagh on Day 1 at p. 145 That evidence must, however, be read with other answers given by Prof. Moynagh in the course of his cross-examination. For example, on Day 1 at p. 146, Prof. Moynagh did not dispute that the predominant features of concern regarding COVID-19, as of March and April, 2020 were the respiratory issues associated with the disease. On the same day at p. 147, he acknowledged that *"there was absolutely no mention of acute encephalitis"* and that there was no association as of 15th March, 2020 *"either speculatively or otherwise"* of an association between COVID-19 and acute encephalitis. Prof. Moynagh also acknowledged on Day 1 at p. 148 that in April, 2020, the association between COVID-19 and acute encephalitis had not been brought *"to the attention of anyone"*. Prof. Moynagh was also asked, in the course of his cross-examination on Day 1 at p. 163, whether he agreed with Prof. Fitzpatrick that, having reviewed all of the relevant materials, the measures taken by Government were in relation to *"efforts to stop the transmission of coronavirus as opposed to… taking any steps against acute encephalitis; you'd agree with her on that?"*, his answer was *"yes, stop transmission of the virus and the ensuing disease which is COVID-19"*.

122. Having regard to the submissions made by counsel for the parties, it is necessary to review the relevant materials which were placed before the court in the form of a book of relevant records which assist in understanding the reasons underlying the measures taken on 15th March, 2020 and on subsequent dates. This exercise is necessary in order to determine

whether or not it can be said that the closure of the hotel and bar was proximately caused by an occurrence of acute encephalitis.

The relevant records

123. The book of records contains minutes of meetings of NPHET from 3rd March, 2020 onwards. The minutes for the meeting of 3rd March reflect the need to prepare guidance for large gatherings and to establish specialist subgroups within NPHET to address matters such as vulnerable groups, acute hospitals preparedness, medicines and medical devices, and healthcare workers and staff. Throughout the minutes of that meeting, reference is made to COVID-19. There is no reference made to any of the particular manifestations of the disease. That was followed by a further meeting on 7th March, 2020 which addressed a number of issues including the risk to patients of acquiring COVID-19 from an exposed healthcare worker. A particular concern was expressed in relation to aerosol generating procedures. It was decided to develop national guidance to address healthcare workers in particular. Again, the minutes refer throughout to COVID-19. There is no reference in these minutes to any particular manifestations of the disease or complications that might arise from the disease.

124. A further meeting took place on 8th March, 2020. The minutes of the meeting of that date record concern, in light of the *"rapidly evolving global situation",* in relation to the upcoming St. Patrick's Day Festival. It was agreed that a recommendation should be made that, given the nature and scale of St. Patrick's Day Festival events in terms of size and the risks attendant on mass gatherings, the continued progression of community transmission in some European countries along with the emergence of a number of cases of local transmission in Ireland, it was recommended that the Festival events should not proceed. This was followed by a press statement from the Department of the Taoiseach on 9th March, 2020, following a meeting of a special cabinet subcommittee on COVID-19, that the Government had decided, *inter alia*, to cancel St. Patrick's Day events. The announcement also extended

to the provision of income support and it also outlined a series of actions to be taken by the Health Service Executive ("*HSE*") to prepare for cases of COVID-19. The announcement referred to COVID-19 without specifying any of its manifestations.

125. A further meeting of NPHET took place on 10th March, 2020 which referred to the *"rapidly evolving nature of the situation"* which had been highlighted by the ECDC. The minutes record discussion in relation to a large number of matters including the potential for restrictions on mass gathering with a view to *"attenuating the spread of COVID-19"*. The closure of schools and universities was also discussed for the same reason. As in the minutes of the previous meetings outlined above, there was no reference to anything other than COVID-19. The minutes do not disclose any discussion about any particular aspect or manifestation of the disease.

126. There was a further meeting of NPHET on 11th March, 2020 which continued into 12th March. The minutes record considerable concern about the level of social interaction. Discussion took place about the need for social restrictions or *"cocooning"* for vulnerable groups. A recommendation was also made that people should reduce their social and workplace contacts. In addition, a recommendation was made that mass gatherings should be restricted to no more than 100 people indoors or 500 people outdoors. It was also agreed that a recommendation should be made to Government for the closure of schools, third level education facilities, crèches and other childcare facilities. On the same day, the WHO Director General announced that COVID-19 should be characterised as a pandemic. In his statement, the Director General said that the course of the pandemic could be changed if countries detect, test, treat, isolate, trace and mobilise their people in the response. This was followed by a statement by the Taoiseach issued on 12th March, 2020 in which he announced that the Government was closing schools, colleges and childcare facilities and cultural institutions and advising that all indoor mass gatherings of more than 100 people or outdoor

mass gatherings of more than 500 people should be cancelled. Where possible, people were also advised to work from home.

127. A meeting of NPHET also took place on 12th March, 2020. At that meeting, some consideration was given to the symptoms of COVID-19. The minutes refer to:-

> *"fever 38 degrees or over and/or new onset continuous cough should be considered. Also noted, that if shortness of breath is present, then clinical care should be sought."*

128. As noted in para. 24 above, an announcement was made by the Taoiseach on 15th March, 2020. In that announcement, the Government advised all public houses and bars (including hotel bars) to close from that evening until at least 29th March. The announcement referred to discussions which had taken place with the Licensed Vintners Association ("*LVA*") and the Vintners Federation of Ireland ("*VFI*"), both of whom had outlined the *"real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions"*. The announcement also records that the Government, having consulted with the Chief Medical Officer, was of the view that the closure was an *"essential public health measure"*.

129. It is clear from the terms of the Government announcement that the decision to close public houses and hotel bars was not prompted by any concern about acute encephalitis. The stated reason for the decision (which flowed from representations made by representatives of public houses, namely the LVA and VFI) was identified as the difficulties which arise in maintaining social distancing in a public house setting.

130. One day later, the National Action Plan in Response to COVID-19 was published by the Government. It provides the following very brief summary of what was known, at that time, about COVID-19. Under the heading *"What is COVID-19 and what we know about the virus"*, the following was stated:-

"COVID-19 is a new disease caused by a strain of coronavirus not seen in humans before December 2019. As such, there is a lack of immunity in the population which means that we are all susceptible to infection and, with no vaccine currently available, COVID-19 has the potential to spread widely.

People can catch COVID-19 from others who have the virus, through inhaling small droplets from people who cough or sneeze, or through touching contaminated surfaces and then touching their face.

Its symptoms, which can take up to 14 days to show, may include a cough, shortness of breath, breathing difficulties and fever (high temperature). Information from the… ECDC… suggests that–

- *80% of people infected will experience a mild to moderate illness, which can be managed at home and will make a full recovery,*
- *14% of patients may experience more severe symptoms,*
- *6% of people may become more seriously infected and will require hospital care."*

131. There is no mention anywhere in the action plan (which is 60 pages long) of acute encephalitis or inflammation of the brain or of the nervous system. Nor is there any other reference to any of those features in any of the remaining relevant records which have been placed before the court for the purposes of this hearing. This is unsurprising in light of the medical evidence that it was not until later in April, 2020 that any papers were published suggesting any link between COVID-19 and inflammation of the brain. It is, therefore, unnecessary to go through, in this judgment, all of the relevant records. It should, however, be noted that, on 24th March, 2020, a further statement was made by the Taoiseach which

outlined further steps taken by the Government to respond to the COVID-19 emergency. These included the following:-

(a) People were advised to stay at home if at all possible. People were told that they should only leave home to go to work if they were unable to work from home and their attendance at work was essential. The statement also made clear that leaving home would only be permitted for the purposes of shopping for essential supplies, medical or dental appointments, care for others or to take physical exercise;

(b) Non-essential indoor visits to other people's homes were to be avoided. Social gatherings of individuals outdoors should be of no more than four unless all were from the same household;

(c) No unnecessary travel should take place within the country or overseas;

(d) All theatres, clubs, gyms/leisure centres, hairdressers, betting shops, marts, markets, casinos, bingo halls, libraries and other similar outlets were required to close;

(e) All hotels were to limit occupancy to essential non-social and non-tourist reasons;

(f) All non-essential retail outlets were required to close. Those retail outlets that were permitted to stay open were required to implement physical distancing;

(g) Cafes and restaurants were to limit supply to takeaway food or delivery;

(h) All sporting events were cancelled;

(i) All places of worship were required to restrict numbers to ensure adequate physical distancing;

132. The announcement of 24th March, 2020 was the first announcement that applied to hotels (as opposed to hotel bars). It did not require hotels to close completely but their ability

to trade was limited to essential non-social and non-tourist purposes. There is nothing in the announcement which assists the plaintiff in its contention that the interruption to its business was caused by an occurrence of acute encephalitis either as an incident of COVID-19 or otherwise.

The subsequent Regulations

133. Nor is there anything in the terms of the subsequent emergency legislation which suggests that the measures taken were prompted by concerns about acute encephalitis as an incident or possible incident of a COVID-19 infection. For this purpose, Part IV of the Health Act, 1947 ("*the 1947 Act*") empowers the Minister for Health to make regulations specifying those diseases which are *"infectious diseases"* for the purposes of the 1947 Act. Under s. 31 of the 1947 Act, the Minister is expressly empowered to make regulations providing for the prevention of the spread of an infectious disease. It should be noted that acute encephalitis was, at one time, treated as an infectious disease for the purposes of the 1947 Act. By the Infectious Diseases Regulations, 1981 (S.I. No. 390 of 1981) ("*the 1981 Regulations*"), a number of diseases were specified including many on the list contained in the MSDE clause in the AXA policy. Acute encephalitis was included in that list. However, by the Infectious Diseases (Amendment) (No. 3) Regulations, 2003 (S.I. No. 707 of 2003) ("*the 2003 Regulations*"), a new schedule was inserted to the 1981 Regulations. This is broken down into two columns. In the left-hand column, there is a list of diseases. The causative pathogens for those diseases are listed in the adjoining right-hand column. Thus, for example, *"plague"* is listed as a disease in the left-hand column while the causative pathogen is listed in the right-hand as *"Yersinia Pestis"*.

134. As noted in para. 26 above, on 20th March, 2020, the 1947 Act was amended by virtue of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act, 2020 ("*the 2020 Act*") which came into effect on 9th March, 2020. Section 10 of

the 2020 Act inserted a new s. 31A into the 1947 Act which enabled the Minister for Health to make regulations providing for a range of restrictions to prevent, minimise or slow the spread of COVID-19. For present purposes, it is unnecessary to set out the full text of s. 31A. It is important to note that s. 31A is concerned exclusively with measures to address the risk to humans arising from the spread of COVID-19. It makes no mention of acute encephalitis. Insofar as it is relevant for the purposes of these proceedings, s. 31A(1) provides as follows:-

> *"**Regulations for preventing, limiting, minimising or slowing spread of Covid-19***
>
> ***31A**(1) The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19…, to deal with public health risks arising from the spread of Covid-19 and, without prejudice to the generality of the foregoing, such regulations may, in particular, provide for all or any of the following:*
>
> *(a) …*
>
> *(f) the safeguards required to be put in place by owners or occupiers of a premises or a class of premises (including the temporary closure of such premises) in order to prevent, limit, minimise or slow the risk of persons attending such premises of being infected with Covid-19*
>
> *…*
>
> *(2) When making regulations under subsection (1), the Minister —*
>
> *(a) shall have regard to the following:*
>
> *(i) the fact that a national emergency has arisen of such character that there is an immediate and manifest risk to human life and public health…*

> *(ii) the fact that a declaration of Public Health Emergency of International Concern was made by the* [WHO] *in respect of Covid-19 and that Covid-19 was duly declared… to be a pandemic;*
>
> *(iii) the fact that Covid-19 poses significant risks to human life and public health by virtue of its potential for incidence of mortality;*
>
> …
>
> *(v) the need to act expeditiously in order to prevent, limit, minimise or slow the spread of Covid-19…"*

135. Thereafter, on 7th April, 2020, the Minister made regulations under s. 31A of the 1947 Act, namely the Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations, 2020 (S.I. No. 121 of 2020) ("*the 2020 Regulations*") which introduced a number of restrictions. As para. 8.3 of the plaintiff's response dated 27th July, 2020 to AXA's request for particulars dated 6th July, 2020 makes clear, the 2020 Regulations are among the emergency measures which are relied upon in the statement of claim as giving rise to the alleged closure of the hotel and bar. The 2020 Regulations impose very significant restrictions on the ability of people resident in the State to leave their place of residence without reasonable excuse. Regulation 4(2) sets out matters which will be regarded as a reasonable excuse for this purpose. These include access to an essential service. For this purpose, an *"essential service"* means a service specified in Schedule 2 to the 2020 Regulations. Paragraph 8 of Schedule 2 is relevant for present purposes. It addresses the position of hotels in the following terms:-

> *"8. The following services relating to accommodation and food services provision:*

> (a) *the operation of hotels or similar accommodation services providing essential accommodation (including accommodation for homeless persons and persons in direct provision, persons who are unable to reside in their usual place of residence due to reasons related to the spread of Covid-19 or otherwise or persons who require such accommodation for the purposes of any matter which falls within… Regulation 4(2) and related services;*
>
> (b) *food and beverage service activities for supply to a business engaged in an essential service;*
>
> (c) *the provision of food or beverage takeaway or delivery services."*

<u>The arguments of the parties in relation to the records, the Government measures and the Regulations</u>

136. Counsel for AXA highlighted that the 2020 Regulations (and all of the subsequent regulations which varied the restrictions imposed by the 2020 Regulations) all proceed on the same legislative basis. They are all made on the basis of s. 31A of the 2020 Act and are, therefore, directed solely towards the risk posed by COVID-19 and cannot be said to have been prompted by any concern about acute encephalitis. Counsel also referred to the Infectious Diseases (Amendment) Regulations, 2020 (S.I. No. 53 of 2020) ("*the 2020 Amendment Regulations*") which inserted a new schedule to the 1981 Regulations and which listed as a notifiable infectious disease COVID-19 identifying SARS-CoV-2 as the relevant pathogen. Counsel for AXA stressed that acute encephalitis was not restored to the list in 2020 (whether with SARS-CoV-2 as the relevant pathogen or otherwise). Counsel for AXA submitted that the court *"would be compelled to conclude that this is not a situation where the plaintiff can satisfy the requirement that the business interruption which it claims, namely the closure of its premises and subsequent losses, occurred as a result of the occurrence and*

manifestation within the geographic radius of acute encephalitis". Counsel also emphasised that acute encephalitis was never cited by the plaintiff in its pleadings in these proceedings.

