Neutral Citation Number: [2022] EWHC 2549 (Comm)

Claim No: CL-2021-000396

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2022

Before :

THE HON MR JUSTICE BUTCHER

- -

Between :

VARIOUS EATERIES TRADING LIMITED
(formerly known as Strada Trading Limited) **Claimant**

- and –

ALLIANZ INSURANCE PLC **Defendant**

- -
- -

Leigh-Ann Mulcahy KC and Max Evans (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Charles Dougherty KC and Timothy Killen (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 11-14 July 2022

- -

Approved Judgment

.....

THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. This judgment relates to a number of preliminary issues which were ordered to be tried in this action. Those issues relate to the coverage provided under a policy on the 'Marsh Resilience' Form, by which the Defendant ('Allianz') insured the Claimant ('VE') against business interruption loss.

2. The hearing of these preliminary issues took place in sequence with the hearing of preliminary issues in two other actions: Stonegate Pub Co Ltd v MS Amlin Corporate Member and others (CL-2021-000161) and Greggs Plc v Zurich Insurance Plc (CL-2021-000622). In each case some similar issues arise in relation to the Marsh Resilience Form, and how the policy in each case responds to business interruption losses occasioned by Covid-19 and its consequences.

3. It was initially planned that the hearing in this action should be the third in the sequence. As a result of one of the counsel in the Greggs v Zurich action contracting Covid-19, however, the hearing in that action was adjourned until after the hearing in this action. The hearing in this action thus took place second, after that in Stonegate v MS Amlin.

4. Given that the insurances in each case are on the same basic Form, and the overlap in the facts relevant to the preliminary issues in each case, many of the arguments in the three cases have been similar. But each case is separate. This judgment will accordingly deal with the issues in the VE action, but it will, as has always been envisaged by the parties and the Court, make reference to the judgments in the other actions, and in particular to that in the Stonegate v MS Amlin action.

VE and its Business

5. VE is a company in the Various Eateries plc group. The group purchased the Strada portfolio of 43 restaurant sites on 22 September 2014. From around 2015 most of the existing Strada sites were disposed of or converted into new 'concepts'. At the material time, however, VE operated ten relevant insured venues, as follows:

   (1) Coppa Club locations at Sonning, Streatley, Maidenhead, Henley-on-Thames, Brighton and Tower Bridge. Coppa Club is a multi-use, all-day concept, to provide a clubhouse which customers identify as their own. In residential areas outside London, the format is for a full-service Clubhouse. That is the format, for example, in Sonning and Streatley. Larger city centre locations adopt a Club and Brasserie format, as is the case at Tower Bridge. In cities and high streets some venues adopt a high street hub format, typically including a restaurant, bar, café and workspace. This was the format at Henley, Maidenhead and Brighton.

   (2) A Tavolino restaurant at Bankside (also called Riverside). This brand was directed to providing high quality Italian food at mid-market prices.

   (3) Two Strada sites, Southbank (Royal Festival Hall) and Dockside (St Katherine Docks). These are Italian casual dining restaurants.

   (4) An Above and Below venue in Marylebone High Street, called 31 Below, which has an all-day menu, full service bar and downstairs lounge area and workspace.

6. VE contends that these venues were affected by the pandemic in rather different ways. The court is not asked to make any findings as to what these were. It is sufficient for present purposes to record that it is VE's case that: (i) 31 Below stayed closed from 20 March 2020 until 1 October 2020, as it was heavily reliant on high street traffic and lacked outdoor capacity; (ii) Riverside and Dockside were disproportionately affected by travel and 'stay-at-home' restrictions; (iii) Coppa Streatley and Coppa Sonning had large event or private dining spaces which could not be used to capacity due to restrictions on gatherings and weddings; (iv) social distancing requirements had impacts which differed from venue to venue.

The Policy

7. VE was insured by Allianz on the terms of the Marsh Resilience Form. That is an 'off the peg' wording which was offered to the market by at least 11 insurers. The relevant policy by which VE was insured ('the Policy') consisted of a Policy wording and a Schedule. The material provisions of the wording appear at Annexe 2 to this Judgment. The relevant provisions of the Schedule appear at Annexe 1 to this Judgment.

8. The Item 1 Venues were Coppa Club Maidenhead, Henley-on-Thames and Brighton, 31 Below and Strada Dockside; the Item 2 Venues were Coppa Club Tower Bridge, Sonning and Streatley, Strada Southbank and Bankside.

9. The Period of Insurance was from 29 September 2019 to 28 September 2020. This may be compared with the relevant policy period in the Stonegate v MS Amlin case, which ended on 30 April 2020, and that in Greggs v Zurich, which ended on 31 December 2020.

The Parties' Cases in Outline

10. VE claims from Allianz an indemnity in respect of Covid-19 related business interruption loss in the sum of at least £16,345,317. It claims that such loss was caused by numerous 'Covered Events' which fall to be indemnified under one or all of what were called the 'Disease Clause' (Insuring Clause 2.3(viii)), the 'Prevention of Access Clause' (Insuring Clause 2.3 (xii)) and the 'Enforced Closure Clause' (Insuring Clause 2.3(viii) taken with Definition 69(iii)). VE claims that all its pandemic-related loss is recoverable until the end of the 12 or 24 month Maximum Indemnity Period ('MIP'), as applicable.

11. Allianz's case is that VE's Business Interruption Loss ('BIL'), Additional Increased Costs of Working (or 'AICW') and Claims Preparation Costs which it is entitled to recover under the Policy, are limited to £2.5 million, £400,000 and £175,000 respectively. It has paid the £2.5 million. As I understand it, it has stated that it will make payments in respect of AICW and Claims Preparation Costs subject to proof, but has not yet done so in full.

12. In broad outline Allianz contends:

(1) That contrary to VE's case that there were many Covered Events, there were only a few. On Allianz's primary case, (1) there was one Covered Event in respect of the Disease Clause; (2) there were two Covered Events in respect of the Enforced Closure

Clause; and (3) there was a Covered Event in respect of the Prevention of Access Clause in respect of each piece or set of advice from or restriction by the government which prevented or hindered access to the Insured Locations;

(2) That regardless of how many Covered Events there were, all of VE's claimed losses aggregate as one Single Business Interruption Loss (or 'SBIL'), on the basis that they are all 'in connection with' a single occurrence. A number of different candidates for that 'single occurrence' are pleaded by Allianz.

(3) That VE can recover in respect of business interruption losses after the Period of Insurance, within the MIP if, but only if, such losses are proximately caused by a Covered Event occurring within the Period of Insurance. These, Allianz contends, are likely to be limited, and do not extend to all VE's Covid-19 related losses up to the end of the MIPs. This is because, on Allianz's case, in relation to the Disease Clause, the government and public response to Covid-19 was at any point proximately caused by Covid-19 cases at that point in time; and in relation to the Enforced Closure and Prevention of Access Clauses, because they respond only to business interruption loss as a result of a closure or prevention of access during the Period of Insurance.

