THE HIGH COURT

COMMERCIAL

[2023] IEHC 455

[No. 2020/3656 P.]

BETWEEN

HYPER TRUST LIMITED TRADING AS THE LEOPARDSTOWN INN

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3558 P.]

BETWEEN

ABERKEN LIMITED TRADING AS SINNOTTS

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3402 P.]

BETWEEN

INN ON HIBERNIAN WAY LIMITED TRADING AS LEMON AND DUKE

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[No. 2020/3453 P.]

BETWEEN

LEINSTER OVERVIEW CONCEPTS LIMITED TRADING AS SEÁN'S BAR

PLAINTIFF

AND

FBD INSURANCE plc

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 26th July 2023

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Introduction

1. This is the fourth judgment which I have given in these proceedings in which each of the plaintiffs have pursued claims against the defendant insurer (*"FBD"*) in respect of losses suffered by them following the imposed closure of public houses owned by them under Government measures introduced to address the COVID-19 pandemic. Each of the plaintiffs were insured by FBD under a standard form policy of insurance known as the FBD Public House Insurance policy (*"the FBD policy"*) which was designed specifically for the insurance needs of the public house trade. Similar

policies have been sold to approximately 1,300 publicans throughout Ireland. The FBD policy provided insurance in respect of interruption to the insured's business arising either as a consequence of property damage or as a consequence of a number of specific perils as defined in extensions (1) to (5). The relevant extension for present purposes is (1)(d).

2. A significant dispute arose between the parties as to the proper interpretation of the FBD policy. The principal issues of interpretation which arose between them were addressed in the first judgment delivered by me on 5th February 2021 (neutral citation [2021] IEHC 78) (*"FBD No. 1"*). In that judgment, I concluded that the relevant peril insured under extension (1)(d) of the policy constituted imposed closure of the premises following outbreaks of infectious or contagious disease (in this case, COVID-19) on or within 25 miles of the insured premises. I took the view that cover was not lost where the closure was prompted by nationwide outbreaks of disease provided that there was an outbreak within the relevant 25-mile radius and that each such outbreak was one of the proximate causes of the closure. It was accepted by FBD that there had been outbreaks of COVID-19 within a 25 mile radius of each of the plaintiffs' public houses prior to the imposition of the first period of closure announced by the Government on 15th March 2020. I concluded that each of these outbreaks was instrumental in the Government decision to close public houses and that this was sufficient to satisfy the requirement in extension 1(d) that the imposed closure of the premises arose *"following … outbreaks of contagious diseases … within 25 miles…"* of the insured premises.

3. I further held, for the reasons explained in paras. 198 to 199 of *FBD No. 1*, that, even if the word *"following"*, as used in extension 1(d), connotes proximate cause, that test was satisfied in circumstances where each outbreak was an efficient cause of the Government imposed closure. In the same judgment, I also addressed the issue as to the

correct counterfactual to deploy for the purposes of assessing the likely position of the plaintiffs' respective businesses on the hypothesis that the insured peril had never eventuated.

4. Subsequent to the delivery of the judgment in *FBD No. 1*, a further issue arose between the parties as to whether the word *"closure"* in extension 1(d) of the FBD policy also extended to a partial closure of the premises. That issue arose in circumstances where, at certain times, public houses serving a substantial meal were permitted to re-open but their bar counters were required to remain closed. This issue (together with certain other questions which are not immediately relevant here) led to a subsequent judgment delivered on 22nd April 2021 (neutral citation [2021] IEHC 279) (*"FBD No. 2"*). In that judgment, I came to the conclusion that the word *"closure"* as used in extension 1(d) should be interpreted as extending both to a closure of the entire premises and also to a closure of part of the premises. However, I made it clear that, for *"closure"* to arise, there would have to be a shutting down of the premises or a part of the premises before cover under extension 1(d) could be triggered. Unlike some other policy wordings available on the market, extension 1(d) did not purport to provide cover where access to the premises was *"hindered"* or *"restricted"*. I took the view that, if a discrete area of a public house was closed to patrons as a consequence of the Government measures, such a part of the premises would be regarded as closed for the purposes of extension 1(d). I indicated that the position was less clearcut where a closure of a discrete part of the premises could not be identified and I deferred any ruling on that issue to the next phase of these proceedings which was scheduled for hearing in July 2021.

5. In July 2021 I subsequently heard evidence from each of the individual plaintiffs and from their experts in relation to the impact of the closures on their business both in

respect of complete closure of the premises and in respect of closure of the bar counter. In addition to the case made by them in respect of the closure of the bar counter, the plaintiffs also made the case at that hearing that cover was available under the FBD policy in respect of early closing of their premises (i.e. at those times when they were required by Government regulations to close their premises at 11.30 p.m. which was earlier than the pre-pandemic closing time). In my judgment delivered on 28th January 2022 (neutral citation [2022] IEHC 39) (*"FBD No. 3*), I came to the conclusion that the closure of the bar counter should be regarded as the closure of a discrete part of the public house premises sufficient to trigger cover under extension 1(d). In the same judgment, I also concluded that the requirement to close at 11.30 p.m. also fell within the ambit of extension 1(d).

6. There were very significant differences between the experts called by the parties as to how one could properly measure the losses stemming from the closure of the bar counter. In para. 150 of *FBD No. 3*, I indicated that the factual evidence called by the plaintiffs did not assist in identifying where the demarcation line may lie between the bar counter area and the rest of a public house. It also did not assist in attempting to calculate, even on a very approximate basis, the number of patrons who would typically stand or sit at the bar counter during either peak or off-peak periods. Nonetheless, I sought to address how these losses might be assessed. In para. 165 of *FBD No. 3*, I emphasised that the losses which are recoverable by the plaintiffs under extension 1(d) are those which arise as a result of the *"imposed closure of the premises"* and that, accordingly, it is losses which flow from a closure of a physical part of the premises (rather than those which flow from a closure of an element of the business) which are covered. In para. 172, I expressed the view that it is necessary to seek to assess the capacity of the bar counter area and to devise a methodology that can, as objectively as

possible, estimate the number of customers attending the bar counter and the amount likely to be spent by them on drink. In paras. 176 to 183 of *FBD No. 3*, I proposed a methodology that I considered could be used to measure the losses sustained by the plaintiffs as a consequence of the closure of the bar counters, but I acknowledged in para. 184 that it might well be the case that improvements or refinements could be made to the method of assessment suggested by me. In the same paragraph, I indicated that I was prepared to consider any reasonable and workable suggestions that the parties might have.

7. The judgment in *FBD No. 3* also addressed a number of other issues (none of which is immediately relevant for the purposes of this judgment). After delivery of that judgment, a final hearing was scheduled to commence on 4th November 2022 in order to address the remaining issues between the parties and for the purposes of finally assessing the losses sustained by each of the four plaintiffs to the extent that they are covered under extension 1(d) of the FBD policy. In advance of that hearing, an issues paper was prepared. In broad terms, those issues related to the following:-

(a) A number of questions arose in relation to the application of the methodology proposed in paras. 176-181 of *FBD No. 3* for the calculation of loss attributable to the bar counter of each of the premises;

(b) A further issue arose as to whether the principle of indemnity limits the amount payable to the plaintiffs during the indemnity period. In this context, FBD strongly made the case that the principle of indemnity did not permit the plaintiffs to recover more during a period of partial closure than they would have earned in an equivalent period prior to the COVID-19 pandemic;

(c) A question also arose as how any of the costs of the business ought to be attributed to the partially closed part of the premises (either as a consequence of early closing or as a consequence of closure of the bar counter area) such that the profit attributable to the closed part of the premises would be commensurately reduced;

(d) The parties also raised a question as to whether each period of early closure commences a new and distinct indemnity period related solely to that period of early closure notwithstanding that there was already in existence an indemnity period commencing on 15th March 2020 (when the Government measures were first introduced);

(e) The parties were also in dispute as to whether an indemnity should be available in respect of additional staff wages and operational costs attributable to the open parts of the premises during periods of partial closure;

(f) A significant issue arose as to whether FBD, in indemnifying the plaintiffs, is entitled to the benefit of any of the payments received by the plaintiffs from the various Government support schemes that were in place during the currency of the COVID-19 pandemic;

(g) In the event that FBD were held to be entitled to make deductions in respect of payments received under the Government support schemes, an additional issue arose as to whether the plaintiffs are entitled to an indemnity from FBD in respect of those amounts in the event that, at some point in the future, the State seeks to recoup any part of those payments from the plaintiffs;

(h) Finally, the plaintiffs sought to raise an issue as to whether their costs should be paid on a legal practitioner and client basis in light of the regulatory expectations of the Central Bank of Ireland (*"CBI"*).

8. However, on 4th November 2022, I was informed by the parties that, following intensive discussions, they had agreed terms of settlement which resolved the issues in dispute between them. They also agreed the terms of a draft order which they put before the court for my consideration. Given the complex issues in the case and the potential impact of the outcome on other similar cases, counsel indicated that they proposed to make submissions to me in relation to the form of order to be made and in relation to a number of issues of principle which are relevant to the draft order. It should be noted that the draft form of order which has been prepared addresses the findings previously made by me in *FBD No. 3*. It also addresses the additional issues which were scheduled to be determined in this final module of the hearing. Counsel on both sides accepted that the draft order could not be made in relation to the latter issues unless I was satisfied, on the basis of the applicable legal principles and the materials before the court, that it was appropriate to make an order in those terms.