137. In response, counsel for the plaintiff acknowledged that there was no reference to acute encephalitis in any of the relevant records recording the meetings of NPHET. However, counsel argued that acute encephalitis is specifically listed in the MSDE clause and cannot be explained away by AXA. Counsel made the point that the fact that it is no longer a notifiable disease under the 1981 Regulations is neither here nor there. Counsel for the plaintiff argued that, although the connection between acute encephalitis and COVID-19 was not posited in any medical or scientific paper until after the closure of public houses on 15th March, 2020 and after the enactment of the 2020 Regulations on 7th April, 2020, these measures were adopted to address all the consequences of COVID-19 both known and unknown. As noted in para. 121 above, counsel relied in this context on the observations made in the minutes of the NPHET meetings which referred to the *"evolving nature"* of the situation. Counsel also referred to the reference in the statement made by the Taoiseach on 12th March, 2020 that *"this is unchartered territory"*. Reliance was also placed on the statement made in the National Action Plan (quoted in para. 130 above) that COVID-19 is a new disease caused by a strain of coronavirus not previously seen in humans. Counsel, therefore, argued that there was a causal connection between the claimed interruption of the plaintiff's business and *"Covid and its consequences – known and unknown"*.

138. With regard to the pleading point made by counsel for AXA, counsel for the plaintiff very properly accepted that the case now made based on acute encephalitis was not expressly made in the pleadings. Counsel submitted that the pleadings *"have been overtaken by increased knowledge and, to a certain extent, based on the evidence that we now have and was produced in this Court…"*. In circumstances where this is a test case in relation to the

AXA Enterprise Policy, counsel submitted that the pleadings should not be a barrier to the court engaging with the issue raised in relation to acute encephalitis.

My conclusions in relation to the case based on acute encephalitis

139. In the particular circumstances of this case, I agree with counsel for the plaintiff insofar as the pleading point made on behalf of AXA is concerned. Paragraph 14 of the statement of claim specifically invokes the cover available under para. 1 of the MSDE clause. AXA raised particulars of this allegation and pressed the plaintiff to confirm which of the specific diseases listed in the MSDE clause is alleged to have triggered cover under the policy. The response ultimately provided by the plaintiff was incomplete and uninformative. It unhelpfully stated that the identity of the disease was a matter for evidence and legal submission. Without prejudice to that contention, it was suggested that cases of COVID-19 had manifested themselves within County Dublin and that this had caused the closure. Notwithstanding the uninformative nature of that response, the matter was not pursued any further by AXA. Thereafter, the witness statement of Prof. Moynagh was furnished in which he suggested that acute encephalitis had been identified as a complication of a COVID-19 infection. In turn, the evidence outlined in his witness statement was addressed in the reports of Prof. Horgan and Prof. Fitzpatrick. Thus, although the specific disease or condition listed in the MSDE clause was not identified in the plaintiff's pleadings prior to the trial, the nature of the case which the plaintiff proposed to make in relation to acute encephalitis was fully disclosed to AXA in a manner which allowed AXA to address it appropriately. In these particular circumstances, it seems to me that I should address the substance of the issue notwithstanding that the formal position on the plaintiff's pleadings is not ideal.

140. As noted in para. 119 above, the plaintiff can only succeed on this issue if it can show that the claimed interruption to its business was proximately caused by an occurrence of acute encephalitis within a 25-mile radius of the Clarence Hotel. Although there is no requirement

under para. 1 of the MSDE clause to prove that there was any imposed closure of the hotel, the plaintiff has nonetheless relied on the closure arising from the Government advice of 15th March, 2020 and the enactment of the subsequent regulations as links in the chain of causation alleged to exist between acute encephalitis and the interference with its business. As outlined above, counsel for the plaintiff has argued that the closure of 15th March, 2020 was attributable to concerns about all of the effects of COVID-19 both known and unknown and, therefore, extended to acute encephalitis even though it was not a recognised complication of COVID-19 at the time.

141. In my view, it is crucial to keep in mind that, as explained by Lord Shaw in *Leyland Shipping* (which was applied by the Supreme Court in *Ashworth*) proximate cause is to be taken as meaning *"the real efficient cause to which the event can be ascribed"*. It is instructive to consider the facts of the *Leyland Shipping* case. The case illustrates the way in which a court, in seeking to identify the proximate cause of an event, will focus on the real cause and will not be concerned with what Lord Shaw described as *"the attendant circumstances"*. The case related to the sinking of a ship during the course of the First World War. The ship was torpedoed by a German submarine 25 miles from Le Havre. The torpedo opened a large hole in the ship below the water line. Water entered two of the holds. As the vessel appeared to be to sinking, the captain ordered the crew to evacuate the ship. However, the weather, at that point, was fine. The sea was described as *"smooth"*. Within a relatively short time, a decision was made to board the vessel again and to make for Le Havre with the assistance of a tug. By that time, too much water had entered the ship to enable the ship to be docked in the inner harbour. In those circumstances, the ship was moored in the outer harbour and pumping commenced which continued all night. On the following night, there was a storm. The weather was so bad that it was impossible to continue pumping. In those circumstances, there was a concern that the vessel might sink at the berth. For that reason, the

port authorities ordered that the ship should be moved to a position near the outer breakwater. Two days later, the bulkheads of the ship gave way and the ship sank. The question which arose was whether the proximate cause of the loss was the torpedo (in which case there was no cover available under the policy) or whether it was attributable to the perils of the sea (for which there was cover under the policy). At pp. 370-371, Lord Shaw explained that the real efficient cause of the sinking was the torpedo. The attendant circumstances (such as the weather conditions encountered as the ship was being pumped) were not sufficient to affect that conclusion. He said:-

> *"In my opinion the real efficient cause of the sinking of this vessel was that she was torpedoed. Where an injury is received by a vessel, it may be fatal or it may be cured: it has to be dealt with. In so dealing with it there may, it is true, be attendant circumstances which may aggravate or possibly precipitate the result, but which are incidents from the injury, or received from it an operative and disastrous power. The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold…"*

142. It has been recognised in the case law that there can be more than one proximate cause of an event. Much of the relevant case law to that effect is analysed by Black J. in the Supreme Court in the *Ashworth* case. The decision of the Court of Appeal of England & Wales in *Miss Jay Jay* (i.e. *J.J. Lloyd Instruments Ltd v. Northern Star Insurance Co. Ltd* [1987] 1 Lloyd's Rep. 32) is a useful illustration of the application of this principle. That case concerned damage suffered by a yacht which had crossed from England to France. The weather during that journey was quite brisk with winds of about force 5 on the Beaufort scale. On the return voyage, the weather and sea conditions were different. The wind was less at about force 4 but the sea conditions were bad with waves of approximately three metres in height which created difficulty for the yacht. In the Seine estuary in the course of the return

voyage, the yacht suffered a cracked hull. The owners of the yacht made a claim under the policy which provided cover for damage done by *"external accident"*. In the High Court, a finding was made that the sea conditions were bad but not exceptionally so; that there were defects in design and construction which made the vessel unseaworthy for a passage from France to England but that the vessel would have been able to survive the voyage if the sea conditions had been normal. A finding was made that both the defects in design and the weather conditions were proximate causes of the damage done to the yacht and that, since there was no exclusion in relation to defective design, the owners of the yacht were entitled to recover under the policy. That decision was upheld by the Court of Appeal. At pp. 39-40, Slade L.J. explained the position as follows:-

> *"As Lord Shaw… said in Leyland Shipping Co Ltd v. Norwich Union Fire Insurance Society Ltd… at p 369:*
>
> > *"The cause which is truly proximate is that which is proximate in efficiency…".*
>
> [The High Court] *found as facts… that (a) the sea conditions encountered by the vessel were "markedly worse than average but not so bad as to be exceptional"; (b) the vessel was in such a condition by reason of defects in design and construction as to be unseaworthy for a passage from Deauville to Hamble; (c) a boat of its size and configuration, complying with the description set out in the manufacturers brochure would, if properly designed and built, have made the relevant voyage in the conditions actually encountered without suffering damage; (d) nevertheless, the vessel would have been able to survive the voyage if the sea conditions had been no worse than average.*

In the light of findings (a) and (d) I think it clear on any common sense view that the sea conditions at the relevant time must be regarded as at least a cause, whether or not the proximate cause, of the damage to the yacht… However, in the light of the findings (b) and (c), I think it no less clear that the faulty design and construction of the boat must also be regarded as at least a cause, whether or not the proximate cause of the damage. On a common sense view of the facts both these two causes were, in my opinion, equal, or at least nearly equal, in their efficiency in bringing about the damage…

…since the… policy contains no relevant exception relating to loss caused by unseaworthiness of the vessel… the legal position… is stated thus in Halsbury's Laws of England… Vol. 25 par. 181…:

> *"It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy; the assured will be entitled to recover.""*

143. The fact that there can be more than one proximate cause of an insured loss is potentially relevant to the argument made by counsel for the plaintiff that the closure of 15th March, 2020 and subsequent measures were intended to address both the known and unknown consequences of COVID-19. In effect, the plaintiff's argument is that each of the known and unknown consequences of COVID-19 should be treated as concurrent proximate causes of the Government ordered closure. There can be no doubt but that the measures taken by the Government were intended to address the harmful effects of COVID-19. To that extent, the argument advanced by counsel for the plaintiff is correct. But that does not mean that each of the harmful effects of COVID-19 can be treated as a proximate cause each acting

concurrently to cause the Government to take the measures which it did. This is especially so in respect of an effect of the disease (assuming acute encephalitis to be a possible effect) which was not postulated in the context of COVID-19 at the time the measures were taken. It is clear from the relevant records that the measures were taken to assist in slowing or preventing the spread of COVID-19 as a disease which was known to be damaging to humans and to have the potential to overwhelm the health service. In enacting the measures which affected the plaintiff's business, there is no evidence that the Government had in mind any particular aspect or *sequela* of COVID-19 other than its overall impact and its alarming level of transmissibility. In particular, there is no evidence that the measures imposed by the Government were prompted by any concern about inflammation of the brain or of the central nervous system. The overwhelming evidence is that the measures taken by the Government were prompted by a general concern about COVID-19 and its transmissibility. Moreover, even on the assumption that acute encephalitis is a possible complication of a COVID-19 infection, its suspected incidence is so rare as to make it extremely unlikely that the Government would impose such extensive and intrusive restrictions as those imposed in March and April, 2020 in order to deal with a very rare complication of COVID-19. Thus, even on the assumption that acute encephalitis is a possible incident of the COVID-19 infection, it is impossible, in my view, to conclude that acute encephalitis was a cause, let alone a proximate cause, of the measures taken by the Government in 2020.

144. Furthermore, it is wrong, in my view, to focus exclusively on the cause of the measures taken by the Government. Such measures are not the focus of para. 1 of the MSDE clause. It is critically important to keep in mind the language of para. 1 of the MSDE clause and the nature of the insured peril under that clause. The plaintiff can only succeed to the extent that its losses were proximately caused by an insured peril. As noted previously, unlike the clause considered in the *FBD* case, para. 1 of the MSDE clause is not triggered by a

Government imposed closure. Such an imposed closure forms no part of the insured peril. Instead, the clause only provides cover in respect of business interruption which arises as a result of the occurrence of acute encephalitis (or one of the other conditions specifically listed) manifested by a person at the hotel or within the relevant 25-mile radius. In the context of the plaintiff's case based on acute encephalitis, the insured peril is plainly the occurrence of such encephalitis manifested by a person at the hotel or within a 25-mile radius. As explained by the UK Supreme Court in the *FCA* case, occurrence, in the case of a disease, means each case of illness sustained by an individual. Thus, on the terms of the clause in issue, if the plaintiff could prove that it suffered an interruption to its business which was proximately caused by one or more cases of acute encephalitis manifested either at the hotel or within a 25-mile radius, it would be entitled to cover under the policy.

145. However, as outlined in para. 105 above, on the basis of the evidence, I have found, as a fact, that there was no incident of acute encephalitis reported as a consequence of a COVID-19 infection in Ireland in 2020. The fact that no such case has been reported is particularly important in light of the language of para. 1 of the MSDE clause which requires that the condition (in this case acute encephalitis) be *"**manifested** by* any *person whilst at the premises or within a 25 mile radius of it"* (emphasis added). That word *"manifested"* is important. The Shorter Oxford Dictionary, Vol. 1, at p. 1691 gives the following relevant definition of the verb manifest: *"Make evident to the eye …; show plainly, reveal, display … by action …, evince; be evidence of…".* Those dictionary definitions are consistent with the way in which the word *"manifested"* would ordinarily be understood. There is nothing in the language of para. 1 of the MSDE clause or the policy as a whole that suggests that *"manifested"* should be given some different meaning. Nor is there anything in the relevant context which would suggest that a different meaning should be given to the word. The fundamental problem facing the plaintiff, in the context of para. 1 of the MSDE clause, is that

there is no evidence of a manifestation of acute encephalitis which is thought to be associated with COVID-19 or the underlying SARS-Cov-2 virus anywhere in Ireland prior to the closure of the hotel.