The Preliminary Issues

13. The Preliminary Issues which it has been ordered should be determined seek to resolve the parties' disagreements arising from their respective positions outlined above. Those Preliminary Issues are as set out in the list which appears at Annexe 3 to this Judgment. In broad terms, those Preliminary Issues can be categorised as follows:

(1) Questions of interpretation as to what constitutes a 'Covered Event' for the purposes of the Disease, Prevention of Access and Enforced Closure Clauses, and consequently how many such 'Covered Events' there were.

(2) Questions as to how the start and end of the 'Indemnity Period' are to be identified and calculated; and also as to the correct test for causation which is to be applied as to whether losses in the Indemnity Period are related to Covered Events.

(3) Questions of whether and how VE's losses are to be aggregated, and what the applicable limits of cover are.

The Evidential Basis of the Hearing

14. The parties have agreed various facts. There was also an agreed chronology concerning events relating to Covid-19. I will refer to these as far as necessary. As I set out further below, there was also uncontested expert evidence on virology from Professor Oliver Pybus.

Principles of Construction

15. The issues which arise are in large part questions of construction of the Policy. I have considered the principles applicable to questions of construction, and how they apply in relation to a policy on the Marsh Resilience Form, in my judgment in Stonegate v MS Amlin. I adopt what is said there.

Preliminary Issues 1 and 2: The Insuring Clauses

16. The central issue under this heading is, as I have already indicated, the identification of the Covered Event(s) under each of the relevant Insuring Clauses, and thus the number of such Covered Events.

17. These issues are essentially the same as those I have considered in my Stonegate v MS Amlin judgment as Stage 1 Issue 1. In that case the terminology of 'triggers' was used, which is potentially ambiguous. In the present case, the issues are in terms of the Covered Events. Furthermore, while in Stonegate v MS Amlin Stonegate Insurers contended that the issue of the number of 'triggers' was of no significance and hardly sought to advance their own case as to the maximum number of 'triggers', in the present case Allianz has actively argued for its case as to the number of Covered Events.

18. The identification of the Covered Event(s) must be considered by reference to the Disease Clause, the Enforced Closure Clause and the Prevention of Access Clause in turn.

19. In relation to the Disease Clause, VE's case is that there was a Covered Event each time there was an 'occurrence' of Covid-19 in the Vicinity (giving that term the meaning it was found to have in the FCA Test Case), and there was such an occurrence each time a person contracted Covid-19 or entered the Vicinity with it. Allianz's primary case was that the Covered Event was all cases of Covid-19 considered together, or what was referred to as the 'epidemic/pandemic' for convenience, within the Vicinity during the Period of Insurance. Alternatively Allianz contended that there was a Covered Event on each transmission of SARS-CoV-2 within England during the Period of Insurance.

20. Allianz's primary case was not one which had a counterpart in Stonegate v MS Amlin, or in Greggs v Zurich. It is based on the proposition that the Divisional Court in the FCA Test Case, in relation to 'RSA 4' which was a policy on the Marsh Resilience Form, had rejected a submission that the Disease Clause provided cover only for 'events', and extended to providing cover for 'states of affairs'. Particular reliance was placed on paragraph [145] of the judgment of the Divisional Court ([2020] EWHC 2448 (Comm)). Furthermore, Allianz pointed out, the Divisional Court's decision in relation to RSA 4 had not been appealed to the Supreme Court. Allianz argued that it was significant that, under the Disease Clause, there was no reference to an 'occurrence' as such, but rather to a Notifiable Disease or Other Incident 'occurring' within the Vicinity. This, coupled with the fact that in Definition 69(ii) an additional notifiable disease would be 'deemed to be notifiable from its initial outbreak' and the width of the definition of Vicinity indicated that the Covered Event should be recognised to be the pandemic/epidemic itself rather than each of the cases of the disease.

21. It is true that paragraph [145] of the judgment of the Divisional Court in the FCA Test Case contemplated that the relevant Covered Event under Clause 2.3 of RSA 4 could be something other than what would usually be called an 'event' and that, in consequence, this was not an objection to regarding the peril as the disease having occurred (ie of which there had been at least one instance) within the Vicinity. I agree with VE, however, that that part of the reasoning in the Divisional Court has been

undermined by the reasoning of the majority in the Supreme Court, and in particular at paragraphs [61]-[74], especially [69] ([2021] UKSC 1). Lords Hamblen and Leggatt JJSC there emphasised that an 'occurrence' of a disease, as that concept appeared for example in 'RSA 3', meant something which happened at a particular time, in a particular place and in a particular way, and that a disease which spread, or an outbreak of the disease – unless it had sufficient unity of time, locality and cause – could not be called an 'occurrence'. I accept that that reasoning is applicable to the Marsh Resilience Form and to the Policy in particular. I do not regard the fact that Insuring Clause 2.3(viii)(d) refers to a Notifiable Disease 'occurring within the Vicinity', and not to an 'occurrence', makes a difference in this regard. Consistently with the reasoning of the majority of the Supreme Court, a Notifiable Disease should be considered to 'occur' when illness is sustained by an individual, and that it will 'occur' as often as there are cases of illness. Further the fact that a disease may be deemed notifiable from its initial outbreak does not itself indicate what is to be regarded as an occurrence of the disease.

22. For these reasons I reject Allianz's primary case on this Issue.

23. Allianz also adopted the case made by Zurich in the Greggs v Zurich action that the Policy was only 'triggered' by a Covered Event when there had been interruption or interference with VE's business as a whole and therefore that there was only one 'trigger' of the Disease Clause by reason of the spread of the pandemic. I have given my reasons for rejecting that argument in paragraphs [33-40] of my Judgment in Greggs v Zurich.

24. Allianz's secondary case under this heading was that the disease will only have 'occurred' within the Vicinity when it was transmitted between people in the Vicinity, and not merely the existence of cases of the disease, which Allianz contended would refer to the state of affairs of a person having the disease and would not typically be considered as an occurrence.

25. It was not apparent as to whether this point would make any significant difference to the amount recoverable in this case. In my view, however, the disease must be regarded as 'occurring' each time it was contracted within the Vicinity, which will have involved a transmission within the Vicinity, and also each time someone with the disease entered the Vicinity. That a disease must be regarded as 'occurring' in the latter case appears to me to be supported by the fact that many of the Notifiable Diseases are not endemic in the UK, and would necessarily have to be brought from abroad. There appears no reason why cover under Insuring Clause 2.3(viii)(d) should apply only when such a disease has been transmitted within the Vicinity, rather than in relation to the individual who comes from abroad with the disease. Had the former been intended, the clause could have said 'transmitted within the Vicinity', which it does not; while the word 'occurring' is in my view wide enough to cover a case where a person with the disease comes within the Vicinity.

26. In relation to the Enforced Closure Clause, I consider that the reasoning in my Judgment in Stonegate v MS Amlin at paragraphs [67-69] is applicable.

27. In keeping with that reasoning, it appears to me that there were two Covered Events per Venue, and a total of 20. There were two because there was the enforced closure during the first national lockdown between 20 March and 3 July 2020 and from 24

September 2020, when there was early closure of restaurants (initially at 10pm). There were two Covered Events **per Venue** for the reason given in para. [68] of the Stonegate v MS Amlin Judgment.

28. In relation to the Prevention of Access Clause, I consider that the reasoning in paragraphs [70-73] of my Judgment in Stonegate v MS Amlin is applicable.