The issues of principle that arise

9. I heard submissions from counsel for FBD and counsel for some of the plaintiffs in relation to the issues of principle that arise in relation to certain elements of the draft order. Those issues were:-

(a) The first issue concerns the alleged entitlement of FBD to deduct any payments made to the plaintiffs under the Government support schemes from the amount to be paid to the plaintiffs under extension 1(d);

(b) The second issue concerns the methodology to be adopted in measuring the plaintiffs' losses (particularly in respect of those portions of the

premises that were required to be closed from time to time under the Government measures). As noted in para. 6 above, I expressly accepted in *FBD No. 3* that the parties might wish to suggest modifications or refinements of the methodology suggested by me in that judgment. In this context, the methodology ultimately agreed between the parties (as described further below) has been put forward by all parties as representing a fair balance between their respective positions. It was also emphasised by counsel for the parties that the formula proposed by the parties for quantifying losses stemming from partial closure of the premises should map, insofar as possible, the approach to be taken in the context of a full closure of the premises.

10. By far the greater part of the November hearing was concerned with the first issue, namely the question as to whether FBD, in making payments to the plaintiffs, is entitled to take the benefit of the Government supports available to businesses during the currency of the COVID-19 pandemic. In turn, this judgment is principally concerned with the same issue. As explained further below, the State did not seek to intervene in the hearing of this issue.

Relevant terms of the FBD policy

11. In order to understand how the first issue arises, it is necessary to have regard to the terms of the FBD policy. Section 3 of the policy deals with consequential loss. Under the heading *"The Cover"*, the policy provides that FBD is to indemnify the insured in respect of the loss of gross profit, the increased cost of working, and professional auditor's charges, resulting from the business being affected by loss or damage falling within either s. 1 or s. 2 of the policy. Section 1 insures the buildings and s. 2 insures the trade contents. Thus, for example, business interruption cover is

available in respect of the impact on the business of a fire at the premises insured. However, as discussed in *FBD No. 1*, the business interruption cover available under the FBD policy is not limited to cases where damage is suffered to the premises or its contents. The policy also contains a number of specific extensions which provide cover for other causes of business interruption. In particular, under extension 1(d), the policy provides cover in respect of the imposed closure of the premises by order of Government Authority following outbreaks of contagious or infectious diseases either on the premises or within a 25-mile radius of the premises. However, the cover in respect of the loss of gross profits, the increased cost of working and auditors' charges is not unlimited. Quite apart from the limits of liability agreed at its inception, the policy provides that the indemnity will be subject to a deduction in respect of *"... any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage"*. I will refer to this provision as *"the savings clause".*

12. A question arises as to whether the Government supports received by the plaintiffs are to be deducted in accordance with the savings clause as a *"sum saved during the indemnity period in respect of ... expenses of the business as may cease or be reduced in consequence of the damage"*. It should be noted that the word *"damage"* is not defined in the policy. The meaning of the word *"damage"* is not immediately obvious in the context of extension 1(d). As noted, above, the cover provided under the extension is not triggered by any physical damage. As Lords Hamblen and Leggatt observed in *Financial Conduct Authority v. Arch Insurance (UK) Ltd* [2021] A.C. 649 at p. 743 (*"the FCA case"*):-

> *"The reference to "damage" is inapposite to business interruption cover which does not depend on physical damage to insured property such as*

> *the cover with which these appeals are concerned. It reflects the fact that the historical evolution of business interruption cover was as an extension to property damage insurance. It was held by the court below, and is now common ground, that for the purposes of the business interruption cover which is the subject of these appeals, the term "damage" should be read as referring to the insured peril."*

13. A meaning has to be given to the word *"damage"* consistent with the form of business interruption insurance in issue. The savings clause is clearly intended to apply in respect of every form of business interruption cover provided by the FBD policy. As appears from the above extract from the judgment in the *FCA* case, it was agreed there that the word *"damage"* should be read as a reference to the insured peril. Likewise, there was no dispute between the parties in this case that *"damage"* should be read in the same way. In my view, the parties were clearly correct to take that approach. It is trite law that the policy must be read as a whole. It follows that the savings clause should be read in light of each element of business interruption cover available under the policy and given a meaning that allows it to operate consistently across the range of cover available.

14. There was also no dispute between the parties that the insured peril had eventuated – namely the imposed closure of the premises by order of Government Authority following outbreaks of contagious or infectious diseases within a 25-mile radius. In any event, I had made such a finding in *FBD No. 1*. The case which had been made (and which I accepted in *FBD No. 1*) was that the Government measures were caused by outbreaks of COVID-19 which occurred within a 25-mile radius of each of the premises. I also decided that this conclusion was not undermined by the fact that the Government measures were prompted by other outbreaks outside the relevant 25

mile radii. I held that each outbreak was a concurrent proximate cause of the Government measures.

15. Counsel for FBD submitted that the savings clause is directed towards ensuring that an insured is not over-indemnified in respect of the loss suffered. Essentially, he submitted that the clause was designed to indemnify the insured solely to the extent that the insured was out of pocket as a consequence of the occurrence of the insured peril. Counsel submitted that this was entirely consistent with the principle of indemnity which he submitted was at the heart of an insurance policy. He referred, in this context, to the well-known decision in *Castellain v. Preston* (1883) 11 Q.B.D. 380 (addressed further below).

16. Counsel for FBD also drew attention to a number of other provisions of the policy which, he submitted, reinforced the conclusion that the intention of the policy is solely to indemnify the insured to the extent that the insured is out of pocket. For example, there is a special condition in the policy in respect of value added tax (*"VAT"*). This is special condition 1 to s. 3 of the policy which is in the following terms:-

> *"(1) To the extent that the Insured is accountable to the Tax Authorities for Value Added Tax, all terms in this Section of the Policy shall be exclusive of such tax."*

17. The effect of this special condition is that, where the insured is registered for VAT, the insured will not be paid any sum paid to third parties in respect of VAT on invoices issued by such third parties in relation to the remediation of the damage suffered by the insured as a consequence of the peril. For example, if an insured paid out monies to a builder in respect of rebuilding works necessary following the destruction of part of the insured premises, the insured (if registered for VAT) would

be required to discharge the VAT on the builder's invoice and then to reclaim that payment from the Revenue in the same way as the insured would reclaim VAT on any other expenses paid out by it in the ordinary course of business where those payments are subject to VAT.

18. Counsel for FBD also referred to special condition 2 to s. 3 of the policy. It provides as follows:-

> *"(2) If during the indemnity period goods shall be sold or services rendered elsewhere than at the Insured premises for the benefit of the business, either by the Insured or others on his behalf the moneys paid or payable in respect of such sales or services shall be brought into account in arriving at the gross profit earned during the indemnity period."*

19. Counsel for FBD submitted that this is a concrete example of the principle of indemnity. He illustrated the application of the clause by asking the court to consider a hypothetical case where there has been a fire at a public house which knocks the public bar out of operation but does not affect the lounge. In order to maintain his business, the owner of the public house decides to take over the next-door premises and expand into it on a temporary basis while the bar is being rebuilt. In such a case, special condition 2 would have the effect that the insured could not claim for the loss of profits of the bar not operating when he is in a position to trade as a bar from the adjoining premises. Counsel submitted that both special condition 2 and special condition 1 demonstrate that the policy guards against double recovery and that they are *"illustrative of the contractual bargain between the parties"*.

20. Counsel for FBD also drew my attention to general condition 11 of the policy. General condition 11 deals with two matters. The first part of the clause (which is very common in many policies of insurance) deals with circumstances where there is more

than one policy of insurance in place in respect of the same damage. Secondly, it addresses circumstances where there is a compensation fund available to pay the damage suffered by the insured. The latter part of clause 11 is in the following terms:-

> *"If at the time any claim arises under this Policy there is a Compensation Fund covering the same liability or the same property lost/damaged, the Company shall not be liable to make any payment under this Policy."*

21. Counsel for FBD accepted that these provisions do no more than provide support for his submission as to the nature of the policy. He confirmed that FBD does not seek to make the case that any of the supports in issue can be equated with a compensation fund. I agree that the clauses highlighted by counsel support the view that, in designing the FBD policy, FBD has sought to ensure that the insured should not recover more than the amount required to indemnify the insured in respect of the loss suffered. However, these clauses are not directly relevant to the savings clause itself. The language of that clause requires close consideration albeit that it must always be read in context and in light of the policy as a whole.

22. Counsel for FBD accepted that the key provision to be addressed is the savings clause itself. He submitted that there were two key phrases within the language of the savings clause. In the first place, the sums to be deducted comprise any sum saved during the indemnity period *"**in respect of** such of the charges and expenses of the business… as may cease or be reduced in consequence of the damage"* (emphasis added). Counsel submitted that those words *"in respect of"* are invariably given a very wide meaning. He drew attention in this context to the decision of the Court of Appeal in *Donnelly v. Vivier & Co. Ltd* [2022] IECA 104, where Ní Raifeartaigh J. observed that the phrase *"in respect of a contract"* has a very wide meaning. In support of this

proposition, Ní Raifeartaigh J. referred to the judgment of Lightman J. in *Albon v Naza Motor Trading Sdn Bhd* [2007] 1 W.L.R. 2489 at paras. 26-27, where he said:-

> *"Accordingly the formula of words in CPR 6.20(5) "in respect of a contract" does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract. That is the clear and unambiguous meaning of the words used. No reference is necessary for this purpose to authority and none were cited beyond Tatam v. Reeve [1893] 1QB 44. If such reference were needed, I would find support in a passage which I found after I had reserved judgment in the judgment of Mann CJ in Trustees Executors and Agency Co Ltd v Reilly [1941] VLR 110 at 111: 'The words* ***'in respect of'*** *are difficult of definition, but they have the widest possible* ***meaning*** *of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.'"*(Emphasis in the judgment of Lightman J.)