146. In the circumstances, there is no evidential basis upon which to form the view that the interruption of to business of the hotel or the Octagon Bar was caused by any occurrence of acute encephalitis manifested in that way. It follows that there is no basis in this case to conclude that the interruption to the business arose as a result of acute encephalitis. While the plaintiff has suggested that it might be possible for it to demonstrate, in the course of the next module of the hearing, that a case of acute encephalitis had arisen within the 25-mile radius in advance of the Government measures taken in March and April 2020, it seems to me to be impossible to establish by reference to such retrospective evidence that the plaintiff's loss of business arose as a consequence of the manifestation of acute encephalitis. If there was no reported case of acute encephalitis prior to the closure in March 2020, I can see no basis on which the plaintiff can prove that a case was manifested prior to that date or that the closure of the hotel arose as a consequence of the manifestation of such a case. Bearing in mind the meaning of the word *"manifested"*, it would be impossible to hold, in the context of the requirement of proximate causation, that the closure occurred as a consequence of the manifestation of something that was unreported and unknown at the time of the closure. For para. 1 of the MSDE clause to apply, the interference with the business of the hotel must be shown to have been proximately caused by at least one case of acute encephalitis which was manifested by a person prior to its closure. If no one was aware of such a case at the time of the closure, no case could be said to have been manifested. Accordingly, I fail to see how the proximate cause test can be said to have been met. In the absence of knowledge of the occurrence of the case, the link between the closure and that occurrence could not be shown.

The judgment of Cockerill J. in *Rockliffe Hall Limited*

147. Subsequent to reserving judgment in this case on 22nd January, 2021, the parties drew my attention to the decision of Cockerill J. in *Rockliffe Hall Ltd v. Travelers Insurance Company Ltd* [2021] EWHC 412 (Comm) delivered on 11th February, 2021. The potential impact of this judgment was addressed by the parties in supplemental written submissions delivered on 11th March, 2021. In that case, the plaintiff's hotel in Co. Durham was insured under a policy issued by Travelers Insurance. The hotel had to close following Government restrictions introduced in the UK. Extension 10 of the business interruption section of the Travelers policy provided cover in respect of interruption or interference with the hotel business in consequence of *"Infectious Disease manifested by any person whilst at the Business Premises which results in closure… by the order of an appropriate competent authority…* [or] *An outbreak of an Infectious Disease within 10 miles of the Business Premises…"*. The term *"Infectious Diseases"* was defined in the policy by reference to a specific list which included acute encephalitis and also meningitis. The list did not include COVID-19. The plaintiff claimed an indemnity from Travelers under the policy. Its case was expressly pleaded on the basis that the business interruption had been caused by outbreaks of COVID-19. The insurers applied for summary dismissal of the proceedings under the Civil Procedure Rules applicable in England & Wales on the basis that the infectious disease extension did not, on its proper construction, cover losses resulting from COVID-19. In response, the plaintiff submitted that it would be wrong to dismiss the proceedings and argued (*inter alia*) that its case had a real prospect of success on the basis that there was evidence that encephalitis and meningitis were conditions associated with and/or caused by COVID-19. On the basis of the case as pleaded, Cockerill J. concluded that this argument was not open to the insured which had specifically pleaded that its losses were caused by COVID-19. In contrast, in the present case, the plaintiff argues that it has not pleaded its case in the same way and that instead it has claimed to be entitled to an indemnity under the policy

as a consequence of the Government advice of 15th March, 2020 and the subsequent regulations which were enacted. The plaintiff also stresses that the clause in issue in *Rockcliffe Hall* was expressed in different terms to para. 1 of the MSDE clause in the AXA policy. In addition, the plaintiff has reiterated in its supplemental submissions, the argument that what is in issue here is a *"composite causality"*. Citing paras. 201 -202 of the judgment in the *FBD* case, the plaintiff submits that, if an insured peril is an inseparable component of an overall cause of loss, then *"it will constitute the proximate or efficient cause of that loss even where there are several other parallel causes of that loss"*. For the reasons previously addressed in para. 143 above, I do not believe that this submission is sound.

148. With regard to the pleading point made by the plaintiff here, it is important to note that, in the *Rockliffe Hall* case, Cockerill J. came to the conclusion that, in any event, even if the case had been pleaded differently, the plaintiff could not succeed. At paras. 71 to 75 of her judgment, Cockerill J. said:-

> *"71. There are two possible approaches to this argument, but both of them are plainly defective, essentially for the same reason: that SARS-CoV-2 may cause acute encephalitis or meningitis is not the same as saying that either are synonyms for or forms of Covid-19 (even assuming acute encephalitis or meningitis were recognised symptoms or complications of Covid-19, which remains to be shown).*
>
> *72. The first approach would be to contend that Covid-19 is a form of meningitis or acute encephalitis, such that a diagnosis of Covid-19 is in fact a diagnosis of encephalitis and/or meningitis. That is not a tenable construction of the words. The reasonable person in the position of the parties would not understand these diseases to refer to Covid-19, which is a new disease*

(discovered after the Policy incepted), with a different name and commonly associated with entirely different main symptoms, definition and categorisation. If Covid-19 results in encephalitis or meningitis it plainly only does so in a small minority of cases. It would be an Alice in Wonderland approach to call Covid-19 "encephalitis" or "meningitis".

73. …

74. The second approach is arguing that any manifestation of Covid-19 in the form of another covered peril means that this is to be taken as the actual causative peril. This was really the essence of the case being run. But it is plainly wrong simply as a matter of logic and language. Without getting into factual questions of causation, which I accept would be for another day, it is clear that the purpose of the list is to identify the specific diseases (albeit sometimes ones which can have more than one cause) which, if there is an outbreak of them which causes loss, are covered.

75. In order for either of these diseases/conditions to have "an outbreak" within a 10-mile radius…, there would have to be a manifestation of actual and diagnosed cases of those diseases. There is no suggestion of any such thing; and indeed the pleaded case reflects the obvious fact that what has brought businesses across this country to a standstill is an outbreak of Covid-19. Covid-19 is what on any analysis and the pleaded case caused the closure. It is not either of the diseases/conditions relied on by Rockliffe Hall."

149. As the plaintiff has highlighted, there are obvious differences between the way in which the *Rockliffe Hall* case was argued and pleaded and the case made by the plaintiff here. There are also differences in the language of the relevant policy provisions. However, the point made by Cockerill J. in para. 75 of her judgment resonates here too. The problem for the plaintiff is that, in the absence of a report of at least one case of acute encephalitis manifested within a 25-mile radius of the hotel prior to any of the events leading to its closure, there is simply no basis to find that the interference with its business has been proximately caused by a case of acute encephalitis within that radius. In the circumstances, I can see no scope for the application of para. 1 of the MSDE clause. Accordingly, my response to the question posed in para. 46 above is that, in my view, para. 1 of the MSDE clause is of no assistance to the plaintiff in the context of the loss of business suffered by it as a consequence of the restrictions introduced in response to the COVID-19 pandemic.

Does COVID-19 constitute a "*defect in the drains or sanitary arrangement at the premises*" within the meaning of the MSDE clause?

150. This question is posed in the context of para. 5 of the MSDE clause. Read on its own, para. 5 provides as follows:-

> *"5. The closing of the whole or part of the* ***premises*** *by order of the public authority as a result of a defect in the drains or other sanitary arrangements at the* ***premises****."* (bold in original)

151. It is obvious that some words are missing from para. 5. The intention of the clause is clearly to provide cover in respect of business interruption arising from the closing of the whole or part of the premises. This is one of those cases where it is obvious that something has gone wrong with the language used in the policy and, in accordance with the principles outlined by Lord Hoffmann in the *Investor Compensation* case (as summarised in para. 110 (f) above), it is necessary to construe para. 5 in a manner which gives effect to the intention

of the parties. In my view, it is clear that para. 5 was intended to provide cover in respect of business interruption as a result of the closing of the premises (or a part of the premises) by order of *"the public authority"* as a result of a defect in the drains or other sanitary arrangements at the premises. I will proceed to consider the question posed on that basis.

152. As outlined earlier, the case made by the plaintiff is as follows:-

(a) The plaintiff contends that the inability of the hotel to implement social distancing is a defect in the sanitary arrangements at the hotel;

(b) That failure, in turn, led to the closure imposed by the Government on 15th March, 2020 as reinforced by the subsequent 2020 Regulations enacted in April, 2020;

(c) Insofar as the involvement of a *"public authority"* is concerned, it was argued on behalf of the plaintiff that this language is resonant of the language that might be used in a policy of insurance governed by English law. It was accordingly submitted on behalf of the plaintiff that *"public authority"* should be interpreted broadly to include the Government, the Oireachtas, An Garda Síochána, NPHET (which it was suggested is made up of representatives of statutory bodies);

(d) The closure required as a consequence of the announcement made by the Taoiseach on 15th March, 2020 and the subsequent regulations caused an interruption to the plaintiff's business.

153. In that way, the plaintiff contends that each element of para. 5 of the MSDE clause has been satisfied in this case and, on that basis, the plaintiff claims to be entitled to be indemnified by AXA under the policy.

154. In response, counsel for AXA urged that the court should construe the reference to *"sanitary arrangements"* in the context of the adjoining reference to the *"drains"*. Counsel

relied on the maxims or canons of construction known in Latin as *ejusdem generis* (of the same kind) and *noscitur a sociis* (known by its associates). Counsel relied, in this context, on the observations made by the Divisional Court, at first instance, in the *FCA* case [2020] EWHC 2448 (Comm) at para. 68 to 69, where the court said:-

> *"68. …if a clause in an insurance policy covers, or excludes, the risk of damage to a number of items, it is likely that the words used denote things of the same genus (ejusdem generis), and each word can take its meaning from the words with which it is linked or surrounded (noscitur a sociis). In Watchorn v. Langford (1813) 170 ER 1432, the insurance policy covered "stock in trade, household furniture, linen, wearing apparel and plate". When the insured's linen drapery goods were destroyed in a fire, the House of Lords held that the policy did not respond because the reference to "linen" must have been to household linen or linen in clothing, rather than drapery.*
>
> *69. A more recent illustration can be seen in Tektrol Ltd… v. International Insurance Co of Hanover Ltd… [2006] 1 All ER (Comm) 780 where an insurance policy excluded liability for "erasure loss distortion or corruption of information on computer systems".* [The court] *…noted that "loss" in this context was a reference to loss by electronic means, rather than the burglary of a computer, citing the maxim noscitur a sociis…"*

155. The Divisional Court cautioned, however, in para. 70 of its judgment that the principle of *noscitur a sociis* is one which only operates if there can be said to be a common characteristic of the surrounding words and it is a principle which must, in any event, give way if the particular words, or other features of the contract, so dictate.

156. Counsel for the plaintiff also relied on the approach taken by O'Donnell J. in *ICDL GCC Foundation v. The European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327. In that case, an issue arose as to what was meant by a contractual requirement that the plaintiff should obtain at its own expense *"all licences, permits and consents necessary for it to carry on its business"* in Saudi Arabia. Applying the *noscitur a sociis* principles, O'Donnell J., at p. 379, concluded that the word *"consent"* was intended to be akin to a permit or licence, both of which connote a legal rather than a commercial or practical requirement.