29. As to the number of Covered Events falling within the Prevention of Access Clause in this case, there was a debate between the parties as to what had been admitted by Allianz on the pleadings. In para. 14 of and Appendix 2 to APoC, VE pleaded that there had been nine groups of instructions, which it characterised as follows: (1) social distancing rules applicable from 16 March 2020 to 19 July 2021; (2) 'stay at home', 'work from home' and equivalent instructions; (3) restrictions on gatherings (including the rule of 6 and the rule of 2); (4) closure instructions; (5) restrictions on weddings; (6) Covid-19 secure guidance; (7) early closure requirements; (8) table service requirements; and (9) international travel restrictions. In response, Allianz admitted that VE had cover for business interruption loss 'resulting from the government action or advice set out in paragraph 14 [of APoC] from the date that the action was first taken/implemented until the end of the Period of Insurance.'

30. As I understood it, VE contended that Allianz had admitted that there were at least nine Covered Events under the Prevention of Access Clause. I do not consider that to be correct or that Allianz has admitted on the pleadings that each of the groups of instructions was a separate Covered Event. The admission was that the various instructions or regulations caused prevention of access.

31. The number of Covered Events must be judged by reference to the substance, not to the form or precise mode of promulgation or communication, of the relevant actions or advice. This will be achieved by looking at the groups of regulations, guidance or rules which brought about any particular prevention of access as being one Covered Event. I would not, for example, regard as sensible an approach by which lockdown 1 was regarded as having constituted separate Covered Events in respect of closure, stay at home/work from home and social distancing.

32. In part because of the disagreement between the parties as to the position on the pleadings, and in part because there appeared to be no agreement as to what, if any, difference it would make as to how many Covered Events under the Prevention of Access Clause there were, there was not, in my view, properly focused argument as to exactly how many Covered Events there were under this Clause, although it is apparent that there will have been at least several. I consider that the parties should consider this Judgment as a whole, and I will hear further submissions, if necessary, as to whether it is permissible and desirable for there to be any further argument on the issue of how many Covered Events there were.

Preliminary Issue 3.1

33. Issue 3.1 asks whether the Covered Event is (1) the interruption to or interference with the Insured's business as a result of the matters set out in clauses 2.3(viii) and (xii), or (2) the matters set out in clauses 2.3(viii) and (xii) even if they predate the interruption to or interference with the Insured's business which results from such matters.

34. There was no dispute between the parties about the proper answer to this question. They agreed that it is the latter (ie (2)). This is the answer indicated by paragraph [215] of the judgment of Lords Hamblen and Leggatt in the Supreme Court in the FCA Test Case, and, as I have said, it was not in issue before me.

Preliminary Issue 3.2

35. Issue 3.2 asks whether the Indemnity Period begins upon the interruption or interference with the Insured's business as a result of the matters set out in Insuring Clauses 2.3(viii) and (xii) or upon the matters set out in Clauses 2.3(viii) and (xii) even if they predate the interruption or interference with the Insured's business resulting from such matters.

36. The parties are at issue as to what is the correct answer to this question. VE says that the Indemnity Period begins with the commencement of the interruption or interference, while Allianz contends that it begins with the occurrence of the Covered Event.

37. The significance of this point is that, if the Indemnity Period begins with the occurrence of the Covered Event, when that is earlier than the commencement of the interruption or interference, then the Indemnity Period will also end earlier, potentially cutting down the amount of BIL which VE can claim.

38. The point turns on the proper construction of the definition of Indemnity Period (definition 42), which, for convenience, I set out again here:

> '**Indemnity Period** means the period of time during which interruption or interference to the **Insured's Business** occurs as a consequence of the **Covered Event** beginning with the occurrence of the **Covered Event** and ending not later than the end of the **Maximum Indemnity Period** thereafter.'

39. VE's case is that this clause provides that the Indemnity Period starts when the interruption or interference occurs, because it is only after that point that there will begin 'the period of time during which the interruption or interference to the Insured's Business occurs'. Allianz, by contrast, contends that the definition makes it clear that the Indemnity Period starts with the Covered Event because it expressly provides 'beginning with the occurrence of the Covered Event'.

40. I think it clear that a case in which there was any significant gap between the occurrence of the Covered Event and the interruption or interference to the Insured's Business was not at the forefront of the draftsperson's mind in framing this definition, and indeed in the case of most Covered Events there is very unlikely to be any significant gap. The question remains, however, as to how the words used would have been understood by a reasonable policyholder when entering the contract of insurance.

41. In my judgment, the proper construction of the words used is that the Period of Indemnity starts with the commencement of the interruption or interference which results from the Covered Event. That gives effect to the words 'the period of time during which the interruption or interference … occurs' which are the core words of definition, and avoids the conclusion that there is a period of time which counts as the

Indemnity Period which is not within the period of time during which there is interruption or interference. The words 'beginning with the occurrence of the Covered Event' can sensibly and without manipulation be read as saying that the Indemnity Period will begin no earlier than the Covered Event.

42. This interpretation makes better commercial sense, especially in the context of a policy wording which provides cover for business interruption arising from Notifiable Diseases. The occurrence of a Notifiable Disease in the Vicinity might not be known for some time, and before any interruption or interference. Especially if the MIP were short, it might have substantially (or even entirely) elapsed by the time interruption or interference was experienced, if it were correct that the Indemnity Period always commenced with the occurrence of the Covered Event. It is difficult to see why the parties should have intended that the length of the Indemnity Period which occurs after the start of interference with the business should depend on whether there is a gap between the Covered Event and its effect in interfering with the business.

Preliminary Issues 4 and 5: Losses after the Period of Insurance

43. Issues 4 and 5 deal with the question of whether and to what extent there is cover for BIL after the Period of Insurance but within the MIP. They are to be taken with Issue 2.2, which is framed in terms of the Covered Events from the Enforced Closure peril ending on 28 September 2020. Whether that end date is appropriate was itself in issue.

44. The parties were in agreement that the question of whether BIL after the Period of Insurance can be recovered depends on whether it was proximately caused by Covered Events within the Period of Insurance. This is so by reason of the provision in Clause 2.3 that the insurer agrees to pay 'the resulting Business Interruption Loss', and of the definition of 'Indemnity Period' which stipulates that the relevant period is that in which there is interruption or interference 'as a consequence of' the Covered Event.

45. The parties were at issue as to what losses after the Period of Insurance can be said to have been caused by Covered Events occurring within the Period of Insurance. It is helpful to consider this question by reference to each of the relevant Insuring Clauses in turn.

The Disease Clause

46. I start with the Disease Clause. It is VE's primary case that Covered Events, namely the occurrences of Covid-19 in the Vicinity during the Period of Insurance, caused interruption and interference, and so loss, throughout the MIP. In support of this primary case, VE argued that any interruption at any given point in time was caused concurrently and equally by all cases of Covid-19 that had occurred in the Vicinity; that insured occurrences during the Period of Insurance caused uninsured occurrences after the Period of Insurance; and that an attempt to weigh the causative effects of insured and uninsured occurrences of the disease is impractical, and was disapproved by the Supreme Court in the FCA Test Case. As part of its argument, VE adopted Stonegate's submissions in Stonegate v MS Amlin on these points. If that primary case was not accepted, VE submitted that, at the least, the Government's decision-

making until the end of lockdown 3 in May 2021 was proximately caused by insured cases of the disease.