23. In my view, counsel for FBD is correct in his submission that the words *"in respect of"* are capable of a very wide meaning. Similar views have been expressed by the courts in different contexts in relation to similar phrases such as *"in relation to"* or *"in connection with"*. The latter phrase was found in s. 60(1) of the Companies Act 1963. In *Eccles Hall Ltd v. Bank of Nova Scotia* (High Court, Unreported, 3rd February 1995), Murphy J., at p. 16 of his judgment, said that such words were *"of wide import"*. Similarly, the phrase *"in relation to"* or *"related to"* have also been given a wide meaning. For example, in *Gulliver v. Brady* [2003] IESC 68, an issue arose as to whether the plaintiff (who claimed that he was entitled to an equity partnership in a firm of solicitors) was bound to go to arbitration by virtue of an arbitration clause in a memorandum of understanding between the parties under which the parties agreed that

any disputes between the parties them *"arising out of or in relation to this Agreement"* should be referred to arbitration. The plaintiff maintained that his claim to a partnership was not based on the memorandum of understanding but arose independently of it and that, accordingly, his claim was not captured by the arbitration clause. Nevertheless, the Supreme Court held that the arbitration clause applied to his claim. In the judgment of the court, Geoghegan J., at para. 9. endorsed the view expressed by the authors of *Russell on Arbitration* that the words *"in relation to"* should be given a broad meaning and that they were sufficient to capture not only disputes arising under the contract in which the arbitration clause appears but also disputes arising under a related contract.

24. Secondly, counsel for FBD addressed the meaning to be given to the words *"in consequence of"* in the savings clause. A saving will only be taken into account under the savings clause where it arises in consequence of the insured peril (i.e. in consequence of the imposed closure of the premises by order of a Government authority following an outbreak of COVID-19 within 25 miles of the premises). Counsel accepted that, classically, the words *"in consequence of"*, when used in a policy of insurance, have been interpreted as requiring proximate causation. A number of relevant authorities for this proposition are identified in para. 165 of *FBD No. 1*. Counsel for FBD submitted that, while the words *"in consequence of"* are usually interpreted in that way, this is not a universal rule. Counsel referred, for example, to the approach taken by the Divisional Court in the *FCA* case in para. 96 of its judgment, where the court construed the words *"in consequence of"* in a policy of insurance as embracing indirect causation. It is clear from that paragraph of the court's judgment that this conclusion was based upon a consideration of the way in which the words were used in the context of the clause as a whole. On that basis, counsel for FBD argued that, at minimum, the phrase *"in consequence of"* is capable of having a variable meaning,

depending on the context. He accordingly argued that the words *"in consequence of the damage"* as used in the saving clause should be given a broad scope in terms of causation.

25. In the alternative, counsel submitted that, even if the words *"in consequence of"* are to be construed as importing a test of proximate causation, that test is satisfied in respect of each of the Government supports in issue. In support of this proposition, counsel for FBD highlighted that the proximate cause is not to be equated with sole cause. Thus, the fact that there may be more than one reason for the introduction of the Government supports does not necessarily mean that the insured peril was not a proximate cause of the supports. Counsel referred to paras. 194-199 of the judgment in *FBD No. 1* where I considered the case law on proximate cause. Among the cases discussed was 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) (*"the Miss Jay Jay case"*). In that case, Slade L.J. explained the position as follows:-

> *"The legal position in such a case is stated thus in Halsbury's Laws of England ...:*
>
> *'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'.*
>
> *No authority has been cited to us which leads me to suppose that this passage incorrectly states the relevant law ... The crucial point is that in the contingencies envisaged in the passage, for the purpose of applying the*

provisions of the policy and s. 55 of the Act, the loss is treated as proximately caused by the cause insured against, notwithstanding the presence of a concurrent cause not covered by the policy."

26. As noted by me in para.199 of *FBD No. 1*, this passage is consistent with the analysis of the case law undertaken in Ireland by Black J. in the Supreme Court in *Ashworth v. General Accident Fire and Life Assurance Corporation* [1955] I.R. 268 at pp. 298-299. Having regard to the law on proximate causation, counsel for FBD submitted that, once the court is satisfied that the imposed closure of the plaintiffs' premises as a consequence of the various Government measures was a real and efficient cause of the introduction of the measures, that will satisfy the test of proximate causation for the purposes of the savings clause. Furthermore, counsel relied on what was said in para. 201 of *FBD No. 1* where I rejected the argument made by FBD that the effective cause of the losses suffered by the plaintiffs was public reaction to the emergence of COVID-19 disease rather than the closure imposed by the Government measures. In para. 201, I said:-

"It may be that the closure following the outbreaks in issue is not the only effective cause of loss but, as the approach taken in Miss Jay Jay shows, that will not necessarily mean that the plaintiffs are unable to recover under the FBD policy at least in those cases where the effective causes overlap and where it is not possible to distinguish between the effects of one from the effects of the other."

27. Counsel for FBD also relied on the judgment in *FBD No. 2*. At that point in the proceedings, an issue had arisen as to whether concurrent causes of an event must always be equal or nearly equal in their efficiency before they could be said to satisfy

the proximate causation test. Counsel for FBD referred in particular to para. 49 of that judgment where I said:-

> *"...it was submitted by counsel for FBD in the course of the February, 2021 hearing that the only concurrent causes of loss that can be considered under the Miss Jay Jay principle are those that are equal or nearly equal in their efficiency in bringing about the damage. That argument was based on the language used by Slade LJ in the Miss Jay Jay case (quoted in para. 199 of the principal judgment). I do not, however, believe that it is correct to say that concurrent causes must always be equal or nearly equal in their efficiency before the Miss Jay Jay principle can arise. I also do not believe that Slade LJ was laying down any rule to that effect. It seems to me that Slade LJ was simply drawing attention to the particular facts of that case from which it was clear that both of the causes of the damage to the yacht were approximately equal in efficiency with the result that there was no doubt that both were proximate causes. For the Miss Jay Jay principle to apply, it is, of course, necessary to show that there are two or more proximate causes of the relevant loss or damage. That necessarily requires that each of those causes can properly be described as a real and efficient cause of the loss. But I think it would be wrong to suggest that they must always be nearly equal in their efficiency. In the Leyland Shipping case (which is the principal authority on proximate loss and which was expressly followed by the Supreme Court here in the Ashworth case addressed in para. 194 of the principal judgment) Lord Shaw, at pp 370-371, drew a distinction between "the real efficient cause" on one side of the line and "attendant circumstances" on the other. Once it is shown that a cause of loss has the character of a "real efficient cause" of the loss, that seems to me to be sufficient to make it a proximate cause.*

> *On occasion, there can be more than one real efficient cause of loss even where each cause might not be fully or nearly equal in efficiency. Whether that is so in any individual case is a matter of degree to be assessed on the particular facts of that case. The closer the respective causes are to being equal in efficiency the easier it will be to say that they are each proximate causes of the relevant loss. But that does not necessarily mean that something approximating to equality in efficiency is required in every case. There are also cases where the two causes are so inextricably mixed that it is simply impossible to attribute weight to one or the other. This is well illustrated by the decision of Tomlinson J. in IF P & C Insurance Ltd. v. Silversea Cruises Ltd. [2004] Lloyd's Rep. IR 217 (discussed in para. 202 of the principal judgment). In that case, insurers led expert evidence to the effect that the cause of a sharp drop in the insured's cruise line business following the attack on the World Trade Centre in September, 2001 was 80 to 90% due to the attack (an uninsured peril) and 10 to 20% due to Government warnings against foreign travel (which was an insured peril). At p. 245, Tomlinson J. rejected the attempted attribution of relative causal effect as entirely arbitrary and held that it was impossible to divorce the effects of one from the other."*

28. On that basis, counsel for FBD argued that, if the court were to take the view that there are various reasons why the individual Government supports were introduced, it would nonetheless be sufficient for FBD's purposes that FBD can demonstrate to the court that the Government measures closing the premises were a real efficient cause of the supports rather than merely an *"attendant circumstance"*.

29. I accept that there are circumstances where the words *"in consequence of"* can be construed as requiring something less than proximate cause. However, there is

nothing in the language of the savings clause here – or in the relevant context – to suggest that the parties intended to give those words a less onerous meaning than that which they would ordinarily convey. I therefore believe that, subject to considering the additional arguments (discussed below) in relation to the indemnity principle, the words *"in consequence of"* in the savings clause should be read as requiring proximate cause. In such circumstances, the savings clause will not apply unless the Government supports in issue can be said to have been proximately caused by the insured peril namely a Government closure which itself was proximately caused by an outbreak of COVID-19 within 25 miles of each of the plaintiffs' premises. As explained in *FBD No. 1,* the insured peril is a composite one involving first an outbreak followed in sequence by a Government closure proximately caused by that outbreak. It follows that, before the savings clause can be said to apply, it must be shown that (a) the saving arose in the course of the indemnity period in respect of a charge or expense of the business payable out of gross profit and (b) the saving was proximately caused by the insured peril.