157. In the course of the hearing, I raised with counsel for AXA whether it was possible to apply either of the maxims *ejusdem generis* or *noscitur a sociis* where para. 5 simply refers to one specific item (namely a defect in the drains) before using the words *"or other sanitary arrangements"*. In contrast, the clause in issue in the *ICDL* case referred to a group or genus made up of three relevant words. I drew to the attention of counsel the decision of the Supreme Court (albeit in the context of statutory interpretation) in *Royal Dublin Society v. Revenue Commissioners* [2000] 1 I.R. 270. In that case, an issue arose as to whether the *ejusdem generis* maxim could be applied in the context of s. 7 of the Excise Act, 1835 under which a licence for the sale of intoxicating liquor could be granted to *"any theatre or other place of public entertainment…"*. The issue which arose in that case was whether the Simmonscourt Pavilion at the RDS premises in Ballsbridge in Dublin could be considered to be a place of public entertainment within the meaning of s. 7 of the 1835 Act. The High Court had held, applying the *ejusdem generis* maxim in its interpretation of the provision, that the Pavilion did not have the characteristics associated with a theatre and, in those circumstances, had upheld the decision of the respondents to refuse a theatre licence to the applicant. This decision was overturned by the Supreme Court which held that there was no scope for the application of the *ejusdem generis* principle. In taking this course, Keane J. (as he then was)

referred to the decision of Asquith J. in *Allen v. Emmerson* [1944] KB 362 in which the court had noted that no case had been cited to establish that, in contrast to cases where a number of classes are enumerated, a genus could be said to exist by the mention of a single class only (in that case, theatres) followed by the reference to other places of public entertainment. In that case, Asquith J. concluded that a funfair was a *"place of public entertainment"* notwithstanding that those words were prefaced by a single reference to *"theatres"*. In the *Royal Dublin Society* case, the Supreme Court followed and applied the decision in *Allen v. Emmerson* and held that the Simmonscourt Pavilion (although it did not operate in the same way as a theatre) should be considered to be a place of public entertainment for the purposes of s. 7 of the 1835 Act. Nonetheless, it is clear from the judgment of Keane J. that issues of interpretation of this kind are not to be approached in an overly prescriptive way. At p. 282, he cited the following statement in *Bennion on Statutory Interpretation* (2nd Ed.) 1992, at pp. 860:-

> *"(1) For the ejusdem generis principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore the genus must be narrower than the general words it is said to regulate.*
>
> *(2) The nature of the genus is gathered by implication from the express words which suggest it… Usually these consist of a list or string of substantives or adjectives…*
>
> *The ejusdem generis principle may apply where one term only establishes the genus, though in such cases the presumption favouring the principle is weakened because of the difficulty of discerning a genus… a rule that two or*

> *more genus-describing words are always required would be too rigid. The question is invariably one of the intention conveyed by the entirety of the passage, and there can be no absolute rule… It is true that the mention of one genus describing term only may make it more difficult to arrive at the nature of the genus…"*

158. Although that passage was cited in the context of statutory interpretation rather than contractual interpretation, the principle seems to me to be consistent with the approach which is taken in the context of contractual interpretation. It is consistent, for example, with the commentary on the *ejusdem generis* principle described by Lewison in *"The Interpretation of Contracts"* (6th Ed.) at para. 7.13. Accordingly, if there were a number of specific items mentioned of a similar nature to drains, it would provide a stronger indication that the reference to *"other sanitary arrangements"* was intended to be read as referring to arrangements of a similar nature to drains. Where *"drains"* is the only specific item enumerated in para. 5 of the MSDE clause, there is less reason to suppose that sanitary arrangements were intended to be narrowly confined in the manner suggested by AXA. That said, drains are an inherent part of the immediate context of para. 5 and the reference to drains must, therefore, be kept in mind in seeking to understand what was intended by the reference to sanitary arrangements.

159. Counsel for AXA sought to bolster his submission by reference to the statutory context. He referred, in this regard, to the Public Health (Ireland) Act, 1878 and, in particular, to s. 17 of that Act which required every sanitary authority to keep in repair *"all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act"*. I agree that the statutory background is part of the relevant context against which the AXA policy is to be construed. The judgment of O'Donnell J. in the *MIBI* case makes that clear. However, I am not

persuaded that the 1878 Act is of significant relevance. That Act and the Public Health Acts which followed it primarily imposed obligations on sanitary authorities and counsel for AXA did not identify any provision of the Public Health Acts which empowers a public authority to issue a closure order to hotel premises as a consequence of a defect in drains or related arrangements. In this context, it seems to me to be crucial to bear in mind that para. 5 of the MSDE clause is directed at circumstances in which a public authority is empowered to issue a closure order in respect of premises as a consequence of a defect in the drains or other sanitary arrangements. For that reason, the 1878 Act appears to me to be beside the point. There are, however, a range of other statutory provisions which would permit the closure of a hotel or bar serving food on public health grounds. These include, for example, the power available to authorised officers under s. 53 of the Food Safety Authority of Ireland Act, 1998 ("*the 1998 Act*") to issue a closure order where an authorised officer is of the opinion that there is or is likely to be a grave and immediate danger to public health. Similar powers were also available, at the time the policy was put in place, under Regulation 19 of the European Communities (Official Control of Foodstuffs) Regulations, 2010 (S.I. No. 117 of 2010) ("*the 2010 Regulations*") (which have since been replaced by new regulations enacted in March, 2020) under which an authorised officer can serve a closure order on a food business operator where there has been any failure to comply with any provision of food legislation (which includes a whole range of legislation including Regulation (EC) No. 178/2002 and Regulation (EC) No. 882/2004 under which extensive obligations are placed on food business operators).

160. Significantly, Regulation 17 of the 2010 Regulations expressly empowers the Food Safety Authority of Ireland to impose *"sanitation procedures or any other action deemed necessary, on a food business operator in order to ensure the safety of food or compliance with food legislation"*. Thus, the 2010 Regulations expressly have in mind sanitary

arrangements which may be relevant to the carrying on of a food business service by a hotel or restaurant or bar. It is also significant that, under s. 52(1) of the 1998 Act, an authorised officer may serve an improvement notice on the owner of premises involved in the handling or preparation of food where the condition of the premises is *"of such a nature that, if it persists, it will or is likely to pose a risk to public health"*. Section 52(1) expressly envisages that, in any such notice, the authorised officer should specify the *"activity **or defect in the premises**... giving rise to the risk"* (emphasis added).

161. It is clear from these provisions of food hygiene and safety law that, in the context of a hotel or a bar serving food, there are relevant provisions which are capable of resulting in a closure order in the event that the sanitary arrangements employed in the premises for the handling or service of food are defective. Given that fact and given the relatively weak basis to consider that the use of the word *"drains"* should be construed as a *genus*, there is no good reason, in my view, to confine the reference to *"sanitary arrangements"* in para. 5 of the MSDE clause to arrangements in the nature of drains or other infrastructure put in place for the disposal of waste water. As the discussion in paras. 159 to 160 above illustrates, in the context of the hotel and the bar sectors, there are relevant sanitary requirements applicable to them which are not focused solely on drains or related utilities.

162. That does not, however, necessarily mean that para. 5 of the MSDE clause is engaged on the facts of this case. At this point, it is important to recall the case which the plaintiff seeks to make for the application of para. 5. In the written submissions delivered on behalf of the plaintiff, it is asserted that the inability to facilitate effective social distancing on the premises:-

> *"was probably, in and of itself, a defect in the sanitary arrangements. COVID-19 is... spread by physical contact between individuals and with surfaces which have been touched by infected individuals – and the prevailing view in March 2020 was that*

there was no way of adequately ensuring that cleaning and precautions such as glove and mask-wearing would alleviate these defects in sanitary arrangements – albeit defects that had arisen through no fault of the operators of those arrangements."

163. In addition, the plaintiff relied on the observations made by Prof. Moynagh to the effect that *"sanitary arrangements"* referred to conditions affecting health, including precautions against disease. Prof. Moynagh said:-

> *"The first locations for public health information about COVID-19 included washing facilities. Closure of the premises was undoubtedly due to a number of factors, including the inability to put "other sanitary arrangements" in place that would suppress the above transmission patterns and dynamics and so would act as a high risk for transmission of SAR-CoV-2 and COVID-19. In my opinion, it is the case that the closure was linked at least in part to the "sanitary arrangements" and their inability to suppress transmission of the virus to a level acceptable to the public authority."*

While I do not believe that this evidence given by a medical expert such as Prof. Moynagh as to the possible meaning to be given to the expression *"sanitary arrangements"* can be said to be probative in the context of the interpretation of an insurance policy, the plaintiff is entitled, as part of the legal submissions made by its counsel, to advance an argument in similar terms as to the meaning which it suggests should be attributed to para. 5 of the MSDE clause. Ultimately, the plaintiff's submission appears to boil down to the contention that the inability to facilitate effective social distancing on the premises was a defect in the sanitary arrangements. Although Prof. Moynagh went somewhat further in his reference to washing facilities, he did not actually identify any defect in such facilities and, under cross-examination, conceded that he knew nothing about the arrangements that were in place at the hotel either prior to or subsequent to 15th March, 2020.

164. It, therefore, seems to me that the question boils down to whether or not an inability to enforce social distancing could be said to constitute a defect in the sanitary arrangements at the premises. In this context, as the judgment of O'Donnell J. in the *MIBI* case shows, it is wrong to approach the interpretation of a contractual dispute through the prism of the dispute between the parties. The judgment in the *MIBI* case also makes clear that it is essential to consider the meaning of a contractual provision as of the date when the contract was concluded. The question, accordingly, is whether a reasonable person, in the position of the parties at the time the contract was concluded, would understand that the reference to *"a defect in the… other sanitary arrangements at the premises"* was intended to capture an inability to ensure that appropriate social distancing was maintained between customers of the hotel or the hotel bar.

165. It is important to keep in mind that the AXA policy in issue was put in place in April, 2019. At that point, COVID-19 had not been heard of. However, the concept of social or physical distancing was not completely unprecedented. It was, for example, practised since ancient times in the case of leprosy. Nonetheless, the concept was not commonly known and had not been part of common experience in Ireland in living memory. In those circumstances, I have to question whether the practice of social distancing or physical distancing could be said to have been reasonably known to reasonable people in the position of the parties to the AXA policy at the time the policy was put in place in April, 2019.

166. Even if one were to take the view that social distancing was reasonably known as a concept in 2019, I find it difficult to accept that a reasonable person in April, 2019 would have characterised the practice of social distancing or physical distancing as a *"sanitary arrangement"*. Again, it is important to consider the meaning of those words in context and to keep in mind that para. 5 is directed at defects in sanitary arrangements which could lead to the closure of premises by a public authority. I was not referred to any statutory or regulatory

provision dealing with any aspect of sanitary conditions that would have permitted a public authority, at the time the policy was put in place in April 2019, to close premises by reason of an inability to enforce social distancing. In those circumstances, I find it very difficult to accept that a reasonable person, in April, 2019, would have considered that the phrase *"a defect in… other sanitary arrangements"* would cover such an eventuality. Even on the assumption that it could, no one has identified what is alleged to have been the defect in the relevant arrangements at the hotel. A defect inherently involves some element of deficiency or fault. One can see, for example, how a deficiency in hygiene standards could lead to a closure order being imposed for public health and safety reasons – especially where food preparation or service is concerned. However, no equivalent deficiency has been identified here in the context of social or physical distancing. Although the announcement of 15th March, 2020 refers to *"reckless behaviour by some members of the public in certain pubs last night"*, there is no suggestion in the terms of the Taoiseach's announcement on that day that there was any deficiency on the part of the owners of bars generally. On the contrary, the statement expressly acknowledged that the majority of the public and the majority of pub owners were behaving responsibly. The closure required by that announcement was plainly prompted not by any deficiency but by the fact that, as the advice of 15th March 2020 expressly recognises, public houses are *"specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions"*. That can hardly be considered to be a defect since that is an inherent aspect of the concept of a public bar. The very fact that the measure applied to all bars reinforces the conclusion that there was no defect in the sanitary arrangements in any bar in particular. Likewise, when it came to enacting the 2020 Regulations, there is no suggestion that these regulations were designed to address defects in sanitary arrangements at hotels or bars. On the contrary, it is quite clear from the recitals to the 2020 Regulations that they were enacted solely for the purposes of addressing the

"immediate, exceptional and manifest risk posed to human life and public health" by the spread of COVID-19. There is nothing to suggest that the 2020 Regulations were prompted by concerns about the existence of defects in any arrangements. They were designed, instead, to address the spread of COVID-19 and the need to close down all services other than essential services for that purpose. Accordingly, I cannot see any basis upon which it can be said that para. 5 of the MSDE clause can be said to apply in this case.

Is para. 5 of the MSDE clause triggered solely by a premises specific order of a public authority?

167. In light of my conclusion in relation to the previous question, it is unnecessary to determine whether para. 5 of the MSDE clause is intended to address an order directed solely at the individual hotel premises rather than at all hotels or all bars in general. However, were it necessary to decide that question, it seems to me, from a consideration of the language used in para. 5 as a whole, that it is designed to deal with a closure of the Clarence Hotel specifically rather than with a closure of hotel premises throughout the country as part of a general measure closing hotels or bars. The language of para. 5 of the MSDE clause is specific to the premises. It refers to an order of the public authority closing the whole or part of the premises *"as a result of a defect in the drains or other sanitary arrangements **at the premises**"* (emphasis added). Those words *"at the premises"* are also to be found in paras. 2 and 3 of the MSDE clause where they are clearly used in a premises specific sense. The inclusion of the word's *"at the premises"* strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an

order directed at the particular defect found at the premises. This suggests that the order will be a premises specific one.

168. For all of these reasons, I have come to the conclusion that para. 5 of the MSDE clause will only apply where there is a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises.

<u>For the purposes of the denial of access clause, what constitutes an interruption of or interference with the business?</u>

169. The opening paragraph of this clause provides that AXA will cover the plaintiff *"for any loss insured by this section resulting from interruption of or interference with the* ***business*** *where access to* ***your premises*** *is restricted or hindered for more than 24 hours"* (bold in original) arising directly from one of two circumstances as outlined in the next two following paragraphs. The meaning of the words *"restricted or hindered"* is considered further below. At this point, what I am asked to consider is the meaning of the words *"interruption of or interference with"* the business. This is very broad language. It is broader, for example, than the equivalent clause in the Hiscox policy considered by the UK Supreme Court in the *FCA* case. There, the policy simply referred to *"interruption"*. Hiscox argued that the term *"interruption"* means a stop or break and is different from *"interference"* which refers to circumstances where something continues but cannot be carried on properly. This argument was rejected by the UK Supreme Court. At para. 158, Lords Hamblen and Leggatt said:-

> *"158. We reject these arguments. The ordinary meaning of "interruption" is quite capable of encompassing interference or disruption which does not bring about a complete cessation of business or activities, and which may even be*

> *slight (although it will only be relevant if it has a material effect on the financial performance of the business) …"*

170. I entirely agree with the approach taken in the *FCA* case. Moreover, the policy terms here are wider and expressly extend not just to interruption of the business but also interference with the business. Thus, a material effect on the plaintiff's business resulting from circumstances which prevent the business from being carried on normally would be sufficient to trigger cover under the policy provided, of course, the interference or interruption arose as a consequence of one or other of the circumstances giving rise to cover under the denial of access clause.