47. For its part, Allianz contended that VE's primary case was 'startling' and based on 'a fundamental misreading of, or inapposite extrapolation from' the Supreme Court's decision in the FCA Test Case.

48. As indicated by VE's own adoption of Stonegate's arguments, VE's primary argument had, in very large measure, already been addressed to the Court in the Stonegate v MS Amlin hearing, and it is dealt with in paragraphs [201-204] and [215-221] of my Judgment in that case. That reasoning is applicable in this case also. In summary: (1) the decisions in the FCA Test Case do not establish that all cases of Covid-19, whenever occurring, were equal concurrent causes of the governmental actions and public response at any given time; (2) the fact that the cases of the disease occurring in the Period of Insurance may have caused the later cases of the disease (because 'cases make cases') is not sufficient to say that the cases of the disease in the Period of Insurance were the proximate cause of governmental measures and public response after the Period of Insurance; and (3) the 'death blow' or 'grip of the peril' principle is inapplicable.

49. For those reasons, I reject VE's primary case. That is not to say that Covered Events, namely cases of disease occurring in the Vicinity in the Period of Insurance, could not have been the proximate cause of any interruption or interference after the Period of Insurance. It rather means that any such causation would need to be demonstrated, and cannot be said to be established in the ways suggested in VE's primary case.

50. I turn to consider VE's secondary case, namely that it is apparent on the facts that cases in the Period of Insurance were the proximate cause of interruption and interference after the end of the Period of Insurance, at least up to the ending of lockdown 3. VE's case in this regard concentrated on the governmental response to the pandemic. VE did also contend that cases within the Period of Insurance were proximately causative of interruption and interference to its business after the Period of Insurance via other routes, and I will turn to those after considering the case in relation to governmental action.

51. As to that, VE argued that that the 'second wave' of Covid-19 had commenced in early September 2020, during the Period of Insurance; that from the onset of the second wave it was envisaged that it would take some time (in the region of 6 months) to deal with it; and that the government's response in that period was to the problem of the second wave, and to the advent of the Alpha Variant, which itself had originated during the Period of Insurance. On this basis, the Covered Events of Covid-19 within the Period of Insurance were equally effective proximate causes of the governmental action and the resulting interruption and interference throughout this period.

52. In support of this case, VE drew particular attention to the following:

(1) That at a press conference on 9 September 2020, Professor Whitty presented data showing that confirmed cases were beginning to go up again 'and going up really much more rapidly over the last few days'. On 10 September 2020, at SAGE meeting 56, it was said that '[T]he current situation in the UK is analogous to the one in early

February, with rapidly increasing incidence' and that it was 'highly likely that further national and local measures will be needed to bring R back below 1 in addition to those already announced'. By SAGE meeting 57, SAGE was advising that the NHS could become overwhelmed if no interventions were adopted, and that a package of measures would be needed. By 21 September 2020, Professor Whitty was saying that 'we have, in a bad sense, literally turned a corner', and that 'we should see this as a 6-month problem.'

(2) That SAGE was continuing to advise that sustained measures were likely to be necessary in early October 2020. The R rate continued to rise. This led to the announcement of the three Alert levels by the Prime Minister on 12 October 2020, and the tiering regulations on 14 October 2020. But the R rate remained above 1, and by SAGE meeting 64 on 29 October 2020, it was being recommended that measures should be put in place as soon as possible in order to control the rate of transmission of the virus ahead of the Christmas holiday season, allowing for the possibility of a short term relaxation over Christmas. Faced with this advice, the Prime Minister announced the second lockdown, to start on 5 November and finish on 2 December 2020.

(3) That at SAGE meetings 71 and 72 it was reported that R had plateaued at 0.8 to 1.0. But at SAGE meeting 73 on 17 December 2020 R had grown rapidly to between 1.1 and 1.3 in England. SAGE noted very early data on a new variant identified in the South East of England. This variant, which came to be called the Alpha Variant, had higher transmissibility. It had first been sampled during the Period of Insurance, namely on 20 September 2020. It then developed and was relied on by the government in January 2021 as a reason for imposing the third national lockdown.

53. I accept that by September 2020, within the Period of Insurance, it was apparent that a 'second wave' of the virus was developing, largely due to multiple introductions from European countries. It was also apparent that measures to combat this new wave might be required over a period of some months. What occurred after the end of September 2020 was that the measures introduced in October 2020, perhaps predictably, were not sufficient to bring R below 1, and that this led to the imposition of the second lockdown. I accept also that it was at least contemplated that a second lockdown before Christmas might need to be followed by further restrictions after the Christmas holiday, and that the spread of the Alpha Variant made this, in the event, inescapable. Furthermore, I accept, on the basis of the *Hill et al* paper, of which Prof Pybus, who gave evidence, was one of the co-authors, that the Alpha Variant probably originated in a person who had been chronically infected over the course of months, and that it is clear that this variant had originated within the Period of Insurance.

54. However, neither this general pattern, nor any of the materials put before me by VE, persuaded me that the cases of Covid-19 within the Period of Insurance were, save in relation to a short period after its end, proximate causes of the governmental responses which occurred after the end of the Period of Insurance. Instead, the proximate causes of those responses were the cases of the disease which had occurred in the immediate run-up to the measure, together with the anticipation of further cases in the future.

55. That this was the case is supported by the fact that, for measures to be introduced under the Public Health (Control of Disease) Act 1984, they had to be in response to a

serious and imminent threat to public health posed by the disease. Thus the statutory underpinning of governmental measures required that there should be an imminent threat to public health, which would depend principally on the current and projected incidence of the disease, not on past cases of the disease. Furthermore, under the 26 March 2020 Regulations, any restrictions or requirements imposed by those Regulations had to be reviewed every 21 days, emphasising that what was in issue was the current position and the current threat.

56. The fact that the governmental response was to the current and anticipated number of cases is borne out by the lifting of restrictions in the summer of 2020, and then by the imposition of progressively more stringent restrictions in September to November 2020 in response to the rate of infection increasing. What measures were put in place in that period (and indeed thereafter) was not a matter on which there was a set plan which had been arrived at within the Period of Insurance. The Prime Minister, for example, on 30 September 2020 said that 'if the evidence requires it, we will not hesitate to take further measures', 'but if we put in the work together now, then we give ourselves the best possible chance of avoiding that outcome and avoiding further measures'. This indicates, as might be expected, that the government was responding, and would respond, to evidence as it emerged of the current rate and progression of the disease, but also that the government was flexible as to what measures would be necessary, and hoped to avoid the imposition of more restrictions. Similarly, when introducing the second national lockdown on 2 November 2020, the Prime Minister told the House of Commons that, 'faced with these latest figures, there is no alternative but to take further action at a national level'; that 'no-one wants to impose measures unless absolutely essential'; but that 'when the data changes course, we must change course too.'