The decisions in England & Wales and in Australia

30. Counsel for FBD also referred to two authorities which have reached somewhat different conclusions in relation to the application of savings clauses, one from Australia and the other from England & Wales. Counsel for FBD urged that the Australian authority should be distinguished while he submitted that the English authority should be followed. The Australian authority is the decision of the Full Court of the Federal Court of Australia in *LCA Marrickville Pty Ltd v. Swiss Re International SE* [2022] FCAFC 17 (*"the Marrickville case"*). In that case, it was held that certain Government subsidies available in Australia did not fall to be deducted from the amount paid to the insured by an insurer in respect of a business interruption claim. Counsel for

FBD submitted that the decision was based on the particular language of the indemnity clause which required that the insured's losses should be calculated in accordance with a specific provision of the policy referred to as the *"settlement of claims clause"*. The indemnity clause in that case was lengthy but, as counsel for FBD argued, it expressly envisaged that the payment to be made to the insured would be calculated in accordance with the settlement of claims clause. The relevant element of the indemnity clause provided as follows: -

> *"**Cover***
>
> *If the Business carried on by You is interrupted or interfered with as a result of Damage occurring during the Period of Insurance…*
>
> *We will, after taking account any sum saved during the Indemnity Period in respect of such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference, indemnify You in respect of the loss arising from such interruption or interference in accordance with the settlement of claims clause…"*

31. Thus, the indemnity clause required that the indemnity should be calculated by reference to the settlement of claims clause. It is clear from para. 448 of the judgment that the settlement of claims clause provided a number of different bases of settlement depending on the nature of the item in issue. The increase in cost of working and gross revenue were both addressed in Item 9. Having first set out the method of calculating both of these heads of loss, Item 9 concluded with language that, in my view, echoes the language of the savings clause in the FBD policy: *"However, Our payment will not exceed the amount of reduction in Revenue thereby avoided, less any sum saved during the Indemnity Period in respect of such charges and expenses of Your Business payable*

out of Revenue as may cease or be reduced in consequence of the Damage." Notably, the only difference between that sentence and the savings clause in the FBD policy is the reference to *"Revenue"* rather than *"gross profit".* Otherwise, the language used is virtually identical.

32. Counsel for FBD referred to what was said by the Full Court, on appeal, in para. 454 of its judgment, where the Court explained that, notwithstanding the general principles applicable to contracts of indemnity, the Government supports in issue were not to be taken into account in the application of the savings clause. The Court said: -

> *"The express terms of the policy foreclose any application of those principles as the parties have agreed that the loss that is the subject of indemnity is any loss demonstrated by undertaking the agreed calculation in accordance with the settlement of claims clause. The settlement of claims clause records the agreement of the parties both as to the kind and extent of loss the subject of the indemnity. This is the effect of the Cover being an indemnity in respect of a "loss … in accordance with the settlement of claims clause", with the various items of that clause limiting the loss to that which is in consequence of the Damage (which includes the outbreak of a human infectious or contagious disease occurring within a 20 km radius, which is deemed to be Damage). It is not simply a calculation provision. Its application requires an assessment as to whether particular items of loss have been incurred in consequence of the Damage."*

33. Counsel for FBD submitted that this paragraph is crucial to understanding the ambit of the decision. In substance, he suggested that the Full Court had found that the parties had agreed to effectively exclude the application of the principles of indemnity and substitute for it a *"precise and prescriptive formula as to… what the insured was*

entitled to under the policy…". He submitted that, in contrast, the FBD policy is a policy of indemnity which should be interpreted in accordance with the principle of indemnity. His arguments in relation to the principle of indemnity are addressed at a later point in this judgment. At this point, I will confine myself to the arguments made in relation to the relevance of the *Marrickville* case.

34. Counsel for FBD also referred to what was said by the Full Court in para. 457 of its judgment in relation to the purpose of the settlement of claims clause. The Court took the view that the clause was intended to provide an agreed mechanism for calculating loss: -

> *"The purpose of the "Settlement of claims" provisions in Section 2 of the Meridian policy is to provide an agreed method of ascertaining the loss and to thereby avoid lengthy disputes. The reasonable businessperson considering the policy from the point of view of the parties to it would understand them to have agreed upon this methodology as the basis for determining both whether there is a loss as well as the quantum of any loss. The question whether or not there is a loss, as well as the extent of any loss, may otherwise be contestable. The provisions avoid this controversy by setting out the methodology to be used. In light of these detailed provisions, there is simply no room for general principles applicable to contracts of indemnity to operate in relation to these issues."*

35. Counsel for FBD drew attention to what was said by the Full Court in para. 461 of its judgment. Paragraph 461 explains why the court came to the conclusion that the relevant Government supports in that case could not be considered to arise as a result of the damage. The court said: -

> *"…The requirement is that the cessation or reduction of charges or expenses be in consequence of "the" interruption or interference. This takes the reader back*

to the beginning of the "Cover" section, where reference is made to the insured's business being interrupted or interfered with "as a result of Damage". It is that interruption or interference that is being referred to in the "sum saved" provision. The word "Damage" is given an extended meaning by cl 8. Relevantly for present purposes, the "outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation" is deemed to be Damage to Property used by the insured at the Situation. Thus, the reference (at the beginning of the "Cover" section) to the insured's business being interrupted or interfered with "as a result of Damage" is to be read as including the insured's business being interrupted or interfered with as a result of the insured peril described in cl 8(c). Returning, then, to the "sum saved" provision, the concern is with "the" interruption or interference earlier identified, that is, the interruption or interference resulting from the insured peril in cl 8(c). The question, then, is as follows: assuming that Meridian is able to establish on evidence that the insured peril in cl 8(c) is a proximate cause of its loss (as to which, see ... [the judgment of the first instance judge, Jagot J. at] *[481], [485] – [498]), were the JobKeeper payments made and received "in consequence of" the interruption or interference (that is, the interruption or interference resulting from the insured peril in cl 8(c))? As a matter of the application of the policy's provisions, they were not. The criteria for eligibility for JobKeeper payments were financial ones; they did not depend on whether or not there had been an outbreak within 20 km of the premises of the business. Meridian was entitled to the JobKeeper payments regardless of whether or not there was an outbreak within 20 km of its premises. Conversely, had Meridian not met the financial tests for JobKeeper, it would not have been entitled to*

JobKeeper payments, even if the insured peril in cl 8(c) occurred. Accordingly, the second aspect of the "sum saved" provision (the causal requirement) is not satisfied. It is therefore not necessary to consider the first aspect of the provision."

36. In adopting this approach, the Full Court took a different view to that taken by Jagot J. at first instance. At para. 462, the court said: -

"The primary judge was of the view that the JobKeeper payments reduced the insured's loss and expenses in the form of saved wages payments and were therefore to be taken into account (see … [her judgment at] *[509] in the context of Meridian, and [623] – [624] in relation to Taphouse). However, the primary judge did not analyse in detail whether the JobKeeper payments were made and received "in consequence of" the interruption or interference (that is, the interruption or interference resulting from the insured peril in cl 8(c)). In the section of the reasons dealing with causation in the context of the Meridian policy, the primary judge relied on FCA v Arch. Her Honour considered that, by parity of reasoning, the JobKeeper payments were to be taken into account under the "sum saved" provision (… [623]; see also … [395])). However, it is necessary for the purposes of the causal requirement in the "sum saved" provision to focus on the criteria for the JobKeeper payments, rather than the general underlying policy of the JobKeeper scheme. Approaching the matter this way, the causal requirement is not satisfied."*

37. It is clear from these paragraphs that the Full Court took the view that there was no sufficient causal connection between the insured peril and the introduction of the relevant Australian Government supports. Counsel for FBD submitted that this approach must be seen in the particular context of Australia where COVID-19 was not

widespread at the relevant time. He referred, in this context, to the separate judgment of Moshinsky J., who said at para. 3: -

> *"In the judgment of the primary judge at [53], her Honour noted that the parties relied on those parts of the reasoning in Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] AC 649 (FCA v Arch) that suited their purposes. The same can be said of the parties' submissions on appeal. Insofar as the judgments of the Supreme Court of the United Kingdom deal with causation, their Lordships' reasoning was helpfully summarised by the primary judge at [53]-[83] of her Honour's reasons. I do not consider it necessary for the purposes of deciding any issue in the present appeals to consider the correctness or otherwise of their Lordships' reasoning in relation to causation. It is important to note that the underlying factual circumstances in the United Kingdom at the relevant times for the purposes of FCA v Arch were very different from those in Australia at the relevant times for the purposes of these appeals (namely, during 2020 and 2021). As the primary judge noted at [56], an important part of the context of the decision in FCA v Arch was that the outbreak of COVID-19 in the United Kingdom was "so widespread". In comparison, it could not be said that the occurrence of COVID-19 cases in Australia at the relevant times was widespread…"*

38. Counsel for FBD suggested that there were very few COVID-19 cases in Australia at the time the relevant government supports were made available. Nonetheless, he suggested that there was likely to have been a significant amount of economic dislocation in Australia as a consequence of the pandemic. He submitted that the factual premise in Australia was, therefore, very different to the experience here in Ireland or in the United Kingdom. Counsel may well be correct in what he said about

the position in Australia but it should be noted that these submissions were made without the benefit of any evidence as to the factual context in which the Australian Government supports were put in place. This aspect of counsel's submissions should be read subject to that very important caveat.

39. I agree that the decision in *Marrickville* can be distinguished. However, I am not convinced that it can be distinguished on the basis suggested by counsel for FBD. I am not persuaded that there is any significant difference between the approach taken in the relevant indemnity clause in *Marrickville* and the approach taken in the indemnity clause in s. 3 of the FBD policy. I appreciate that, in the relevant clause in *Marrickville*, the indemnity clause expressly said that the indemnity would be provided *"in accordance with the settlement of claims clause"*. It might therefore be said that this formula of words expressly made clear that the extent of the indemnity available under the policy in question was governed by the settlement of claims clause rather than the general principle of indemnity. However, while the structure adopted in s. 3 of the FBD policy is not identical, there seems to me to be very little difference in substance between the two approaches. The indemnity clause in s. 3 of the FBD clause very clearly sets out the nature of the indemnity to be provided by FBD. The clause opens with the words: *"The Company will indemnify the Insured in respect of …".* Those words are followed by paras. (A) to (C) dealing with the types of losses that can be recovered and also by the savings clause itself. The savings clause is incorporated as an inherent part of the indemnity clause. Thus, the nature of the indemnity to be provided is expressly subject to the savings clause. The underlying intention appears to be that only those savings which fall within the ambit of the savings clause are to be deducted from the amounts calculated in accordance with paras. (A) (dealing with the loss of gross profit), (B) (dealing with the increased cost of working) and (C) (dealing with

auditor's charges). In common with *Marrickville,* that is the form of indemnity which the policy prescribes.