Does COVID-19 constitute a *"danger or disturbance"* within the meaning of the denial of access clause?

171. The denial of access clause covers business interruption or interference where access to the hotel is restricted or hindered for more than 24 hours *"arising directly from … the actions taken by the police or any other statutory body in response to a danger or disturbance at* [the hotel] *or within a 1 mile radius…"*. The plaintiff makes the straightforward point that the spread of COVID-19 constitutes a danger. In response, AXA submits that the term *"danger"* gains colour from its juxtaposition with the word *"disturbance"* and it also contends that the overall phrase *"a danger or disturbance"* connotes, in the context of this clause, an incident which is local to the premises rather than a nationwide danger. AXA maintains that the term *"danger"* is qualified by the later phrase *"at your premises or within a one mile radius of your premises"*. Again, in this context, it is submitted on behalf of AXA that this connotes some hazard which occurs at, or very near, the hotel, rather than a nationwide danger. AXA also relied upon a number of passages in the judgment of the Divisional Court in the *FCA* case (outlined in paras. 172 to 175 below) in

which the Divisional Court considered similar clauses. Notably, these aspects of the judgment of the Divisional Court were not subsequently appealed to the UK Supreme Court.

172. In the course of its judgment, the Divisional Court considered the origin of a clause of this kind which the court characterised as an *"action of competent authorities clause"* or AOCA clause in short. At para. 489, the court referred to its origin in the following terms:-

> *"489. Like Mr Kealey QC before him, Mr Orr QC submitted that the paradigm case contemplated by the AOCA clause is a bomb scare, a brawl or a serious traffic accident, in response to which the police or other relevant authority takes action which prevents access to the insured premises, that is shuts off access for all purposes because access to the premises is unsafe or needs to be kept clear for the emergency services or police investigations. As Riley on Business Interruption Insurance 10th edition at* [para.] *10.34 explains, these types of AOCA extensions arose out of terrorist activity in the UK in the 1980s and 1990s which involved devices that did not explode, not just those that did, so that traditional business interruption cover contingent on property damage did not respond."*

173. The view expressed by the Divisional Court is consistent with the evidence given by Mr. Mills in this case on behalf of the plaintiff. In the course of his direct examination, he was asked about the purpose of a denial of access (non-damage) clause in the insurance industry. His response was as follows:-

> *"Okay, probably… it originates from the industrial side and the original way it was envisioned is that you're in a facility, you're in a space or an area where there's multiple manufacturing facilities, one manufacturing facility suffers a loss, effectively, or a fire or an explosion, whatever it may be, which renders the access to your building or your premises and your ability to conduct business… impossible. And if*

that delay – if that access is denied for longer than the specified waiting period – in the case of this policy, 24 hours – then that insurance, it is a covered claim against this policy."

174. The Divisional Court also addressed whether the COVID-19 pandemic could be considered to be a *"danger"* within the meaning of a number of AOCA clauses in issue in that case. At paras. 431 to 437, the Court dealt with the MSA 1 policy which contained an AOCA clause which referred to government action *"following a danger or disturbance in the vicinity of the premises"*. At paras. 436 to 437, the court rejected the case made by the FCA that the reference to *"danger"* encompassed the COVID-19 pandemic experienced at a countrywide basis. The court said:-

"436. …In our judgment, Mr Kealey QC is right that these words demonstrate that the cover under this clause is a narrow, localised form of cover. The paradigm example of what is covered, as he submitted, is the bomb scare or gas leak in the vicinity or neighbourhood of the premises which causes the authorities (whether the police or the army in those examples), exercising statutory powers, to evacuate insured premises and require policyholders and their employees and customers not to access the premises. We do consider that the undefined term "vicinity" does have a local connotation of the neighbourhood of the premises. What that constitutes may depend on the nature of the danger or disturbance and the particular facts of the case, but, contrary to [the submissions of counsel for the FCA]*, we do not consider that the entire country can be described as in the vicinity of the insured premises…*

437. Even if there were a total closure of insured premises pursuant to the Regulations, there could only be cover if the insured could demonstrate that it

> *was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to in the country as a whole, which led to the action of the government in imposing the Regulations…"*

175. At paras. 479 to 491, the court also addressed an AOCA clause in a Zurich policy which referred to *"Action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises…"*. At para. 484, the court noted the argument made by counsel for the FCA to the effect that, if the word *"danger"* is given its ordinary and natural meaning, a disease such as COVID-19 is *"plainly a danger"*. Although the court at para. 430 appeared to accept that a localised outbreak of an infectious disease such as measles was capable of constituting a danger, the FCA argument was nonetheless rejected by the court in light of the nationwide nature of the COVID-19 pandemic. As explained above, the court referred, at para. 489, to the origin of a clause of this kind. At paras. 490 to 500, the court continued, insofar as relevant, in the following terms:-

> *"490. Mr Orr QC submitted that since the clear objective intent of the AOCA clause was to provide cover in response to… a local incident, that was a very long way from a pandemic and government response nationally to it. If one were drafting an extension to apply to government measures in response to a pandemic, it would certainly not look like the AOCA extension and no reasonable reader could think that this extension covered the pandemic or the wholly unprecedented measures the government took in response.*
>
> *491. We have already noted… Mr Orr QC's submission that "a danger" does not encompass a national infectious disease pandemic, but rather a transient incident posing a risk of danger such as a bomb threat or fire. What is meant by "a danger" is given further colour by the words "or disturbance" which*

reinforce that the clause is contemplating an incident specific to the locality of the premises rather than a continuing countrywide state of affairs…

499. In relation to "danger…in the vicinity of the Premises" we agree with Mr Orr QC that this clearly indicates that this is narrow localised cover intended to cover dangers occurring in the locality of the insured's premises, of which the paradigm example is a bomb scare…

500. We also agree that the word "danger" gains some colour from its juxtaposition with "disturbance". The paradigm example of a "disturbance" in this context would be an affray or brawl. In our judgment "vicinity" although not defined, does have a local connotation of the neighbourhood of the premises. What that constitutes may depend on the nature of the danger or disturbance and the particular facts of the case, but, contrary to the FCA's submissions, we do not consider that the entire country can be described as in the "vicinity" of the insured premises. As Mr Orr QC correctly submitted, the overall phrase "a danger or disturbance in the vicinity of the Premises" contemplates an incident specific to the locality of the premises rather than a continuing countrywide state of affairs."

176. AXA urges that a similar approach should be taken here. It stresses in this context the similarity between the language of the denial of access clause in the AXA policy and several of the AOCA clauses considered in the *FCA* case. While the denial of access clause does not expressly refer to a danger or disturbance in the *"vicinity"* of the hotel, AXA contends that the clause carries the same message through the reference to the very narrow radius of one mile. AXA also relies on the historical origin of the clause as explained in the passages

quoted above and argues that the clause was not designed to address dangers posed by nationwide events such as a pandemic. For my part, while I acknowledge the force of the AXA submissions in relation to the construction of the clause, I would not place too much emphasis on the historical origin of the clause. While the nature of that origin could be said to have been reasonably available to the parties at the time the policy was put in place and to form part of the relevant factual context on that basis, the meaning to be given to the clause must also be assessed by reference to the terms of the policy as a whole and how the clause would be reasonably understood as of April 2019.

177. Quite apart from the considerations outlined above, AXA also relies on para. 4 of the list of matters which are not covered by the denial of access clause (quoted in para. 70 above). Paragraph 4 refers to notifiable diseases as detailed in the murder, suicide or disease cover. The effect of para. 4 is that there is no cover under the denial of access clause where the restriction on access to the hotel is caused by such a disease. In this context, there was a debate between the parties as to whether these matters should or should not be regarded as exclusions to cover. While AXA had, in the written submissions delivered on its behalf, expressly characterised para. 4 as an exclusion to cover, a different case was made in the course of the oral submissions of counsel for AXA. In the oral submissions, counsel for AXA sought to characterise para. 4 as a proviso or as a clarification as to the ambit of cover available under the denial of access clause. Counsel sought to distinguish paras. 1-5 of the list of matters which are not covered (again as quoted in para. 70 above) from the general policy exclusions which appears at pp. 8-9 of the policy and which counsel for AXA suggested were *"properly the exclusions"*.

178. While the full terms of the denial of access clause are set out in para. 70 above, it may be helpful to repeat the relevant paras. dealing with what is not covered here:-

*"**We** will not cover **you** where access to **your premises** is restricted or hindered as a result of*

*1. physical **damage** to property ...*

2. strikes, picketing, labour disturbances or trade disputes.

3. ...

4. notifiable diseases as detailed in the Murder suicide or disease cover

*5. actions where **you** have been given prior notice"* (bold in original).

179. The plaintiff argued that, if COVID-19 is not covered by the MSDE clause, *"it stands as a corollary that the fourth exclusion cannot and does not apply"*. The plaintiff maintained that para. 4 only excludes cover for those diseases that are listed in the MSDE clause. The plaintiff argued that this was to prevent double recovery under the policy. This argument was rejected by AXA. In the written submissions, AXA noted that the term *"notifiable diseases"* is not defined in the policy. That being so, AXA argued that the term should be interpreted by reference to its plain and ordinary meaning. As such, it argued that the term should be construed as meaning a disease, human or animal, the occurrence of which must be formally notified to the relevant authority. On the basis of the agreed facts, the parties accepted that COVID-19 was made a *"notifiable disease"* on 20th February, 2020. On that basis, AXA argued that para. 4 applied and that, accordingly, even if it could be said that COVID-19 otherwise represented a *"danger"* within the meaning of the denial of access clause, it was not covered under the clause.

180. AXA also rejected the plaintiff's contention that para. 4 is very specific in referring only to diseases that are detailed in the MSDE cover such that the term *"notifiable diseases"* should be understood as much broader than the closed list of diseases set out in the MSDE clause. AXA maintained that the intention plainly was that cover for any notifiable diseases (i.e. not just those specified in the MSDE clause) was to be excluded. AXA argued that it

would make no commercial sense that a notifiable disease, for which there was no cover under the MSDE clause, could be covered under the denial of access clause.

181. Counsel for AXA argued that the *"obvious intention"* of para. 4 is to make clear to an insured that, if there is a claim in respect of a notifiable disease, it will be dealt with under the MSDE clause and the question of whether there is cover will be determined in accordance with that clause and not the denial of access clause. Counsel submitted that it would not make any business sense to have, on the one hand, an MSDE clause which specifically lists the diseases in respect of which cover is provided, but, on the other hand, have a *"danger or disturbance"* clause which provides cover for diseases (such as COVID-19) which do not appear on the specific list of diseases for which cover is provided under the MSDE clause. Counsel for AXA submitted that it was not within the reasonable expectations of a policy holder to think that cover was being provided under the denial of access clause in respect of diseases that were not listed in the MSDE clause.

182. Having regard to the arguments of the parties, there are essentially two issues to be addressed in the context of the question posed in para. 50 above as to whether COVID-19 can be said to constitute a *"danger or disturbance"* within the meaning of the denial of access clause. The first issue that has to be decided is whether all notifiable diseases including COVID-19 are not within the ambit of the clause. The second issue relates to whether, if a notifiable disease such as COVID-19 is potentially within the ambit of the clause, a nationwide pandemic can be said to fall within the meaning of a *"danger or disturbance"*. I will address each of those issues in turn.

183. In so far as the first of those issues are concerned, it is also necessary to consider whether the provisions of para. 4 should be regarded as an *"exclusion"* from cover. If para. 4 constitutes such an exclusion, the principles identified by Geoghegan J. in *Analog Devices* (as summarised in para. 110 (i) above) will apply and AXA would have to show, if it wishes to

rely on para. 4, that the facts here clearly fall within the ambit of the exclusion clause. It also has to be borne in mind that, as explained in para. 110 (h) above, any ambiguity in a standard form contract of this kind which was prepared solely by AXA (without any input from the insured) will be construed *contra proferentem*. It is clear from the observations of Keane J. (as he then was) in the *Rohan Construction* case and from the judgment of Geoghegan J. in *Analog Devices* that the *contra proferentem* principle is capable of being invoked in the case of any clause in a contract of that kind where there is genuine ambiguity as to its meaning. The principle is not confined, under Irish law, to exclusion clauses.

184. I have come to the conclusion that para. 4 should be characterised as an exclusion clause. I have reached that conclusion for the following reasons:-

(a) In the first place, para. 4 is preceded by the words *"**we** will not cover **you** where access to **your premises** is restricted or hindered…"* (bold in original). There is no material difference between those words and the heading *"What is not covered"* on p. 52 of the policy. As noted in para. 63 above, page 2 of the policy makes clear that a heading in those terms is intended to signal an exclusion from cover.

(b) Secondly, para. 4 must be read in conjunction with paras. 1 to 5 (all of which come under the same heading). Paragraph 2 is particularly instructive in this context. It refers to *"strikes, picketing, labour disturbances or trade disputes"*. In my view, the reasonable reader of this policy would construe para. 2 as an exception to cover in respect of the disturbances in relation to labour disputes which in the absence of the exclusion, would clearly have fallen within the ambit of *"disturbance"* as used in the clause. Similarly, para. 5 is a fairly obvious exception. It excludes cases where the hotel has been given prior notice of the relevant action by the police or by a statutory body. Were it not

for such an exclusion, there would undoubtedly be cover under the Denial of Access clause even in cases where prior notice of the relevant action had been given.