57. That regard will have been had to the number of cases before the end of the Period of Insurance does not mean that those cases were a proximate cause of subsequent action. In any exercise of monitoring the progression of a disease the past cases will be observed and taken into account, not least as a comparison with the current and expected incidence. That is a different matter from saying that past cases are of equal efficacy with the current and expected cases in determining whether any and if any what measures should be imposed. Equally, the fact that there were contingency plans made as to what it might be necessary to do does not mean that all matters envisaged by the plan had been determined on as a result of cases which had occurred at the time the plan was drawn up. Had the number of cases, as time went on, not justified the implementation of all parts of a contingency plan, then they would not have been adopted, just as more drastic measures than planned might have been adopted had the development of the disease required it.

58. As I have already indicated, however, I accept that cases of the disease did not immediately lose their potential to cause government response. To put the matter in concrete terms, I accept that cases of Covid-19 occurring in the Vicinity during the Period of Insurance had the potential to be a proximate cause of government action for a time after 28 September 2020. This is in part because of the fact that information on cases occurring in that period remained, for a time, the most up to date information on which decisions were made; and also because of the period for which people infected with the disease remain infectious, which the parties agree to be 14 days.

59. When the Prime Minister announced the three-tier system for England on 12 October 2020, his statement to the House of Commons included the explanation that:

> '… the number of cases has quadrupled in the last three weeks … there are now more people in hospital with Covid than when we went into lockdown on March 23 … and deaths are already rising…'

Given this, I consider that it can be said that cases which had occurred within the Period of Insurance were at least an equal proximate cause of the action announced by the Prime Minister and thus of any interruption or interference which arose from the system of tiers introduced on 14 October 2020 by the sets of Health Protection (Coronavirus, Local COVID-19 Alert Level) Regulations of that date. I would not, however accept that when, on 29 October 2020, it was announced that more areas should be moved into Tier 2, the cases within the Period of Insurance were an equally effective cause. By that stage, in my judgment, it was cases occurring since the Period of Insurance which were more effective; and *a fortiori* this was the case in relation to the second lockdown, which came into force on 5 November 2020.

60. VE's case on the causative effect of cases of the disease occurring in the Period of Insurance and covered under the Disease Clause (or what might be called 'Covered Cases') was not confined to a case in relation to government action. It contended also that Covered Cases caused interruption or interference with its business in other ways, including by making the public less willing to attend its insured venues.

61. Allianz did not deny that there may have been some effects of Covered Cases after 28 September 2020. As I understood it, it accepted that insofar as people had contracted Covid-19 before the end of the Period of Insurance and were self-isolating as a result, then any resulting interference with the business would be covered (subject to other points such as aggregation). Similarly, in relation to cases of death caused by Covid-19 contracted before the end of the Period of Insurance, or cases of 'Long Covid' in people who were infected before the end of the Period of Insurance, or of a booking made for a time after the Period of Insurance but cancelled because an individual contracted Covid-19 during the Period of Insurance, Allianz accepted that they might have had a relevant effect. But in relation to each of these categories, as in relation to any more general case that the public response was to frequent insured venues less because of the Covered Cases of the disease, Allianz contended that it was for VE to establish that there had been any resulting interruption or interference. Allianz made it clear that it was not contending that VE was in any sense debarred from seeking hereafter to establish such matters; merely that they needed to be proved and could not be assumed.

62. I consider that Allianz was correct in relation to this point. It needs to be shown that there was interruption or interference resulting from Covered Cases. In particular, I do not consider that there can be any general assumption that any fall off in numbers attending insured venues after the end of the Period of Insurance (by comparison with the previous year, for example), was due to cases of the disease occurring before the end of the Period of Insurance. In this case, unlike in Stonegate v MS Amlin there was no evidence from experts in Consumer Behaviour. But even without such evidence, it appears to me obvious that there might have been a number of reasons for any such fall off, if it occurred, which include the effects of the ongoing pandemic, and new government measures and warnings.

63. I should refer to a further argument of VE. This was that Allianz's arguments on causation of losses in the Indemnity Period would have the effect of 'erod[ing], almost to vanishing point, the 1- and 2-year MIPs'. I do not consider that this is a cogent argument against the approach which I have held above to be correct. It must be recalled that the Policy does not only cover business interruption as a result of Disease or Prevention of Access. It also provides what might be described as more standard business interruption cover, namely business interruption as a result of Property Damage in consequence of a very wide variety of perils (including fire, earthquake, storm and flood). It is easy to conceive how the incidence of such a peril at one or more insured venues might lead to interruption or interference with the business and to a BIL over the whole of the MIPs agreed. This applies also to various of the 'Specified Causes' listed in Insuring Clause 2.3, for example (xiii), Supply Chain & Contract Sites damaged during the Period of Insurance. Thus the fact, if it be a fact, that for any particular peril the entirety of the MIP is unlikely to be relevant does not assist in relation to the construction of the Policy or as to how causation should be approached. The length of the MIP agreed might be referable to other perils.

Prevention of Access and Enforced Closure

64. In relation to the Prevention of Access and Enforced Closure Clauses, the argument in relation to losses in the MIP was somewhat different. Allianz contended, in relation to those perils, that the Policy provides that there should be an indemnity only for BIL as a result of Enforced Closure or Prevention of Access during the Period of Insurance, and that there is no cover for any period of Enforced Closure or Prevention of Access after the end of the Period of Insurance, even though the closure/prevention may have begun within the Period of Insurance.

65. In essence this appeared to me to be an argument that the only period of closure or prevented access which will be taken into account in assessing whether there has been BIL as a result of those perils is any such period within the Period of Insurance, and would not extend to any part of a closure or prevented access after the Period of Insurance.

66. Allianz's argument was based, in the case of Enforced Closure, on the words of Definition 69(v) and Insuring Clause 2.3(viii)(d) which provide that the peril is the 'enforced closure of an Insured Location by any governmental authority [etc] for health reasons or concerns' (Definition 69(v)), 'during the Period of Insurance' (Insuring Clause 2.3(viii)(d)). In relation to Prevention of Access it was based on the words of Definition 87(ii), which refers to actions or advice of the police (or other authority) 'which prevents or hinders the use of or access to Insured Locations during the Period of Insurance'.

67. I do not consider that Allianz's argument is correct. In my view the correct construction of the Policy is that there is a Covered Event when, in the case of Enforced Closure, there is an enforced closure of an Insured Location within the Period of Insurance, ie, if the closure takes place within the Period of Insurance. There could then be recovery for the resulting interruption and interference with the business, and the extent of that interruption or interference would depend on how long the closure lasted, irrespective of whether the whole period of such closure was within or after the Period of Insurance. Similarly in relation to Prevention of Access, if there

are actions or advice which have, within the Period of Insurance, the effect of preventing or hindering the use of or access to Insured Locations, then there is cover for any resulting interruption or interference, and the extent of that interruption or interference would depend on how long the prevention or hindrance lasted, and the Clause does not require any period of such prevention or hindrance after the Period of Insurance to be disregarded.

68. I regard this as being the meaning which would be given to the Policy terms by a reasonable policyholder. It does not involve any manipulation of the words used, but simply reads the provision that the enforced closure / prevention or hindrance of use/access should be '**during** the Period of Insurance' to refer to the initiation of the closure / prevention or hindrance.