40. Moreover, as previously noted, the savings clauses in both cases are in virtually identical terms – namely that contained within Item 9 of the settlement of claims clause in the *Marrickville* policy and that contained in s. 3 of the FBD policy. In both cases, the language used suggests that only those savings which are proximately caused by an insured peril are to be taken into account in calculating the payment made to the insured.

41. Accordingly, I do not accept that the basis of settlement clause in *Marrickville* can be characterised as being more precise or prescriptive than the provisions of section 3 of the FBD policy. While it is true that the basis of settlement clause in *Marrickville* separately addressed at least nine different items, there is a very clear parallel between Item 9 in that case and the indemnity clause in the FBD policy. Item 9 is no more detailed or prescriptive than the equivalent provisions of the FBD policy. I therefore do not believe that there is any sufficient basis to conclude that *Marrickville* can be distinguished on the basis of the language used. Both policies provide a similar level of detail as to how the losses are to be calculated and as to the nature of the savings to be deducted from the payment to be made to the insured.

42. Furthermore, I do not believe that it is safe to distinguish *Marrickville* on the basis that there were very few cases of COVID-19 in Australia at the relevant time. While there may have been comparatively few cases of COVID-19 in Australia at the time the Australian Government supports were introduced, I do not believe that the observations of Moshinsky J. quoted in para. 37 above can be said to form any part of the *ratio* of this element of the Full Court's decision. It is clear that the majority judgment of the Court proceeded on a different basis. The majority reached the conclusion that the supports were not deductible under Item 9 because it could not be

said that the insured peril was the proximate cause of the supports. That is clear from paras. 461 and 462 of the judgment quoted in paras. 35 to 36 above. Crucially, the supports in question were available whether or not the insured peril had eventuated. The relevant insured peril in clause 8(c) of the *Marrickville* policy was *"an outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius …"*. Under the relevant Australian Government rules governing the JobKeeper scheme (namely the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020), an applicant merely had to show that it carried on business in Australia as of 1st March 2020 and that it satisfied a decline in turnover test. There was no requirement to demonstrate that its business had been closed or that the decline in its turnover had been caused by the COVID-19 pandemic – or by a government imposed closure prompted by that pandemic. For that reason, the Full Court took the view that the criteria for the JobKeeper payments had nothing to do with whether there had been any outbreaks of COVID-19 within a radius of 20 kilometres from the insured premises. The payments made under the scheme could not therefore be said to have been proximately caused by the insured peril.

43. In my view, the position is quite different here. The criteria for the Government supports here have a very significant interconnection with the closure of premises (or parts of premises) imposed as a consequence of outbreaks of COVID-19. In this context, it is important to keep in mind the findings previously made in these proceedings. In *FBD No. 1,* I held that the insured peril was a composite one involving a Government imposed closure following an outbreak of COVID-19 either at the insured premises or within a 25 mile radius of the premises. It was accepted by FBD that there had been a case of COVID-19 within each 25 mile radius. Having regard to the acceptance of all parties that the word *"outbreak"* could be given the meaning given

to it by the Health Protection Surveillance Centre (*"HPSC"*), I held that each of those cases could be said to constitute an outbreak of COVID-19. I also held that each one of these outbreaks were effective in bringing about the Government imposed closures such that each outbreak could be said to be a concurrent proximate cause of the closure. In contrast to the terms of the Australian JobKeeper scheme, the Government imposed closures in response to the outbreaks of COVID-19 are at the heart of the Government supports put in place in this jurisdiction. There is a clear chain of causation between the supports and the relevant insured peril. This represents a very significant point of distinction between this case and *Marrickville.* I explain the basis for this view below when I come to address the individual supports in issue.

44. As noted earlier, counsel for FBD also relied on an English authority and suggested that it should be followed in Ireland. The authority in question is the judgment of Butcher J. in *Stonegate Pub Company Ltd v. MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm). Like the Australian authority, *Stonegate* was concerned with a business interruption claim arising from the COVID-19 pandemic. One of the issues which arose in the case was whether the UK Government supports should be deducted from the amount to be paid to the insured. The policy provided for cover in respect of business interruption loss which was defined as *"Reduction in Turnover"*. In turn, the latter term was defined as follows: -

> *"**Reduction in Turnover** means:*
>
> *i. The amount by which the **Turnover** during the **Indemnity Period** falls short of the **Standard Turnover***
>
> *LESS*

ii. Any costs normally payable out of ***Turnover*** *(excluding depreciation) as may cease or be reduced during the* ***Indemnity Period*** *as a consequence of the* ***Covered Event****…"* (bold in the policy document).

45. It will be seen that, although the language is different, the savings clause contained in para. ii of the Reduction in Turnover clause in *Stonegate* was in substance very similar to the savings clause in the FBD policy. In *Stonegate*, the insurers made the case that, as a consequence of two forms of business supports provided by the UK Government, certain costs (which would normally have been payable out of the insured's turnover) had ceased namely staff wages and business rates. It was argued that this was as a result of a *"Covered Event"* (as defined) because the relevant Government supports were introduced to deal with the effects of the COVID-19 pandemic. One of the covered events under the policy was business interruption arising as a consequence of actions of a relevant authority which prevented or hindered the use or access to one or more of the premises insured for health reasons or concerns. There was also cover for notifiable diseases discovered at an insured location or which occurred in the vicinity of the insured premises.

46. Stonegate, the insured, made a number of arguments as to why the government supports should not be taken into account under the savings clause in issue. In the first place, it argued that the UK Government supports in relation to staff wages had not caused its employment costs to *"cease or be reduced"* in circumstances where, under the UK scheme, the employer continued to have a liability to meet those employment costs in the first instance before any reimbursement was received from the UK Government. It should be noted that a similar argument had been made, at one point, by the plaintiffs in these proceedings but was not ultimately pursued. This argument was rejected by Butcher J. at para. 258 of his judgment: -

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

47. In reaching that view, Butcher J. said that his conclusion was buttressed by three considerations: -

(a) In the first place, it was consistent with the accounting standards relevant to Stonegate under which savings were deducted in reporting any expenses;

(b) Secondly, Butcher J. took the view that the insured's argument was highly artificial. The case made by the insured rested on the notion that the insured had to pay employment costs in the first instance for which it was then reimbursed by the Government. It was argued that, while the effect of that reimbursement was to make good the outlay on wages, it did not reduce the cost incurred One can readily appreciate why Butcher J. considered that this argument was artificial;

(c) Thirdly, in the event that there was any room for argument, Butcher J. was satisfied that his interpretation of the policy was consistent with the basic principle that policies of insurance constitute contracts of indemnity. As noted above, this principle also formed a major part of the argument advanced by counsel for FBD in this case.

48. Counsel for FBD highlighted that, in *Stonegate*, Butcher J. expressly distinguished the *Marrickville* case in so far as the savings clause was concerned. In

para. 289 of his judgment, Butcher J. drew attention to the fact that, in *Marrickville*, the *"sum saved"* provision in the policy required that the sum saved had to be in consequence of the interruption or interference as a result of an outbreak of disease within a 20-kilometre radius of the premises. As previously outlined, I agree that, for present purposes, this is a crucially important aspect of the *Marrickville* judgment. In contrast, Butcher J. observed that the causation requirement in the *Stonegate* case was satisfied in circumstances where the payment had been received in consequence of covered events, namely the occurrence of COVID-19 in the vicinity and Butcher J. noted that the policyholder had conceded that there had been occurrences of COVID-19 in the vicinity of the insured premises.

49. In the same judgment, Butcher J. also addressed the business rates relief provided under the UK Government scheme. Butcher J. rejected the argument made by the insured that the business rate relief scheme had not been introduced in consequence of a covered event. Counsel for FBD drew attention to the finding made by Butcher J. at para. 296 of his judgment in which he rejected the insured's argument in the following terms: -

> *"In relation to the BRR changes which were announced by the Chancellor in March 2020, as well as the measures announced for Scotland and Wales to match or mirror those announced by the Chancellor, it appears to me quite clear that they were in consequence of a Covered Event or Events, namely the occurrence of a case or cases of Covid-19 in the Vicinity. Their timing was no coincidence. In the Budget on 11 March 2020, it was stated that the measures, including the increase in BRR, were 'to provide support to businesses during this temporary period by either reducing their costs or bridging cashflow problems arising from the outbreak [… of Covid-19]'. Further, in the*

Chancellor's announcement of 17 March 2020, he specifically said that it was in response to changed medical advice of the previous day, and the concerns as to the impact on pubs, clubs and other hospitality venues, that he was extending the Business Rates holiday to all businesses in that sector. It appears to me to be artificial to say, as Stonegate does, that the BRR was only in pursuance of the Government's economic policy rather than in consequence of the pandemic. It was in consequence of the pandemic, but aimed at supporting the economy as well."