185. In these circumstances, it follows that AXA must establish that the relevant facts fall within the para. 4 exclusion. As outlined above, AXA has argued that para. 4 embraces any notifiable diseases and, therefore, extends to COVID-19 which became a notifiable disease on 20th February, 2020. I cannot, however, accept that this is the correct interpretation of the para. 4 exclusion. It seems to me that AXA has failed to have regard to the full text of para. 4 which specifically refers to *"notifiable diseases **as detailed** in the Murder suicide or disease cover"* (emphasis added). That language seems to me to very clearly demonstrate that what is excluded are those diseases which are detailed in the MSDE clause. In this context, the relevant heading of the MSDE clause uses precisely similar language, namely *"Murder suicide or disease cover"*. While, at the time the policy was put in place, not all of the diseases detailed in the MSDE clause were notifiable, it appears likely that the list of diseases detailed in the MSDE clause was taken from the 1981 Regulations and was never amended subsequently notwithstanding, for example, the subsequent removal of acute encephalitis from the list of diseases or conditions set out in the Schedule to the Regulations.

186. I appreciate that AXA has argued that such an interpretation of the para. 4 exclusion does not make business sense. As summarised above, AXA has sought to argue that it would make no sense that, on the one hand, cover would be available in respect of a number of listed diseases under the MSDE clause and that additional cover could be available in respect of other diseases which have been excluded from the list in the MSDE clause and which are nowhere mentioned there. However, such an argument overlooks the fact that the cover available under the denial of access clause is not disease cover. The hotel cannot seek to be indemnified under the denial of access clause merely because its business has been restricted

or hindered by a disease. It can only obtain cover under the denial of access clause in respect of an interruption or interference with its business as a consequence of a disease where it can show that the very specific requirements of the denial of access clause have been satisfied. That requires the plaintiff to prove that there was an interruption or interference with its business as a consequence of a restriction or hindrance of access to its premises for more than 24 hours arising directly from one or more of the specific actions detailed in the clause.

187. Thus, for present purposes, it must be shown that there was a restriction or hindrance on access to its premises for more than 24 hours arising directly from actions taken by the police or by a statutory body in response to a danger or disturbance either at the hotel or within a one-mile radius of the hotel. Furthermore, unlike the MSDE clause, there is a limit on liability *"for any one claim"* of €50,000. The clause is therefore quite different to the MSDE clause (which is triggered by an occurrence of one of the listed diseases manifested by a person at or within a 25-mile radius of the insured premises). The denial of access clause requires the insured to prove the existence of a danger or disturbance within a one mile radius and to prove a range of other matters including the taking of actions by the police or by a statutory body. In principle, I can see no reason why the clause could not be triggered by a local outbreak of a highly dangerous disease which required action to be taken by the police or by a health authority. A fairly obvious, if hypothetical, example, would be an outbreak of a highly dangerous and frequently deadly disease such as Ebola on the hotel premises or in nearby premises which necessitated the putting in place by the police or other authority of a *cordon sanitaire* preventing movement in or out of the cordoned off area, I do not believe that such an interpretation does not make sense from a business perspective or is in any way inconsistent with the meaning given to the AOCA clauses by the Divisional Court in the *FCA* case. It seems to me that the Ebola example suggested above meets the criteria for the existence of a danger as discussed in paras. 436 and 500 of the judgment of the Divisional

Court (quoted above). I reiterate that such an interpretation does not mean that AXA is providing cover in respect of a disease which is not detailed in the MSDE clause. I stress that the existence of a disease is not enough on its own. All of the other requirements of the denial of access clause must be met.

188. Accordingly, as a matter of principle, it seems to me that the existence of a notifiable disease (other than one detailed in the MSDE clause) is not automatically excluded from cover under the para. 4 exclusion. For completeness, I should record that I would reach the same conclusion even if para. 4 was not considered to constitute an exclusion clause. It seems to me that, whether or not para. 4 is an exclusion, the language of the clause makes very clear that the notifiable diseases mentioned therein are those which are detailed in the MSDE clause. The plaintiff does not have to rely on the approach taken in *Analog Devices* or on the application of the *contra proferentem* principle. Contrary to AXA's submission, para. 4 does not, by its terms, go so far as to exclude all notifiable diseases. The only diseases which are excluded are those detailed in the MSDE clause. Furthermore, the fact that it is only those diseases which are excluded reinforces the conclusion that other diseases not detailed in the MSDE clause are potentially capable of triggering cover under the denial of access clause provided all of the other requirements of the latter clause are satisfied.

189. That is not, however, the end of the issue. It is still necessary for the plaintiff to demonstrate that an outbreak of COVID-19 constitutes a *"danger or disturbance… within a 1 mile radius"* of the hotel and that the restriction on access to the hotel arose directly from actions taken by the police or by a statutory body in response to such a danger. As noted in para. 182 above, the next issue which I must therefore address in this context is whether COVID-19 constitutes a *"danger or disturbance"* within the meaning of the clause.

190. At first sight, it may appear self-evident that COVID-19 represents a *"danger"*. After all, we have been deluged for more than a year now with Government and Health Service

Executive (*"HSE"*) warnings about the need to stay safe in the face of the pandemic and we have seen, in the media, the images of intubated patients in ICU wards and we have read or heard the heart breaking accounts of those who have suffered bereavements or who have themselves experienced the highly debilitating and painful effects of serious COVID-19 infections. However, the word *"danger"* must be read in context. It cannot be construed in isolation. When read in context, I do not believe that the reference to *"danger or disturbance"* in the denial of access clause was intended to extend to a pandemic which has nationwide effects. I have reached that view for the following combination of reasons:

(a) In the first place, the clause is concerned not with dangers or disturbances *simpliciter* but with dangers or disturbances at the insured's premises or within one mile of the premises. By confining the dangers or disturbances to those which occur within a one-mile radius, the clause, appears to me to have a very similar effect to the AOCA clauses considered in the *FCA* case (which referred to the *"vicinity"* of the insured premises). As the Divisional Court observed at paras. 436 and 500 of its judgment (quoted in paras. 174 to 175 above), the reference to the *"vicinity"* has a local connotation and supports the conclusion that the intention of the provision is to address something that arises at a local level. The same consideration arises in the case of the one-mile radius. It, too, strongly suggests a localised form of cover.

(b) Secondly, the word *"danger"* is used in juxtaposition with the word *"disturbance".* In my view, the latter has a very obvious local connotation. As the Divisional Court pointed out in the *FCA* case, the paradigm example of a disturbance is an affray or a brawl.

(c) Thirdly, the reference to *"actions"* by the police or by a statutory body is also important. As explained in more detail below, it seems to me that the use of a word such as *"actions"* was intended to extend to measures which do not have the force of

law such as those which may have to be taken urgently to address an immediate danger before there is time to invoke specific powers. Typically, that will arise at a local level where, for example, members of An Garda Síochána may need to seal off an area where there is a building in danger of collapse or there is bomb scare or an unruly protest.

(d) Fourthly, it is crucial to keep in mind the terms of the clause as a whole. The clause is concerned with a restriction on access to the insured premises as a consequence of the actions of the police or a statutory body in response to a danger or disturbance within a one-mile radius. The restriction on access is therefore expressly linked to the danger or disturbance within that radius. For similar reasons to those given by the Divisional Court in para. 437 of its judgment in the *FCA* case (quoted in para. 174 above), the effect of the clause is that there will only be an entitlement to an indemnity under the clause if the insured can demonstrate that it was the risk of COVID-19 within that one-mile radius which led to the relevant actions which restricted access to its premises. Here, the relevant actions that are relied upon by the plaintiff are the measures taken by the Government on 15th March, 2020 and the Regulations subsequently enacted by the Minister for Health. While there was an attempt to also rely on the presence of members of An Garda Síochána on the streets and at checkpoints, no evidence to that effect was tendered and that issue is not addressed in the agreed facts. There is accordingly no evidential basis to suggest that access to the premises was hindered or restricted by Garda action. Accordingly, the plaintiff can only succeed on the basis that the measures pleaded constitute relevant *"actions"* within the meaning of the clause and that such actions were taken in response to the presence of a danger or disturbance within a one-mile radius. In common with the Divisional Court in the *FCA* case, I cannot see how it could plausibly be contended

that the measures taken at a national level by the Government or the Minister for Health could be said to have been proximately caused by a risk of COVID-19 within a one-mile radius of the hotel. The measures in question were taken in response to the position in the State as a whole. In my view, there is a significant difference between the terms and the effect of the denial of access clause in the AXA policy and the clause successfully relied upon by the plaintiffs in the *FBD* case. In the latter case, the clause was expressly referable to an outbreak of disease; it covered outbreaks within a much wider 25 mile-radius (which extends to 1,963 square miles); and, as explained in paras. 143 to 144 of the judgment in that case, the language used in the clause envisaged that, in the case of off-premises outbreaks, the outbreaks were likely to be of a highly significant scale such as to require national measures to be taken. In my view, the same considerations cannot be said to apply in the case of the AXA denial of access clause. On the contrary, for the reasons outlined above, the clause has a local focus and appears to me to be concerned with actions taken to address local events in the nature of dangers of disturbances;

(e) Fifthly, the terms of para. 5 of the exclusions to the denial of access clause are also relevant. As explained further below, it seems to me that para. 5 envisages that cover can be denied where advance notice directed to the plaintiff is given of proposed actions that are likely to hinder or restrict access. That also supports the conclusion that the clause is local in nature. It is difficult to envisage individual notice being given if actions had to be taken at national level to address a danger. It is much more feasible to envisage individual notice being given where the actions are in response to a danger within a relatively confined one-mile radius.

(f) Sixthly, although I would not regard this factor as decisive, the historical origin of the clause (as explained previously) also supports the conclusion that the clause is intended to address local rather than national dangers.

191. Bearing all of the considerations outlined in para. 190 above in mind, I have come to the conclusion that a reasonable person in April 2019 would consider that the denial of access clause was intended to respond to localised dangers or disturbances. For the same reason, I do not believe that a reasonable person in April 2019 would have regarded a disease having the characteristics and geographic spread of COVID-19 as coming within the ambit of a *"danger or disturbance"* as those words would be understood in the specific context of the denial of access clause.

On the assumption that COVID-19 is capable of constituting a *"danger or disturbance"*, does the outbreak of COVID-19 have to be specific to the premises or an area within a one-mile radius of the premises?

192. In light of the views expressed in paras. 190 and 191 above, the answers to this question and several of the questions addressed below are largely academic. I will nonetheless address them for completeness.

193. Having regard to the language of para. 1 of the denial of access clause, there can be no doubt but that the relevant *"danger or disturbance"* must either be at the premises itself or within a one-mile radius. Thus, on the assumption that COVID-19 falls within the ambit of *"danger or disturbance"*, the insured must establish that the actions which led to a restriction on access to its premises stemmed from a case or cases of COVID-19 within a one-mile radius.

On the assumption that COVID-19 is capable of constituting a *"danger or disturbance"*, do the actions taken by the police or other statutory body have to take place at the premises or within a one-mile radius of the premises?

194. In my view, the natural reading of para. 1 of the denial of access clause does not require that the actions taken by the police or by a statutory body should take place either at the premises or within a one-mile radius of the premises. As I read para. 1, the requirement is that the danger or disturbance must be at the premises or within a one-mile radius. There is no requirement, as such, that the actions taken by the police or by any statutory body should occur within that radius. That said, it is inherently more likely that any restriction on access to the premises would arise as a consequence of actions taken by the police or by some other statutory body in relatively close proximity to the premises. Nevertheless, it is possible to envisage circumstances where the danger or disturbance would be within one mile of the hotel while the actions taken by the police leading to the relevant restriction on access might be taken outside that radius. Thus, for example, if a powerful bomb was found within one mile of the hotel, one might well find that the police would erect a cordon at a greater distance from the hotel with a view to sealing off the city centre (including the hotel) and requiring the entire of the cordoned area to be evacuated. If that evacuation was to last for more than 24 hours, the hotel might be in a position to claim under the denial of access cover for the interruption caused by the cordon to its business. Similarly, to return to the Ebola example mentioned previously, if there was an outbreak of Ebola (which is a notifiable disease which is not on the list detailed in the MSDE clause) within one mile of the hotel, one could envisage the police being required to establish a cordon sanitaire within a certain distance of that outbreak with a view to ensuring that there should be no movement in or out of the area which has been cordoned off. Again, it would seem to me that, in principle, in such a case, the policyholder might be in a position to bring a claim under the policy where

the policyholder can show that, as a consequence of the erection of the cordon sanitaire, the hotel was unable to carry on its business in the usual way.

195. It therefore appears to me that, in principle, there is no requirement under the denial of access clause that the actions taken by the police or other statutory body should be taken within a one-mile radius of the hotel so long as the relevant danger or disturbance takes place within that radius.

Can any of the Government measures and restrictions (which are of a national or general application) amount to an action taken by the police or statutory body in response to an outbreak of COVID-19 at or within one mile of the hotel?

196. This is the question posed in para. 52 above. It seems to me to be convenient to deal with this question in conjunction with the question posed in para. 53 and also in conjunction with the second question posed in para. 56. The question posed in para. 53 relates to whether the Government measures constitute action taken by the police or any statutory body in response to a danger or disturbance within one mile of the Clarence Hotel. The second question posed in para. 56 asks whether the measures constitute an *"action of the police or a statutory body"*?