69. I consider that the construction for which Allianz contends would produce uncommercial and unintended consequences. It would mean, for example, that if an Insured Location were the subject of enforced closure on the last day of the Period of Insurance, and remained closed for a week, the only cover under the Policy would be for the consequence of the first day of closure. While on Allianz's contention, the remainder of the period of closure would fall within the next policy year, it would be quite possible, indeed probable, that insurers for the next year would exclude cover for an already subsisting closure / prevention or hindrance. It is also difficult to reconcile with the terms of Insuring Clause 2.3(xii), given that that clause requires, for there to be a covered Prevention of Access – Non Damage, an interruption or interference for more than 8 consecutive hours. If the whole of that period had to be within the Period of Insurance, and any period after the Period of Insurance did not count as relevant interruption or interference, then if an insured experienced a prevention or hindrance of use/access within the 8 hours before the expiry of the Period of Insurance, there could be no cover under the Policy, and almost certainly there would be no possibility of a recovery under an insurance for the next year. More generally, Allianz's construction would mean that these two Insuring Clauses provided cover in a markedly different manner from how other Insuring Clauses would cover similar situations. For example, if there were a fire at an Insured Location during the Period of Insurance, and it led to the closure of an Insured Location for a significant period beyond the end of the Period of Insurance, then the entirety of that closure, up to the end of the MIP, would be relevant interruption or interference. But on Allianz's case, if there was an enforced closure for health reasons before the end of the Period of Insurance, no part of the closure after the end of the Period of Insurance would be relevant interruption or interference. I consider that to be paradoxical, and reinforces me in my view as to how the two Insuring Clauses would reasonably be understood.

70. The construction which I favour does lead to the question of whether, in the case of a closure or prevention/hindrance of access/use commencing in the Period of Insurance, there can be a claim on the Policy for the interruption or interference caused by the continuance of the closure or prevention/hindrance for as long as it is in place, even if it lasts for a very considerable time. VE's answer to that question was that if the closure or prevention/hindrance remained in substance the same, and it continued to be a proximate cause of loss, then it is covered as long as it lasts; but if it becomes in substance a new enforced closure or a new prevention/hindrance of access then its effects will not be covered under the Policy. I agree with that. I would add that in

addressing the question of whether the enforced closure or prevention/restriction of use/access is in substance the same, the matters which it will be material to consider include (i) the terms and purpose of the original and later orders, actions or advice; (ii) the legal origin of any powers exercised by the relevant authority in making or giving such orders, actions, or advice; (iii) the reasons why any later order, action or advice was made or given and whether they were the same or different from those which prompted the original order, action or advice; and (iv) the identity of the authority/ies concerned.

71. The application of this test will be fact specific. Subject to one issue, which I will deal with in the following paragraph, I consider that questions of whether specific closures or preventions/hindrances meet the test are ones which should be addressed by further evidence and argument in the light of this Judgment, if they remain in issue and it is necessary.

72. The specific issue which can be resolved at this stage is as to whether VE had cover for the 'hospitality curfew' from 24 September 2020 to 4 November 2020 (during which hospitality venues had to close at 10 pm) and from 2 December 2020 to 26 December 2020 (during which period venues had to take last orders at 10 pm and close at 11 pm). VE accepts that early closure is not covered during the period 5 November 2020 to 1 December 2020 because that was the second lockdown and venues were not open at all.

73. In my judgment, the early closure rule introduced after the second lockdown was not in substance the same as that in force from 24 September 2020 to 4 November 2020. It was not a simple continuance of it, and succeeded a period in which there had been a significantly different restriction. It was not in the same terms (in that it differed as to the time of closing). Nor can all the reasons for it have been the same. The reimposition of a curfew requirement must, consistently with the legal framework under which it was imposed, have been in order to deal with the serious and imminent threat to public health at the time it was introduced by the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations of 2 December 2020, and not the threat which had existed at the time the curfew was initially imposed in September.

Preliminary Issue 6: Limits

74. Issue 6 is in the following terms:

'Is there "total business interruption cover" of £7,906,645 and £40,762,242 in respect of "Item 1" and "Item 2" venues respectively, or is there (as is material to this claim) a Limit of Liability of £2.5m any one Single Business Interruption Loss in respect of Insuring Clause 2.3(viii) (the *disease clause* and *enforced closure* clause) and £500,000 any one Single Business Interruption Loss in respect of the *prevention of access* clause?

75. Whether this issue has any real significance was unclear. Allianz submitted that the answer to it made little difference to the result in this case, other than providing the relevant context for the aggregation dispute.

76. The respective positions of the parties were these. VE contended that Allianz agreed to provide total 'business interruption cover' of £7,906,645 and £40,762,242. Allianz contended that the Limit of Liability was £2.5 million for the Disease and Enforced Closure Clauses and of £500,000 for the Prevention of Access Clause, and are not subject to any 'maximum indemnity' limit.

77. VE's case was based on the fact that in the Schedule, under 'Limits of Liability' appear the words 'Being the **Total Value**'. Total Value is not a defined expression, but VE contends that it is a reference to the Declared Values which had been set out under 'Declared Values – Business Interruption' in the Schedule, and that is supported by the second paragraph under 'Declared Values – Material Damage', which states that 'The **Declared Values** represent the total values of the various locations which have been declared by **Insured** to the **Insurer** within the location schedule…'

78. VE contended that Allianz's case gave no effect to the words 'Being the **Total Value**'. It also submitted that Allianz's case would mean that VE would only be entitled to cover if it establishes a SBIL, ie if its BIL was in connection with a single occurrence; and that that would mean that if the court rejected all Allianz's aggregation arguments, VE could end up with no indemnity. Furthermore, Allianz's case transformed the Limits of Liability into indemnity clauses.

79. For its part, Allianz pointed out that all the various limits set out under Limits of Liability for Insuring Clause 2.1 and for Insuring Clause 2.3 were just that: Limits of Liability. They were not Sub-Limits, which are dealt with in Item 4 of the Schedule. By General Condition 8 of the Policy, the liability of the Insurer was not to exceed the Limit of Liability specified in the Schedule, and that included each of the Limits of Liability for Business Interruption, most of which were expressed as applicable 'any one **Single Business Interruption Loss**'. Allianz further contended that VE misunderstood its position. It clarified that it was not saying that, without any aggregation, there would be no indemnity; and accepted that if there was a Covered Event giving rise to BIL there would always be at least one SBIL.

80. In my judgment that concession must be correct. The Limits of Liability are clearly not intended as indemnity provisions and are not seeking to provide that there can be no cover for a Covered Event unless there is an aggregation of losses by reference to their connection to one occurrence. Equally, it appears to me that the specified limits are intended to apply to all claims made under each of the Insuring Clauses listed. Thus, in respect of, for example, Insuring Clause 2.3(v), there will always be a limit of £250,000 per SBIL, whether there is any aggregation by reference to an occurrence or not. The parties cannot have intended that that limit should apply if there was aggregation but that it should not apply, and only the much larger 'Total Value' figure apply, if there was not.

81. As to the effect of the words 'Being the **Total Value**' I am inclined to think that this serves as an overall limit, so that there can be no recovery under the Policy in respect of BIL in excess of that amount, irrespective of the number of Insuring Clauses involved, and irrespective of the number of SBILs (or in the case of 2.3(xiii)(a), premises or locations) involved.