50. Counsel for FBD submitted that I should follow the decision of Butcher J. However, I am conscious that the decision of Butcher J. was reached on the basis of the particular Government supports available in the United Kingdom and on the basis of the terms of the insurance policy in issue in that case. I do not believe that I can simply follow his approach. Instead, I must reach my own conclusions in relation to the specific Government supports taken up by the plaintiffs here and I must also consider the issues by reference to the specific terms of the FBD policy. That said, there are a number of aspects of Butcher J.'s judgment with which I agree. For the reasons outlined in paras. 42 to 43 above, I agree with Butcher J. that the *Marrickville* case should be distinguished. I also agree with his view that the savings clause extends to savings made by way of reimbursement and that it would be highly artificial to hold otherwise. I can see that a lawyer might construct an argument that the effect of the Government supports is to make good outlays already expended by the insured rather than to save or reduce those outlays in advance. However, I do not believe that this is how the savings clause would be construed by a reasonable person in the position of the parties. It will be necessary in due course to consider each of the Government supports in more detail but, in principle, so long as the receipt results in a saving during the indemnity

period, I can identify no good reason to suggest that the timing of receipt of the Government support is a relevant factor in determining the applicability of the savings clause.

51. I should make clear that, in reaching the conclusion outlined in para. 50 above, I have not found it necessary to take the indemnity principle into account. It seems to me that the conclusion can be reached solely by reference to the ordinary principles applicable to the construction of contracts. Those principles eschew an overly semantic approach and require the court to put itself in the position of a reasonable person in the position of the parties. Putting myself in that position, I do not believe that such a person would consider that a saving does not include the reimbursement of a liability. Taking a common sense view, the insured has been saved an expense that would otherwise reduce its gross profit. It is therefore unnecessary, in my view, to resort to the indemnity principle in order to agree with this aspect of the *Stonegate* decision. Nonetheless, in light of the case made by FBD, it remains necessary to consider the indemnity principle. FBD has strongly urged that, in considering the application of the savings clause to the Government supports in issue, the court should seek to give effect to the principle that a contract of insurance is a contract of indemnity. On that basis, FBD argued that the savings clause should never result in the insured recovering more than its actual loss.

FBD's reliance on the principle of indemnity

52. In the course of his submissions in relation to the *Stonegate* case, counsel for FBD placed considerable emphasis on the way in which Butcher J. relied on what he described as the *"basic principle that the policy was a contract of indemnity"*. More generally, the principle also featured very prominently in the submissions of counsel for FBD. He argued that the principle should be in the forefront of one's mind when seeking to understand what is intended by the terms of the FBD policy. In support of

his submission, counsel for FBD referred to the well-known decision of the Court of Appeal of England & Wales in *Castellain v. Preston* (1883) 11 Q.B.D. 380. While that case was concerned with the doctrine of subrogation, the court strongly emphasised that the indemnity principle is fundamental to a policy of insurance. In that case, the plaintiff insurer insured the defendants' property in Liverpool against fire damage. The defendants contracted to sell the property to their tenants. Between the date of the contract and the date of the sale, the property was damaged by fire. The defendants made a claim under the policy which the plaintiff insurer paid at a time when it was ignorant of the existence of the contract for sale. Subsequently, the sale was completed and the defendants were paid the balance of the purchase money. The plaintiff insurer contended that, by virtue of the doctrine of subrogation, it should be entitled to recover from the purchase money received by the defendants a sum equal to the amount previously paid out by it in respect of the fire damage. At first instance, Chitty J. (as he then was) held that the doctrine of subrogation did not go so far as to cover events of this kind. However, a different view was taken on appeal. In reaching that view, Brett L.J. (as he then was) emphasised the concept of indemnity. He held that the doctrine of subrogation was necessary (irrespective of the terms of any contract of insurance) *"for the purpose of carrying out the fundamental rule"* namely that insurance is a contract of indemnity such that an insured should never get anything more than a full indemnity in respect of the loss insured under the policy. Counsel for FBD relied, in particular, on the following passage from Brett L.J.'s judgment at p. 386: -

> *"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the*

contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."

53. It was submitted by counsel for FBD that the principle so stated by Brett L.J. is the *"guiding principle"* in relation to the interpretation of policies of insurance. In addition, counsel also relied on the decision of Flaux J. (as he then was) in *Synergy Health (UK) Ltd v. CGU Insurance Plc* [2010] EWHC 2583 (Comm). In that case, an issue arose in relation to the extent to which depreciation should be brought into account as a saving, reducing the amount of indemnity payable to the plaintiff under a policy of insurance written by the defendants in respect of (*inter alia*) fire damage. The defendants submitted that, if the plaintiff did not give credit for depreciation, it would recover more than an indemnity for its actual loss in respect of the interruption to its business. In para. 253 of his judgment, Flaux J. accepted that the analysis of the defendants was *"unanswerable and plainly correct"*. It is clear from a consideration of paras. 252 and 253 as a whole that, in reaching that view, he had the principle of indemnity in mind.

54. FBD's reliance on the principle of indemnity gave rise to the only difference between counsel for the parties in relation to the approach which the court should take in construing the savings clause in the FBD policy. In commencing his submissions on this issue, counsel for the plaintiffs made clear that this difference of emphasis as

between the parties did not seem to him to alter in any way the result which was urged by all parties upon the court. Counsel stressed that the plaintiffs fully support the result advocated by FBD. Counsel acknowledged the force of many of the arguments advanced by counsel for FBD but he submitted that the court should not *"oversubscribe"* to the principle of indemnity in interpreting the policy.

55. Counsel for the plaintiffs commenced his submission by referring to *Hickmott on Interruption Insurance* where the author explains that parties to business interruption policies frequently include a formula for the purposes of calculating loss. This is done with a view to avoiding complications in the event of a claim. In making this observation, *Hickmott* explains that, in contrast to material damage policies (which generally do not require any formula to calculate loss relating to damage to tangible property), business interruption policies relate: -

> *"to the intangible future earnings of a business. Without a stated and accepted method of measuring losses of anticipated earnings, it is conceivable that difficulties and disagreements would be frequent and many disputes arise."*

56. *Hickmott* explains that it is very important that losses should be capable of calculation on the basis of recognised or agreed methods. *Hickmott* refers, in this context, to the observations of Greer J. (as he then was) in *Henry Booth & Sons v. The Commercial Union Assurance Co Ltd* (1923) 14 Lloyd's L.R. 114 where Greer J. said: -

> *"It is the common practice in policies of this sort, in order to prevent lengthy disputes, that there should be an agreed method of ascertaining the loss. Sometimes the assessment of the loss is in favour of the assurance company and sometimes the assured, but it is nevertheless good sense to have a method which*

can be readily applied without difficulty and without raising a great number of points for dispute"

57. Having referred to the *Henry Booth* case, *Hickmott* continues as follows: -

"In law, a prior agreement of the parties as to the value of the interests insured, or to the system of measuring the indemnity, does not contravene the general principle of indemnity. The policy remains a policy of indemnity, but it is no longer a contract of strict indemnity. In the case of Elcock v. Thomson, (1949), concerning an ordinary fire policy in which there appeared a clause agreeing the value of the interests insured, MORRIS, J., stated:

> *'When parties have agreed upon a valuation, then in the absence of fraud or of circumstances, invalidating their agreement, they have made an arrangement by which for better or worse they are bound ... When losses occur after parties to contracts have agreed upon valuations, then in some cases advantage may occur to the insured while in other cases advantage may occur to the insurer.'*

In the case of Irving v Manning (1847), in the opinion of the judges, stated by Patteson, J., it was said that:

> *'A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify.'*

There would appear to be no difference in principle between an agreement on a valuation and an agreement on a method of valuation, or a formula for calculating the indemnity payable."

58. Against that backdrop, counsel for the plaintiffs submitted that it is necessary to keep in mind that *Castellain v. Preston* was a fire damage case. In the case of property damage of that kind, there would generally be no necessity to include any formula for calculation of losses. The loss is usually capable of being measured in a more straightforward way (albeit that, as *Elcock v. Thomson* illustrates, the parties to an insurance contract are free to agree values even where that does not equate to a perfect indemnity). In contrast, counsel argued that, having regard to the guidance given by *Hickmott,* there was an obvious rationale for including a loss calculation clause in a policy addressing business interruption. Counsel for the plaintiffs accordingly argued that the approach taken by Flaux J. in *Synergy* should be distinguished and that, instead, the court should follow the approach taken by the New South Wales courts in *Mobis Parts Australia Pty Ltd v. XL Insurance Company SE* [2018] NSWCA 342 (*"the Mobis case"*) discussed in paras. 61 to 67 and 69 to 72 below.