197. For the reasons outlined in para. 190 (d) above, I cannot see any basis upon which the Government measures can be said to be in response to an outbreak of COVID-19 at or within one mile of the insured premises. The denial of access clause is focused on the existence of a particular danger or disturbance which occurs within a one-mile radius of the hotel. Having regard to those considerations and the remaining views expressed in paras. 190 to 191 above, it is not strictly necessary to address the answers to the questions outlined in para. 196. I nonetheless set out my response to them below.

198. A fundamental difficulty facing the plaintiff here is that no statutory body has been identified which took any of the measures which led to the closure of the hotel or the hotel bar. The actions which led to the closure of the hotel and bar were actions of the Government

or of a Minister of the Government. It is specifically pleaded in para. 15 of the statement of claim that the hotel closed on foot of the advice issued by the Government on 15th March, 2020 and the subsequent binding statutory instruments that were enacted thereafter. I have not heard any argument to establish that these measures can be said to have been taken by a statutory body. It was argued by counsel for the plaintiff that there is *"no reality"* to taking a strict construction of words such as *"the police"* or *"statutory body"*. However, there is nothing *"strict"* about giving the ordinary meaning of *"statutory body"* to that term. In my view, the ordinary reasonable person would understand a reference to a statutory body to embrace a body which is established by statute. In this context, AXA has referred to the definition in *Murdoch & Hunts' Encyclopaedia of Irish Law* as to what a statutory body is, namely a *"[B]ody which has been established by, or pursuant to, primary or secondary legislation"*. I do not, however, believe that one needs to turn to *Murdoch & Hunt* for this purpose. In my view, that is the way in which the term would be understood in general speech. It was suggested that the language in the policy is taken from an English precedent and, therefore, should not be construed in the same way in Ireland. However, I must bear in mind that, at the time this policy was put in place, there were many statutory bodies in Ireland carrying out public functions and I can see no basis upon which the language of the policy can be ignored or on which an unusually broad interpretation can be given to the term *"statutory body"*.

199. It was also argued that the actions taken by the Government were prompted by advice from NPHET and that the members of NPHET represented a number of statutory bodies such as the HSE. It is important, however, to bear in mind that NPHET is simply an emergency team made up of many different individuals, some of whom are from the HSE some are from the Department of Health, and others are medical experts employed by a variety of different bodies. I do not believe that there is any reasonable basis upon which one could conclude

that, merely because some members of NPHET are employed by a statutory body, this means that the subsequent actions taken by the Government on foot of NPHET advice can be said to be the actions of a statutory body. In addition, as counsel for AXA submitted, NPHET is not itself a statutory body. It cannot take any actions itself to cause any restrictions on the operation of any premises or the closure of any premises. It depends on the Government to take action.

200. I am nonetheless concerned that there might potentially be a basis for the plaintiffs to make an argument that the Minister for Health constitutes a statutory body. The relevant Regulations enacted in April 2020 and subsequently were made by the Minister. Although this argument was not ventilated at the hearing, it strikes me that it might have been open to the plaintiffs to make an argument that, having regard to the provisions of the Ministers and Secretaries Acts, 1924-2017, the Minister for Health should be considered to constitute a statutory body within the meaning of the policy. In this context, s. 2(1) of the Ministers and Secretaries Act, 1924 ("*the 1924 Act*") expressly provides that each Minister mentioned in that Act is to be a corporation sole with perpetual succession capable of suing and being sued under the style or name of the relevant Minister. While the Minister for Health was not one of the Ministers so established under the 1924 Act, s. 2 of the Ministers and Secretaries (Amendment) Act, 1946 ("*the 1946 Act*") created a new Department of State to be known as the Department of Health and created the position of Minister for Health. Section 2(4) of the 1946 Act specifically applies the provisions of the 1924 Act to the Department of Health and the Minister for Health. On that basis, it seems to be that an argument might well be available to the plaintiff that the Minister should be considered to be a statutory body. While it would be open to me to reach a decision on this issue without further argument from the parties, I believe it would be inappropriate to do so in the particular circumstances of this case which has been put forward as a test case in relation to the AXA policy. In those circumstances, I

believe the more appropriate course to take is to invite the parties to consider whether they wish to advance additional argument in relation to this issue.

201. Insofar as the reference to the *"police"* is concerned, I appreciate fully that, as counsel for the plaintiff have stressed, this is not the official term given to the police force in Ireland which is, of course, An Garda Síochána. Curiously, there is a reference to An Garda Síochána at a different point in the policy, namely at p. 24. This requires the insured to immediately notify An Garda Síochána of any loss or damage by theft. Nonetheless, as counsel for the plaintiff fairly acknowledged, the reference to the *"police"* in the denial of access clause is clearly capable of being understood to be a reference to An Garda Síochána. As noted previously, the policy must be read in context. That includes the legal context. The principal statute now regulating An Garda Síochána is the Garda Síochána Act, 2005 ("*the 2005 Act*"). Section 6(1) of that Act very clearly refers to An Garda Síochána as *"the police force"*. Section 6(1) expressly provides that:-

> *"The police force called the Garda Síochána continues in being under this Act as a police service."*

202. Furthermore, it is clear from s. 7(1) of the 2005 Act that one of the principal functions of An Garda Síochána, unsurprisingly, is to provide policing services for the State with the objective of (*inter alia*) preserving peace and public order, protecting life and property, preventing crime and regulating and controlling road traffic. In these circumstances, I believe that there can be no doubt that the reference to *"the police"* in the denial of access clause is intended (and would be so understood by any reasonable person) as a reference to An Garda Síochána. Thus, in the context of the reference to *"the police"* in the denial of access, it would be necessary for the plaintiff to show that the proximate cause of the restriction on the operation of its business arose as a consequence of the actions taken by An Garda Síochána. While it was suggested that the actions of An Garda Síochána (being present on the street and

making spot-checks on movement of persons) gave rise to the interference with the hotel's business, I do not believe that there is any reality to that argument. In the first place, there is no evidence of any such activity which prevented the hotel or bar from operating. Furthermore, as very clearly pleaded in the statement of claim (and as summarised above), the case made by the plaintiff is not that the bar or hotel had to close as a consequence of actions of An Garda Síochána but as a consequence of the Government advice of 15th March, 2020 and the subsequent enactment of regulations.

203. Moreover, even if one could have regard to the activities of An Garda Síochána in the vicinity of the hotel, I do not believe that there is any basis upon which one could conclude that the actions of An Garda Síochána were the proximate cause of the steps taken by the hotel to close the premises. As explained in para. 141 above, proximate cause is not the first or the last or the sole cause of a loss, it is the dominant or effective or operative cause. The position is well illustrated by the decision in *Gray v. Barr* [1971] 2 QB 554 which is cited by *Buckley on Insurance Law*, 4th Ed., 2016 at para. 8-72. In that case, the defendant, Barr, arrived at the home of Gray, armed with a loaded shotgun in search of his wife who he alleged had been having an affair with Gray. When Barr entered the house, Gray was standing at the head of stairs. Gray told Barr that his wife was not there. Barr refused to accept Gray's word and went up the stairs, holding the gun and demanded to see for himself whether she was there. He refused to put the gun down and leave. As Barr approached the top of the stairs, he intentionally fired one shot into the ceiling to frighten Gray. When he got to the top of the stairs, Gray attempted to grapple with Barr who fell backwards. In the course of his fall, he involuntarily fired a second shot which unintentionally killed Gray. The question which faced the Court of Appeal of England & Wales was whether the proximate cause of Gray's death could be said to be accidental (in which case it would have been covered by a policy of insurance) or whether it was an intentional act on the part of Barr (which, being

criminal, would not have been covered under the policy). At p. 567, Lord Denning referred to the principle explained by Lord Shaw in *Leyland Shipping Co* that proximate cause is the *"real efficient cause to which the event can be ascribed"*. Lord Denning then continued at p. 567:-

> *"Applying this principle, I am of opinion that the dominant and effective cause of the death was Mr. Barr's deliberate act in going up the stairs with a loaded gun determined to see into the bedroom. The whole tragic sequence flows inexorably from that act. It was because of that loaded approach that Mr Gray grappled with Mr. Barr. It was because of the grappling that Mr. Barr fell and the gun went off. There was no new intervening cause at all."*

204. It seems to me that the decision in *Gray v. Barr* illustrates why the activities of An Garda Síochána could not be said to be the proximate cause of the closure of the hotel. Any action taken by the Gardaí flowed inexorably from the previous measures taken by the Government. The real cause of the closure of the hotel was not because Gardaí were on the streets but because of the decision of the Government on 15th March, 2020 followed by the series of statutory instruments enacted by the Minister for Health. The presence of Gardaí on the street was in response to the measures taken by Government and the enactment of the 2020 Regulations. The real and efficient cause of any actions by the Gardaí was the underlying measures and regulations. It follows, in my view, that the underlying measures and regulations were the proximate cause of the restrictions on access to the hotel.

205. However, if the plaintiff were to succeed in an argument, by reference to the 1924 Act, as amended, that the Minister for Health is a statutory body within the meaning of the denial of access clause, it might then be possible to make the case that the 2020 Regulations made by the Minister constituted the actions of a statutory body within the meaning of the clause.

206. I would, therefore, respond to each of the questions summarised in para. 196 above as follows:-

(a) On the facts of this case, I cannot see any basis upon which one could conclude that the measures taken by the Government and by the Minister for Health could be said to constitute actions taken by the police. Furthermore, there is no basis upon which one could conclude that the actions taken by An Garda Síochána were the proximate cause of any loss of business suffered by the hotel or the Octagon bar;

(b) On the basis of the arguments made to date, I cannot see a basis upon which the Government measures could be said to constitute the actions of a statutory body. However, it may be possible for the plaintiffs to construct an argument based on the provisions of the Ministers and Secretaries Acts, 1924-2017 that the Minister for Heath constitutes a statutory body and that the 2020 Regulations constitute actions of a statutory body within the meaning of the denial of access clause. I will give the parties liberty to address this issue by way of further argument if they so wish;

(c) With regard to the question posed in para. 53 above, since none of the measures in question were prompted by a particular danger or disturbance in the vicinity of the hotel, I do not believe that there is any scope to suggest that the measures could be said to constitute action taken by the police or by a statutory body in response to such a danger or disturbance within a one-mile radius of the hotel. In this context, I reiterate what I have previously outlined in paras. 190 to 191 above.

<u>Do *“actions”* require a measure which is mandatory and/or which has the force of law?</u>

207. In light of the conclusions expressed above, the answer to this question is of academic interest only. I, therefore, do not propose to address it at any length. I note that, in the course of AXA's closing submissions, counsel for AXA accepted that the advice and other measures taken by the Government constitute actions for the purposes of the denial of access clause. AXA did not accept, however, that they constitute actions taken by the police or other statutory bodies. For the reasons outlined above, I agree that they do not constitute actions taken by the police. I leave over the question as to whether they could be said to constitute actions by another statutory body (at least insofar as the enactment of regulations is concerned) pending any further submissions which the parties might wish to make.

208. The focus of this question is on whether or not it can be said that the use of the word *“actions”* envisages a measure which is mandatory in effect or which has the force of law. In my view, the word *“actions”* does not go that far. It would have been a relatively straightforward matter for the policy to refer to compulsory actions or to orders. The word *“actions”* does not seem to me to carry with it such a connotation. Given that the clause is concerned with actions taken in response to a danger or disturbance, that is probably not surprising. There may be occasions where immediate action has to be taken by the police or by a statutory body to prevent or minimise the impact of a danger or disturbance even where there is no legal authority for the specific action taken at the time. I appreciate that, in the *FCA* case, the Divisional Court took a different view in relation to the MSA 1 clause (which took the form of an AOCA clause providing cover in respect of interruption or interference with the business *“following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises…”*). In para. 434, the court said:-

> *"434. The next question raised by the AOCA clause is what is meant by "action by the police or other competent local, civil or military authority". It is immediately to be noted that unlike other wordings, such as the Arch wording, the clause does not refer to "action" and "advice". In our judgment,* [counsel for MSA] *is right in his argument that in the context of this clause "action…" connotes steps taken by the relevant authority which have the force of law, since it is only something which has the force of law which will prevent access…"*

209. While I acknowledge the force of the point made by the Divisional Court in para. 434 of its judgment, I respectfully take a different view in the context of the denial of access clause here. It seems to me that there is a significant point of distinction between the language of the clause in the AXA policy and the language of the MSA 1 clause which referred not only to the police but also to *"other competent… authority"*. The use of the words *"competent"* is striking. It immediately suggests that the action taken would be competent (i.e. within the powers of the relevant body concerned). No similar language is used in the denial of access clause in the AXA policy. Given the fact that the clause is designed to deal with an interference with business arising from actions taken in response to a danger or disturbance in the vicinity of the hotel, it seems to me to be likely that the clause was intended to address any action taken by the police or other statutory body whether or not that action had the force of law. The clause is essentially designed to address a local emergency and it would not be unsurprising to find that action might have to be taken to address such an emergency without consideration as to the lawfulness or competence of the relevant actions taken at that time.