Issue 7: Aggregation

82. Issue 7 concerns aggregation. It arises because it is Allianz's case that all the sums claimed by VE are a SBIL, and limited to £2.5 million in respect of Reduction in Turnover and Increased Costs of Working, £400,000 in respect of AICW and £175,000 in respect of Claims Preparation Costs. Allianz contends that that is the effect of a proper application of Policy and in particular the definition of SBIL to the facts.

83. Issue 7.1 raises the question of what is the nature of the 'connection' required by the phrase 'in connection with' in the definition of SBIL. Issue 7.2 asks whether all the amounts claimed by VE arise 'in connection with' one of a number of putative 'single occurrences'. Issue 7.3 asks whether different portions of the BIL claimed by VE are 'in connection with' different 'single occurrences', and if so, how many there are. Finally, Issue 7.4 asks whether none of the BIL claimed by VE is 'in connection with a single occurrence' or alternatively whether some portions of the BIL (such as that relating to the period between lockdowns) are not.

The agreed facts and evidence

84. As I have already set out, the parties agreed various facts, including as to the nature, origin, and spread of the virus. In addition, each side served reports from an expert virologist: Professor Oliver Pybus in the case of VE and Professor Julian Hiscox in the case of Allianz. The extent of their agreement was doubtless reflected in the extent of agreement in the Agreed Facts. In addition, the experts produced two Joint Reports, which indicated further significant areas of agreement.

85. In the event, Allianz indicated that it was prepared to accept Professor Pybus's evidence. Professor Pybus was called to give evidence, and gave some explanatory evidence in chief, but was not cross-examined, and Professor Hiscox was not called.

86. As a result I had, in addition to the Agreed Facts, the uncontradicted evidence of Professor Pybus including that in the Joint Reports which he had produced with Professor Hiscox.

87. Salient features of that additional evidence were:

(1) That SARS-CoV-2 was probably introduced into the human population at the Huanan Market, Wuhan;

(2) The 'ultimate source' of the pandemic in the UK and globally was the outbreak of SARS-CoV-2 in Wuhan, China in late 2019.

(3) There 'must have been' an initial introduction of SARS-CoV-2 into England, and that it was 'reasonably unlikely' that this occurred before 1 January 2020; but that it is 'highly likely' that there was transmission of the virus within the UK at around or slightly before 23-28 January 2020;

(4) An MRCA 'is not a fixed entity but instead must be defined relative to a specific group of infections' and is best understood 'by starting with this group of infections, then moving back in time, and following all the lines of transmission into the past'.

(5) The MRCA of all available SARS-CoV-2 genome sequences was a virus in a cell in a particular infected host, and that infection (i) probably existed around

November/December 2019; (ii) was probably an infection in an intermediate host animal, not in a human; and (iii) was probably located in the Huanan Market. But Professor Pybus thought that there was a reasonable chance that the MRCA infection could instead have existed upstream in the supply chain of the animals to Huanan Market, and therefore may have existed somewhere outside Wuhan in early November 2019, but there are no data at present that can support or refute that notion.

(6) The current view is now that lineages A and B are considered ancestral lineages of the pandemic but neither one is considered as ancestral to the other. Professor Pybus's evidence was that we cannot be certain which lineage preceded the other, and that this has now been clarified in the Pango network nomenclature rules.

(7) 'To a very high degree of certainty, SARS-CoV-2 cases of COVID-19 in England/UK were **not** linked by a continuous chain of infection to the initial introduction in England/UK'. 'Very large numbers of introductions seeded multiple independent transmission lineages in the UK.' Professor Pybus gave evidence that there were at least 1179 introductions, each of which was genetically distinct and created an onward chain of transmission in the UK.

The Proper Approach to Aggregation Provisions and the wording of the SBIL definition

88. The arguments in relation to aggregation in this case, and in particular as to the proper approach to aggregation clauses, and the assistance which can be gained from authority in relation to the words used in the definition of SBIL, overlapped very substantially with those presented in Stonegate v MS Amlin. I considered the arguments adduced in this case (on which the Stonegate parties had the opportunity of commenting), before concluding my views in relation to those presented in the Stonegate v MS Amlin case itself. My reasoning in my Judgment in that case, in particular at paragraphs [78-90] and [101-116] is applicable in this case.

Allianz's aggregation cases

89. I therefore turn to consider Allianz's various cases as to what constituted the single occurrence for the purposes of the aggregating provision in the SBIL.

90. There were, on the pleadings, some 18 different candidates. As developed at trial by Allianz, these can be considered as falling within five broad groups: namely (i) what may be described as 'virology arguments' including as to the initial mutation(s) which led to the progenitor virus and as to the MRCAs of the virus or identified lineages; (ii) arguments in relation to the first transmission or outbreak of the disease in Wuhan; (iii) the 'first or first relevant transmission' in the Vicinity, 'introduction to the Vicinity' or 'outbreak' in the Vicinity cases; (iv) a case as to the continuation or spread of the pandemic within the Vicinity; and (v) a case as to government actions. The pleaded cases, as grouped under these headings were as follows:

Virology arguments	
Argument 1	The 'mutation or set of mutations' of the 'progenitor virus'
Argument 2	The MRCA (most recent common ancestor) of SARS-CoV-2

Argument 3	**(a)** The infection with a genomic sequence equal to the earliest Lineage B SARS-CoV-2 cases or **(b)** (if different) the MRCA of all Lineage B cases
Argument 4	**(a)** The infection with a genomic sequence equal to the earliest Lineage B.1 SARS-CoV-2 cases or **(b)** (if different) the MRCA of all Lineage B.1 cases
Wuhan transmission/ outbreak arguments	
Argument 5	The first human-to-human transmission of SARS-CoV-2
Argument 6	The first 'relevant' human-to-human transmission of SARS-CoV-2
Argument 7	The initial outbreak of COVID-19 in Wuhan in Nov/Dec 2019
England / UK transmission / outbreak arguments	
Argument 8	The first transmission of COVID-19 within England
Argument 9	The first transmission of COVID-19 within the UK
Argument 10	The initial introduction of COVID-19 within England
Argument 11	The initial introduction of COVID-19 within the UK
Argument 12	The initial outbreak of COVID-19 within England
Argument 13	The initial outbreak of COVID-19 within the UK
Pandemic in Vicinity	
Argument 14	The continuation of COVID-19 within England
Argument 15	The continuation of COVID-19 within the UK
Argument 16	The spread of COVID-19 within England
Argument 17	The spread of COVID-19 within the UK
16 March 2020 or subsequent governmental actions which constituted an 'occurrence'	
Argument 18	Instructions and/or advice given by the Government on 16 March 2020, alternatively the earliest of (unspecified) subsequent Government actions

I will deal with these five groups of cases in turn.