59. Counsel for the plaintiffs drew attention to what was said by Flaux J. in *Synergy* at para. 253, where he had accepted the insurer's argument that the principle of indemnity required that depreciation should be treated as a saving to be deducted from the amount to be paid to the insured. In para. 253, Flaux J. said: -

> *"It seems to me that, as a matter of principle, this analysis is unanswerable and plainly correct. On that basis, to the extent that, during the Indemnity Period, the deduction in respect of depreciation ceased to be made, that was a saving against what would otherwise have been the charges and expenses of Synergy's business. It follows that, in principle, that saving should be off-set against any claim under the business interruption section of the policy, unless the wording of the policy requires some different conclusion."*

60. Counsel for the plaintiffs criticised the approach taken in that paragraph. Counsel suggested that Flaux J. had used the principle of indemnity as a starting point *"before he ever gets to the words of the policy, and he's only going to deviate from it unless the words of the policy require a different conclusion…"*. Counsel also drew attention to the way in which Flaux J., having looked at the language of the relevant clause of the policy, gave an artificially extended meaning to the word *"payable"*. Counsel suggested that depreciation is not something that one would naturally describe as being payable. Counsel referred, in this context, to para. 258 where Flaux J. said: -

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

61. In para. 259, Flaux J. suggested that the construction of the word *"payable"* put forward by the insured would lead to an unreasonable conclusion which could be avoided by giving it a *"purposive meaning"*. Counsel for the plaintiffs contrasted the approach taken by Flaux J. with that taken by the courts of New South Wales in the *Mobis* case. That case was also concerned with whether depreciation should be deducted from the amount to be paid to the insured in respect of a business interruption claim. The savings clause was in similar terms to that in issue in the *Synergy* case. The

clause spoke of a sum saved in respect of *"such of the charges and expenses of the Business **payable** out of Gross Profit"* (emphasis added). However, Meagher J.A., in the New South Wales Court of Appeal, took a different approach to that taken in *Synergy*. As counsel for the plaintiffs highlighted, Meagher J.A., at para. 146, accepted that the court must give a business-like interpretation to the language used by the parties in light of the object which the policy was intended to secure. Meagher J.A. also accepted that, in accordance with *Castellain v. Preston*, the prospect of under- or over-indemnification *"may colour the meaning of the language used"*. Counsel for the plaintiffs highlighted that this represented a more restrained approach than that taken in *Castellain v. Preston*. He suggested that, in that case, Brett L.J. went further and appeared to give greater weight to the principle of indemnity than the language used in the policy. Counsel submitted that the approach taken by Meagher J.A. is correct. The principle of indemnity is to be taken into account but not to the extent that it overrides the language used in the policy. Thus, in para. 147 of his judgment, Meagher J.A., having referred to the observations of Greer J. in *Henry Booth & Sons* (quoted in para. 56 above), continued as follows: -

> *"147. But the indemnity under section 2 is not simply against "actual loss", unlike that in business interruption wordings generally adopted in the United States… Rather, the Local Policy contained a formula for the assessment of the insured's loss of gross profit, which… qualifies the application of the principle of indemnity insofar as it might be said to depart from perfect indemnification in some contingency…"*

62. Counsel for the plaintiffs placed particular emphasis upon what was said by Meagher J.A. in paras. 148 and 149 of his judgment where he addressed *Synergy* in the following terms: -

"148 It is by reference to these considerations that the reasoning of Flaux J in Synergy Health at [251]–[260] must be evaluated. Having found that the insured would 'recover an indemnity for more than its actual loss in respect of business interruption' if depreciation was not deducted, his Lordship concluded 'that, in principle, that saving should be off-set against any claim under the business interruption section of the policy, unless the wording of the policy requires some different conclusion'; indeed, he justified a construction that admittedly 'stretche[d]' language in the policy solely by this 'principle' — that a court should only conclude that 'something in excess of a full indemnity' was intended if "no other conclusion is possible": Synergy Health at [258].

149 In my respectful opinion, that reasoning gives the indemnity principle unwarranted effect in the face of the language of the policy, and the specific object of the provisions for the assessment of loss. A reasonable businessperson seeking to understand these lengthy clauses would not begin by assuming that they mean nothing more than the expression 'full indemnity for actual loss to gross profit', and then proceed to enquire whether anything in the language required otherwise. His or her attention would remain fixed on the sense of the language describing the method for ascertaining the loss as coloured by its immediate and commercial context: see Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37 at [46]–[52] (French CJ, Nettle and Gordon JJ)."

63. Subsequently, in para. 151 of his judgment, Meagher J.A. observed that the use of the word *"payable"* rather than *"deducted"* would suggest that expense items that

are not liable to be paid away (such as depreciation) would be excluded from the savings to be deducted. In the same paragraph, Meagher J.A. noted that nothing in the context or purpose of the savings clause required any departure from the ordinary meaning of the language used in it. In this context, Meagher J.A. noted in para. 152 that there was a specific note in the definition of gross profit in the policy requiring that provision should be made for depreciation in ascertaining the opening and closing amounts of stock and work in progress but there was no equivalent language in the savings clause. He observed: -

> *"That an adjustment for depreciation of some assets is applied for one purpose does not suggest any intention that the depreciation of other assets be subtracted for a different purpose. If anything, it reinforces that the omission of any express reference to depreciation of plant and equipment was deliberate…"*

64. It should also be noted that, in para. 154, Meagher J.A. rejected the suggestion that the insured would necessarily receive an incidental benefit over and above a complete indemnity if there was no deduction in respect of depreciation. At para. 155, he acknowledged that the insured might receive an incidental benefit because the replacement property will be in a better condition at the end of the period of business interruption than the original property would have been in, had it not suffered damage. But he made the point that such benefit might readily be offset by incidental costs arising from the change to the insured's anticipated depreciation charges into the future. In this way, Meagher J.A. appeared to take the view that there was no certainty or even a probability that the insured would be over indemnified. In either event, it did not seem to him to matter because he added: -

> *"Whether in the result the insured would be over- or under-indemnified is an enquiry of the kind that the formula in cl 7.1.1 would be expected to foreclose…*

The amount of $1,449,509 should not be deducted from Mobis Australia's business interruption claim."

65. Counsel for the plaintiffs submitted that the approach taken by the New South Wales Court of Appeal in para. 149 of the judgment of Meagher J.A. is entirely consistent with the approach taken by the Supreme Court in Ireland in relation to the interpretation of contractual documents in *Law Society of Ireland v. Motor Insurer's Bureau of Ireland* [2017] IESC 31 (*"the MIBI case"*). He urged that I should, therefore, adopt the same approach in approaching the interpretation of the savings clause in the FBD policy.

66. In response, counsel for FBD indicated that he did not disagree with the proposition that it is possible for the parties to an insurance policy to agree that the policy would provide for something other than a perfect indemnity. However, he suggested that there is a *"sliding scale"* between, at one end of the spectrum, a policy of insurance that provides no formula whatsoever as to the calculation of the indemnity (where one has the purest expression of the principle of indemnity) and, at the other end of the scale, the policies in Australia which he suggested adopt a *"very detailed and prescriptive policy in terms of how the indemnity is to be calculated"*. With regard to the FBD policy, counsel submitted that, insofar as it contains a formula, it is *"at a very high level, it is quite generic, and if the object of having a prescriptive formula is to avoid disputes between the parties… I'm afraid that aspect of the policy hasn't been very successful at all, and that's because of how generic and high level it is that we have ended up with so many disputes in relation to it"*. Counsel, accordingly, argued that the language of the FBD policy does not contain a sufficient level of detail and prescription either to displace or to modify the principle of indemnity.

67. Counsel for FBD also submitted that, applying the approach taken by the Supreme Court in the *MIBI* case (under which the words of a contract are to be read in context), a *"critical piece"* of the context here is that an insurance policy constitutes a contract of indemnity. On that basis, he argued that, where there is an issue as to the proper interpretation of the policy and there are two interpretations open, the court must lean in favour of the interpretation which will give effect to the policy of indemnity. In taking that approach, counsel urged that the court would thereby give effect to what is the central purpose of the policy. He argued that the approach taken by Flaux J. in *Synergy* is correct.

The approach to be taken in relation to the indemnity principle

68. In my view, FBD is wrong to place so much emphasis on the indemnity principle. I fully accept that, as a general proposition, a policy of insurance is a contract of indemnity which is intended to make good a loss suffered by the insured on the happening of an insured peril. Such a policy is not intended to be a source of profit for the insured. However, as with every written contract, the terms of the policy must always be examined in order to understand what the parties to that policy have actually agreed. Notwithstanding the strong emphasis placed by Brett L.J. on the indemnity principle in *Castellain v. Preston* in 1883, subsequent case law has shown that there may well be good reasons why parties to a business interruption policy may agree to modify the principle in the interests of simplicity. That case law includes the decision of Greer J. in *Henry Booth & Sons v. The Commercial Union Assurance Co. Ltd*. It is clear from such decisions that it is common practice in business interruption policies for the policy to provide for a methodology or formula to calculate the losses even where the application of that formula may produce a result that is not fully consistent with a true indemnity. There is no basis to think that parties to an insurance contract of

this kind are not entitled to agree on a formula to calculate loss. There is obvious business sense in taking that approach with a view to simplifying the calculation of loss in the event of a loss. As noted by counsel for the plaintiffs, the observations of Brett L.J. in *Castellain v. Preston* were made in respect of a property damage claim where there should not be the same level of difficulty in calculating the loss. Moreover, the observations of Brett L.J., on which FBD relies, were expressly stated to be in the context of a marine or fire policy (as the passage quoted in para. 52 makes clear). Even in the case of a fire policy, it is well recognised that (as *Elcock v. Thomson* and *Mobis* illustrate) parties can agree on a set value for an item of loss even where that agreed value results in something other than a perfect indemnity.

69. I appreciate that FBD seeks to make the case that the savings clause here is at a very high level and that it is to be contrasted with what counsel sought to characterise as the detailed and prescriptive approach that has been taken in the Australian policies considered in the *Marrickville* and *Mobis* cases. I cannot agree that there is any significant distinction to be made between the approach taken in the savings clause in the FBD policy and that taken in the equivalent clause in *Marrickville*. In para. 41 above, I have already drawn attention to the very obvious similarity between the terms of the savings clause in the *Marrickville* case and the savings clause in issue here. The *Mobis* case was concerned with a different type of clause. The clause there was concerned with the amount to be paid in respect of the cost of replacement of lost, destroyed or damaged stock. The clause was in very simple and straightforward terms and provided that the amount to be paid was the cost of replacement *"by similar property as new"*. While the clause was quite prescriptive, it could not be said to be any more detailed than the savings clause in the FBD policy. Crucially, the New South Wales Court of Appeal was of the view that the specific terms of the policy applied

even though it was argued that the cost of replacement would exceed the actual loss suffered by the insured. That approach is entirely consistent with the decisions cited by *Hickmott* both of which postdate *Castellain v. Preston.* It is also consistent with the general approach taken in Ireland to the interpretation of insurance policies. Under that approach, the words used by the parties are given their natural and ordinary meaning save where the context (or the language of the contract read as a whole) suggests that the parties intended that they should be given a different meaning. The importance of the language used in the policy was emphasised by Griffin J. in *Rohan Construction v. Insurance Corporation of Ireland* [1988] I.L.R.M. 373 at p. 377 where he said: *"It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy … **in the words in which the parties have themselves chosen to express their meaning.** The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause."*(emphasis added).