210. Moreover, I note that, on appeal, albeit in the context of a different clause expressed in quite different terms, the UK Supreme Court did not agree with the Divisional Court in its

interpretation of *"restrictions imposed"* in the *FCA* case. The latter, in the context of the Hiscox 1-4 policy wordings, had held that *"restrictions imposed"* meant mandatory measures imposed pursuant to statutory or legal powers. The UK Supreme Court took a different view. At para. 121, Lords Hamblen and Leggatt said: *"... the test in interpreting the words used is how they would be understood by a reasonable person and we do not consider that a reasonable policyholder would understand the word 'imposed', without more, as making cover conditional on the existence ... of a valid legal basis for the restriction".* In my view, the same conclusion can be made with even greater force in the case of the word *"actions"* which is a word with a very broad meaning. I consider that the reasonable person would not regard the word *"actions"* as connoting solely measures taken which have the force of law. This is especially so in circumstances where the word is used in immediate proximity to the words *"danger or disturbance".*

211. In light of the views expressed above, I do not believe that it is necessary to address the question posed in para. 55 above as to whether, if the answer to the question addressed in paras. 206 to 209 is *"yes"*, which measures, if any, were mandatory in nature and/or had the force of law.

Does the closure of the hotel following the Government advice of 12th March, 2020 or thereafter meet the requirements of the denial of access clause?

212. This is the first question posed in para. 56 above. I have already addressed this question, in substance in paras. 190 (d) and 191 above in the context of my consideration of the issue as to whether COVID-19 constitutes a *"danger or disturbance"* within the meaning of the denial of access clause. For the reasons explained in those paras., I have come to the conclusion that the requirements of the denial of access clause are not met in this case. It is therefore unnecessary to give any further consideration, at this point, to the question posed in para. 56.

Is the policyholder required to demonstrate that a specific occurrence of COVID-19 within a one-mile radius of the premises led to the relevant *"action of the police or statutory body"*?

213. This is the question posed in para. 57 above. In my view, it is clear from the terms of the denial of access clause that the policyholder must prove that the relevant danger or disturbance arose within a one-mile radius of the insured premises and that the disturbance or danger in question was the proximate cause of the action of the police or statutory body. This follows from the use of the words *"arising directly from… the actions taken by the police or any other statutory body…"*. The words *"arising directly from"* very clearly require the insured to prove that the danger or disturbance in question was, at minimum, the proximate cause of the actions taken. AXA has also submitted that the use of these words goes further in terms of causation and imposes a more exacting standard than proximate cause. As I understand the case made by AXA, it is suggested that the words *"arising directly from"* impose a requirement that the danger or disturbance must be the sole cause of the loss suffered by the insured. In other words, AXA maintains that the effect of those words is to exclude the application of the *Miss Jay Jay* principle. In light of my conclusion that the denial of access clause does not cover the losses suffered by the plaintiff, I do not believe that I should address this element of AXA's case. I therefore offer no view on that issue.

What constitutes a prevention or hindrance of access to the premises within the meaning of the denial of access clause?

214. It is unnecessary to address this issue in any detail. It is accepted by AXA that the measures taken by the Government and the Minister for Health here had the effect of restricting or hindering access to the hotel and the bar although AXA maintains that the Government advice or the regulations made by the Minister did not go so far as to require the hotel, as opposed to the Octagon bar, to close.

215. It is important, in this context, to bear in mind that the denial of access clause does not, by its terms, require that there should be a complete closure of the premises. Instead, it speaks of access to the premises being *"restricted or hindered"*. The ordinary meaning of those words, in my view, falls short of a complete denial of access.

216. The ordinary meaning of the word *"restrict"* is to limit. The ordinary meaning of the word *"hinder"* is to keep back, to delay, to impede or to obstruct. It, therefore, seems to me to be clear that the denial of access clause does not require that there should be a complete closure of the premises or a complete denial of access to the premises. It is sufficient if the access to the premises is limited.

217. At this point, it seems to me to be premature to reach any finding as to whether the Government advice of 15th March, 2020 or the subsequent regulations can be said to have required the entire hotel operation to close. That is an issue that would require to be fully considered and debated if and when a hearing takes place in relation to the *quantum* of the losses claimed by the plaintiff.

218. In light of the view which I have formed in relation to the impact of the use of the words *"restricted or hindered"*, it is unnecessary to separately consider the question raised in para. 59 above. It is clear that there can be a prevention of or hindrance of access within the meaning of the denial of access clause where a premises (or a part of a premises) was in use for a limited purpose during the period for which it was otherwise closed. In such cases, however, it is essential that the policyholder must demonstrate that all of the requirements of the denial of access clause have been satisfied. The policyholder must, accordingly, prove that there was a hindrance or restriction on access to its premises arising from actions of An Garda Síochána or a statutory body in response to a danger or disturbance at the hotel or within a one-mile radius of the hotel which proximately causes an interference with its business.

Prior notice

219. The full text of this question has been set out in para. 60 above. Essentially, the question which arises is whether it can be said that the plaintiff had prior notice of the actions taken by the Government or prior notice of the regulations subsequently enacted. If so, an issue arises as to whether para. 5 of the list of exclusions contained in the Denial of Access clause can be said to apply. Under para. 5 of the list of exclusions, cover is not available where access to the premises is restricted or hindered as a result of *"actions where **you** have been given prior notice"* (bold in original).

220. The plaintiff argues that the reference to *"notice"* is capable of at least two meanings, namely:-

(a) that the plaintiff was notified of the existence of the restrictions by the same media channels as the rest of the country; or

(b) that the plaintiff was specifically notified of the actions by way of a notice intended for or addressed to it specifically or to a group to which it belonged.

221. The plaintiff argues that, in circumstances where the reference to *"notice"* is capable of more than one meaning, the meaning most favourable to the plaintiff should be adopted, having regard to the *contra proferentem* principle. The plaintiff highlights that it had no prior notice (in the second sense of that word) of the Government advice of 15th March, 2020 or the subsequent regulations and only learned of their specific terms as and when they were promulgated. On that basis, the plaintiff submits that it does not fall within the terms of the exclusion.

222. In contrast, AXA argues that the term *"notice"* is perfectly clear. Counsel for AXA argued that there is nothing in the language of the denial of access clause which requires that individual notice should be given to the insured. In AXA's closing submissions, counsel for AXA did not go so far as to suggest that there was prior notice of the Government advice of 15th March, 2020. Instead, counsel for AXA limited the case made in relation to this element

of the clause to the regulations enacted on 8th April, 2020. Counsel submitted that advance notice of those regulations was provided in a speech made by the Taoiseach on 24th March, 2020 in which he outlined, among other things, that new action would be taken to limit occupancy of hotels to essential non-social and non-tourist reasons. The indication given by the Taoiseach on that occasion was consistent with the terms of the regulations enacted on 8th April, 2020.

223. It is important to bear in mind that para. 5 is an exclusion clause. As such, AXA must, in accordance with the decision of the Supreme Court in *Analog Devices*, prove that the relevant facts fall squarely within the ambit of the exclusion clause. While I accept that notice is capable of being given to a party affected by it in a number of different ways, I do not believe that it is plausible to suggest that a speech made by the Taoiseach (as reported in the news media) could be said to constitute notice to a policyholder. While every speech of the Taoiseach in the first half of 2020 on the topic of COVID-19 was widely publicised, I do not believe that a speech of that kind would reasonably have been construed, at the time the policy was put in place, as notice to a policyholder of an intended restriction on access to the hotel premises. Paragraph 5, by its terms, does not suggest that foreknowledge is, of itself, sufficient to trigger the application of the exclusion. On the contrary, the language suggests that some step has been taken to give prior notice to the policyholder. I agree with the submission of counsel for the plaintiff that the clause requires that the plaintiff should be specifically notified of the actions by way of a notice intended for it or given to a group to which it belonged. However, it seems to me that a speech by the Taoiseach which was intended for the population of the State as a whole could not, plausibly, be considered to constitute a notice to the plaintiff. I, therefore, do not believe that para. 5 of the exclusions to the denial of access clause could be said to apply in this case.

The limits of indemnity applicable to the MSDE and denial of access clauses

224. This question arises in the context of para. 2 of the provisos to the Denial of Access clause which states that the liability of AXA *"for any one claim will not exceed €50,000"*. There is no equivalent proviso in the case of the MSDE clause. However, although this question was posed in the list of questions for consideration by the court, it was not the subject of any argument in the written submissions or at the hearing. In the circumstances, I do not propose to address this question.

What is the indemnity period applicable to claims under the MSDE and denial of access clauses?

225. Although the policy schedule specifies a 24-month indemnity period in respect of the business interruption cover available under the policy, both the MSDE and the denial of access clauses apply for a period of twelve weeks. In the case of the MSDE clause, it is specifically stated that:-

> *"This cover will only apply for the period starting with the occurrence of the loss and ending after 12 weeks, during which time the results of the* ***business*** *are affected"*
>
> (bold in original)

226. In the case of the denial of access clause, para. 1 of the provisos to that clause specifically states:-

> *"1. the insurance provided by this cover shall only apply for the period starting with the restriction or hindrance and ending after 12 weeks during which time the results of the* ***business*** *are affected"* (bold in original)

227. Ultimately, however, there was no argument either in the written submissions or in the course of the hearing which addressed this issue and, in those circumstances, I do not propose to consider the question in any level of detail. I merely observe that both the MSDE and denial of access clauses by their own terms appear to limit the duration of cover to a period of 12 weeks.

Conclusions

228. I do not propose to summarise here all of the views which I have expressed in response to the agreed list of questions posed by the parties. I will confine myself to recording the findings which are most relevant to my decision on cover. On behalf of the plaintiff, it was submitted that it was entitled to be indemnified by AXA under three specific provisions of the AXA policy. Notwithstanding the ingenuity of the arguments advanced by counsel for the plaintiff, I have not been persuaded that cover is available under the specific terms of the AXA policy in respect of the losses suffered by the plaintiff following the closure of the hotel and the Octagon bar in the wake of the Government advice of 15th March, 2020 and the enactment of the 2020 Regulations. In my view, despite the best efforts of the plaintiff's legal team, the facts cannot be brought within any of the relevant clauses of the AXA policy so as to secure cover.

229. In so far as the plaintiff seeks to rely on para. 1 of the MSDE clause, I have found that cover under that clause is limited to business interruption caused by an occurrence of one of the specific diseases or conditions listed in that paragraph either at the premises of the hotel or within a 25-mile radius. COVID-19 is not listed in that paragraph and, accordingly, there is no cover under para. 1 in respect of business interruption losses caused by cases of COVID-19 *per se*. In so far as the plaintiff has sought to rely on the reference to acute encephalitis in that para., I have found, on the evidence, that there was no reported case of acute encephalitis associated with COVID-19 in Ireland. In the absence of any reported case of that kind prior to the events in issue, the plaintiff is unable to demonstrate that the closure of the hotel and Octagon bar was proximately caused by at least one case of acute encephalitis manifested by any person at the hotel or within a 25-mile radius. In the circumstances, para. 1 of the MSDE clause is of no assistance to the plaintiff.

230. With regard to the alternative case made by the plaintiff based on para. 5 of the MSDE clause, cover is available only where the plaintiff can prove that the whole or part of

its premises was closed by a public authority as a result of a defect in the insured's sanitary arrangements. I have found that the plaintiff has not established that any defect existed in the sanitary arrangements at the hotel which caused its closure. It follows that para. 5 does not cover the losses claimed by the plaintiff in respect of the closure of the hotel and bar following the Government advice of 15th March, 2020 and the enactment of the 2020 Regulations.

231. As for the remaining case based on the denial of access clause, I have concluded that, while the occurrence of a notifiable disease (other than a disease listed in para. 1 of the MSDE clause) is, in principle, capable of constituting a *"danger"* within the meaning of the clause, this does not avail the plaintiff in circumstances where it is not in a position to demonstrate that all of the other requirements of the clause have been satisfied. In particular, the plaintiff has not established that any of the measures taken by the Government in March 2020 or subsequently were prompted by concerns about any danger or disturbance within the one-mile radius of the hotel prescribed by that clause.

232. Furthermore, the denial of access clause will only apply where a restriction on access to the hotel premises is shown to be attributable to actions taken by the police or by a statutory body in response to a danger or disturbance at the hotel or within a one-mile radius of it. The measures taken by the Government or by the Minister for Health cannot be said to constitute actions by the police. On the basis of the arguments made to date, the measures have not been shown to constitute actions by a statutory body. However, by reference to the Ministers and Secretaries Acts 1924 – 2017, there may be an argument open to the plaintiff that the Regulations made by the Minister for Health in 2020 constitute actions by a statutory body within the meaning of the denial of access clause. I am prepared to hear further argument on that issue if the parties so wish although I should make clear that, even if the plaintiff succeeded on that issue, it would not be sufficient to alter the result. The plaintiff's

claim would still founder, in my view, on the findings summarised in paras. 231 above and 233 below.

233. Having regard to the language and context of the denial of access clause and for the reasons discussed in paras. 190 to 191 above, I have concluded that the clause is intended to respond to localised dangers or disturbances which occur within a one-mile radius of the hotel. I do not believe that, as of the date the AXA policy was put in place in April, 2019, a reasonable person would regard a disease having the characteristics and geographic spread of COVID-19 as falling within the ambit of a *"danger or disturbance"* as those words would be understood in the specific context of the denial of access clause.

234. In order to give the parties an opportunity to consider the terms of this judgment and any further steps which they believe may need to be taken (including further argument on the potential application of the Ministers and Secretaries Acts 1924 to 2017), I will list the matter electronically for mention on Friday 30th April, 2021 at 10.30 a.m. In the meantime, the parties should liaise together with a view to agreeing the terms of the order to be made on foot of this judgment. I will also ask the parties to discuss the question of costs. If there is no significant dispute between the parties in relation to those issues or in relation to next steps, it may be possible to finalise the matter on 30th April. If there is any significant level of disagreement, it may be necessary to fix a further hearing on a later date to resolve any issues in dispute.