91. Allianz's cases in relation to groups (i) and (ii) (the virology arguments and the Wuhan transmission / outbreak arguments) overlap very significantly with the cases which were made by Stonegate Insurers which I have called, in my Judgment in Stonegate v MS Amlin the 'initial outbreak of Covid-19 in Wuhan' and the 'Virology Options' cases, and which I consider in paragraphs [142-163] of that Judgment. The findings which I made in relation to the scientific evidence in that case are materially the same as what was agreed between the parties or was the effect of Professor Pybus's evidence in this case. There was, in the present case, less material put before me as to what would have been known to an informed observer in the position of the insured in early 2020. The parties in the present case however had the opportunity of commenting on the material deployed in the Stonegate v MS Amlin hearing. Accordingly I consider that the conclusions which I have reached in that case are applicable in this.

92. Thus, in this case, as in that, I would reach conclusions that an informed observer would have considered that: (i) the initial human infection(s) could be described as a single occurrence; (ii) the 'outbreak' of the disease in Wuhan thereafter was not a single occurrence; (iii) none of the 'virology' options in that case or what I have identified as the virology arguments in this case would have been regarded as a single occurrence. By way of clarification of point (iii), I do not consider that the virology arguments in this case are materially different from those which I considered as virology options in that case. Specifically, I consider that the reasoning in paragraph [160] applies to Arguments 3 and 4 here; and the reasoning in paragraph [161] applies to Argument 1 here. As to Argument 2, I consider that the MRCA of SARS-CoV-2, which is a product of what is being sampled, which probably occurred in a non-human species, at a time and place which cannot be precisely identified, and which was not observed at the time, would not be regarded as an 'occurrence' for the purpose of the aggregating provision.

93. In this case, as in that, I am prepared to accept that each of the matters identified in Arguments 1-7 had a sufficient causal relationship with VE's losses to satisfy such causal requirement as I have found implicit in the definition of SBIL.

94. However, in this case, as in that, I am clearly of the view that to the extent that any of the matters identified in Arguments 1-7 can be said to be single occurrences, they are too remote from the losses to be regarded as relevant occurrences for the purposes of the aggregating provision. They were geographically remote. They were temporally remote, a point which may be said to be all the more pronounced in this case, where the Period of Insurance extends to the end of September 2020, and thus where the aggregation for which Allianz contends extends to losses deriving from Covered Events up to that date. They are also causally remote, in the way identified in paragraph [154] of the Judgment in Stonegate v MS Amlin. Again, that point is *a fortiori* in this case.

95. In relation to group (iii) (ie Allianz's Arguments 8-13), which relate to the first or first relevant transmission within the Vicinity, the introduction into the Vicinity and the outbreak in the Vicinity, I consider that the position is as follows.

96. As the evidence showed, the initial introduction into and the initial transmission within the Vicinity (which are covered by Arguments 8-11) were not causally linked to all the cases which occurred in the UK. Instead there were multiple introductions, which were genetically distinct and led to onward chains of transmission. I consider that there were here very many occurrences, and that the epidemic in the UK (or the losses arising from it) cannot be said to be 'connected with' any one of them. Any one such introduction/transmission cannot be said to have even a weak causative link to all the cases in the UK which led (via government response and public reaction) to VE's losses. I would also regard these occurrences as too remote to be relevant occurrences. Though geographically more proximate, the first introductions were still temporally remote from the losses.

97. Arguments 12 and 13 are couched in terms of the 'initial outbreak' in the Vicinity. The Joint Statement of the experts, which, as it involved Professor Pybus's views, was the evidence before me, was to the effect that 'the terms "initial outbreak" and "first wave" of SARS-CoV-2 infection in England/UK can be considered synonymous. We both agree this period corresponds approximately to late January 2020 to late June

2020, with the numbers of confirmed cases peaking in early April 2020. An exponential rise in cases was observed in March 2020.'

98. If the 'initial outbreak' is given the meaning of the period late January to late June 2020, this case is very difficult to distinguish from Arguments 14-17, which I consider below. In short, I do not consider that to be an occurrence, as it lacked unity of time, involved a very large area and an evolving situation. Insofar as 'initial outbreak' is given a more confined meaning, focusing on the early cases of the disease in the Vicinity, then I consider that the objections to it are effectively the same as those to Arguments 8-11. There were multiple cases, occurring at different times and different places, no single one of which can be said to have been causatively related to all the cases in the Vicinity which led to governmental action and public reaction. Accordingly I do not consider that there can be said to have been 'a single occurrence'. In any event I would consider it too remote.

99. Group (iv) (ie Arguments 14-17), are in effect that the occurrence was the pandemic, or its continuation or spread, within the Vicinity. Allianz submitted that it was possible to regard these matters as a single occurrence and pointed, in support of this, to the Judgment of Lord Briggs JSC in the FCA Test Case, and in particular to paragraph [323] thereof which I have quoted in my Judgment in Stonegate v MS Amlin. I do not consider, however, that, given the analysis of the majority of the Supreme Court, in particular in paragraph 69 of the judgment of Lords Hamblen and Leggatt JJSC, that these matters can be regarded as a single occurrence. Instead the pandemic is to be considered as having been composed of a large numbers of cases, which occurred at different places and at different times.

100. Argument 18 related to Government Action. This was pleaded by Allianz as a case that the instructions by the UK Government to people and businesses on 16 March 2020 were a single occurrence; and if they were not, or if any losses were not in connection with that occurrence, Allianz relied on 'the earliest of any UK Government Instructions and/or advice' as set out in an Appendix to the APOC as might be an 'occurrence'.

101. This case was put as a fallback by both parties. I nevertheless consider that there clearly were occurrences consisting of governmental action with which the alleged losses were connected. These were more extensively canvassed in the Stonegate v MS Amlin and Greggs v Zurich actions than in this. The facts of this case are simpler than those relevant to those cases because it is only the actions of the UK Government applicable to England which are relevant. For reasons more fully expressed in the Judgments in those cases, I reject the idea that there was a single government response, which amounted to one occurrence, covering everything done in response to SARS-CoV-2. I do, however, accept that there was a single occurrence consisting of the Government's decision made on 16 March 2020 to instruct people to avoid social venues and the instructions given on that date to that effect. I would also accept that there was an occurrence on 20 March 2020, when restaurants were instructed to close. Equally, I would accept there to be an occurrence constituted by the announcement and implementation from 24 September 2020 of early closing and other restrictions on restaurants. Further, should they be relevant, I would consider that the bringing into force of the three-tiered system on 14 October 2020, and the imposition of the second lockdown from 5 November 2020, were capable of being relevant single occurrences.

I do not accept that there were separate occurrences when measures were renewed, immaterially changed, or relaxed.

102. It was not part of this Preliminary Issues hearing to seek to attribute particular losses to these different occurrences. That will have to be determined, if it still remains in issue, hereafter.

103. VE made the case that, if there was any aggregation, it should be on a per Insured Location basis. I do not accept that that is the case. There is no justification for it in the wording of the definition of SBIL. Instead, the Limit of Liability per SBIL for Business Interruption – Property Damage, and for Insuring Clauses 2.3 (i), (ii), (iii), (iv) and (vi) are consistent only with the possibility that there can be a SBIL in respect of losses deriving from different Insured Locations; and that is also implicit in the terms of the second paragraph (beginning 'Where the **Insured**…') in Item 5 – Retention of the Schedule.

Preliminary Issue 8

104. This Issue did not appear to add significantly to the matters raised by Issues 6 and 7.

Conclusion

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