70. It is true that, in subsequent cases, the Supreme Court has given more importance to the surrounding circumstances (i.e. the context) than that passage might suggest. I believe that it is fair to say that the approach now taken is that the words used in a contract will always be interpreted in context. But that is done with a view to understanding what the parties intended to convey by the words in which they have chosen to express themselves. The observations of Griffin J. remain valid today albeit that they should be read as though the words *"if necessary"* were omitted. The language used by the parties remains a key consideration. As noted above, counsel for FBD has argued that a *"critical piece"* of the context here is that a policy of insurance constitutes

a contract of indemnity. In my view, that argument overstates the position. Like Meagher J.A. in *Mobis,* I can readily accept that the indemnity principle is a factor to be taken into account in interpreting the terms of a policy. But, if it is clear from the language of the policy that the parties have agreed to accept either something less – or something more – than a perfect indemnity, the ordinary rules of contractual interpretation will require that effect be given to the solution expressly chosen by the parties. That is not to say that there may be cases where the solution chosen by the parties is so inconsistent with the nature of insurance that their contract cannot be properly classified as insurance at all. However, there is no basis to suggest that the formula chosen in the savings clause in the FBD policy falls into that category.

71. On the contrary, the approach taken in the FBD policy is consistent with the approach taken in the policies in issue in *Marrickville* and in the cases cited in *Hickmott.* As those cases make clear, the fact that the parties to an insurance policy may have chosen to apply a formula does not mean that such an insurance policy will not be a contract of indemnity; it merely means that it will not give rise to a perfect indemnity in all circumstances. In particular, it may not do so where the parties have chosen to take a pragmatic approach and to adopt a formula or agreed methodology for calculating either a loss or a saving. In the case of the FBD policy, it seems to me to be clear that a decision was taken to prescribe a particular approach for calculating the savings to be deducted from the payment to be made to the insured. There are good commercial reasons why the parties to an insurance policy might take such an approach. As *Hickmott* explains, it makes sense in a business interruption policy to agree a formula in order to minimise the scope for disputes to arise as to how a saving is to be taken into account. I appreciate that, as counsel for FBD emphasised, the formula chosen in the FBD policy has not succeeded in avoiding disputes. As the written submissions make

clear, there were very extensive disputes between the parties as to how the savings clause ought to be applied. The extent of those disputes must be acknowledged. Nonetheless, I do not believe that their existence undermines the conclusion that the savings clause here was intended to minimise the potential for disputes. The Supreme Court has emphasised in the *MIBI* case that, in construing the terms of a contract, one should not do so through the prism of the particular dispute which has broken out between the parties. Instead, the contract should be interpreted by reference to how it would be understood by a reasonable person in the position of the parties at the time the contract was concluded. I am strongly of the view that, at the time that the FBD policies were put in place, the reasonable person would have considered that the savings clause was intended to provide what, on its face, appears to be a straightforward method for taking savings into account. I believe the reasonable person would never have imagined that the clause was capable of giving rise to the extent of dispute that has been witnessed in the course of these proceedings.

72. Having regard to the considerations outlined above, I am of the view that the approach taken by the New South Wales Court of Appeal in *Mobis* is consistent with Irish law and should be followed. I accordingly accept that the indemnity principle is relevant in construing the FBD policy in so far as it may colour the meaning of the language used. However, the language chosen by the parties must be given appropriate weight. Even where the result may lead either to under-indemnification or over-indemnification, the indemnity principle does not require that a strained or artificial meaning should be given to the words of a policy – at least where there is an evident business purpose for the parties' choice of language. In such circumstances, the language of the policy will prevail unless there is something else in the context which requires that a different meaning should be given to the words used. It is well accepted

that there is an evident business purpose underlying policy terms providing for agreed valuations or for formulae to calculate losses. In such cases, effect is given to the language chosen by the parties even where that does not result in a perfect indemnity. In the present case, the savings clause seems to me to fall into the category of an agreed formula. Accordingly, it is not surprising that its application may potentially give rise to an over-indemnification of the insured. I do not believe that the indemnity principle requires that the savings clause should be interpreted so as to give the words *"in consequence of"* a different meaning to the way in which those words would ordinarily be understood in an insurance context. In addressing the application of the savings clause to the Government supports in issue, I therefore remain of the view expressed in para. 29 above that the words *"in consequence of"* denote proximate cause with the result that the savings clause will not apply unless the Government supports in issue can be said to have been proximately caused by the insured peril.

Relevant context to the introduction of the Government Supports

73. I now turn to the supports in issue. Before considering them in detail, it is important to put them in context. In the first place, it is necessary to recall that the peril insured under extension 1(d) of the FBD policy is a composite one which applies where the business of the insured is affected by a Government imposed closure *"following"* an outbreak of an infectious disease either on or within a 25-mile radius of the insured premises. While there was a debate about whether the use of the word *"following"* denoted proximate cause, that debate is no longer relevant in light of my finding in *FBD No. 1* that, even if it denotes proximate cause, that standard was satisfied. For present purposes, it is sufficient to proceed on the basis that the insured peril requires that the Government closure must be shown to have been proximately caused by an outbreak within the 25-mile radius.

74. Secondly, it is necessary to recall that, on 15th March 2020, the Government issued a press release in which it was announced that all public houses should close until at least 29th March 2020. Thirdly, it is important to keep in mind the finding made by me in paras. 187-199 of my judgment in *FBD No. 1* in relation to causation. Although FBD had conceded that there had been cases of COVID-19 within the relevant 25-mile radius, FBD had argued that there was no sufficient causal connection between the Government decision to close public houses and any such incidents of COVID-19 within a 25-mile radius of the public houses in issue. Contrary to that submission, I found in para. 190 of *FBD No. 1* that each outbreak of COVID-19 in the State was instrumental in the Government decision to close down all public houses wherever they might be situated within the State. Furthermore, in para. 199, I held that each outbreak of COVID-19 was equal in efficiency in bringing about the closure ordered on 15th March 2020 such that each could be considered to be a concurrent proximate cause of the closure. In addition, it is also important to note that, in paras. 201-202 of *FBD No. 1*, I held that the composite peril insured under extension 1(d) was the proximate cause of the losses sustained by the plaintiffs as a consequence of that closure.

75. The Government announcement of 15th March 2020 was the first of a series of measures requiring the continued closure of a range of business premises including public houses. Subsequently, in an announcement on 24th March 2020, the Government directed that all non-essential retail outlets should close and that the restrictions previously announced on 15th March 2020 should be extended until 19th April 2020. This included the requirement that public houses would remain closed. This announcement also signalled that the Government proposed to provide financial support to employers and that this would be provided for in emergency legislation. This

included the support that became known as the Temporary Wage Support Scheme, to which I now turn.

The introduction of the Temporary Wage Support Scheme (*"TWSS"*)

76. In the Government announcement of 24th March 2020, it was stated that action had been agreed in three areas namely additional restrictions, new supports and new legislation. The announcement dealt with these as follows:-

(a) In the first place, additional measures were announced to slow the spread of the virus. These additional measures were recommended by NPHET and the Chief Medical Officer (*"CMO"*). As noted above, this included a direction requiring all non-essential retail outlets to close. It also required that people should stay at home insofar as possible and that no unnecessary travel should take place either within the State or overseas;

(b) Secondly, new measures were announced to assist those who had lost or would lose their jobs as a consequence of the emergency created by COVID-19 and also to incentivise employers to keep employees on their payroll (or to re-engage them, if they had already been laid off the payroll). It is, therefore, clear that (as counsel for FBD observed in the course of his submissions) the mitigation of the adverse economic consequences resulting from the spread of COVID-19 was introduced in lockstep with further public health emergency restrictions (including the continuation of those previously announced on 15th March 2020) and that it was done with a view to alleviating the impact of those restrictions. The scheme was described in more detail in the Government announcement as follows:-

> *"In order to encourage employers and companies badly affected by the Emergency to keep staff on the payroll, a wage subsidy scheme will be introduced to co-fund 70% of the cost of salaries up to a maximum of €38,000 a year. At a salary of €38,000 the subsidy will equate to €410 a week in take-home pay.*
>
> *The cost of this will be great. Many billions of euro in the coming months. But we can bear it and we will be able to pay it back as a nation. We do so willingly because it is the right thing to do and because we owe it to our fellow citizens.*
>
> *I believe that maintaining the link between employees and employers and companies will make it easier for us to bounce back when this is all over. We will keep our economic infrastructure intact. We will give businesses the best chance of making it through this."*

(c) Thirdly, the statement also signalled that new emergency legislation would be enacted before the end of the week.

77. On the same day, the Emergency Measures in the Public Interest (COVID-19) Bill 2020 was initiated in Dáil Éireann. The Bill was given a very expedited hearing in the Dáil and Seanad and was enacted three days later on 27th March 2020 (*"the 2020 Act"*). Section 28 of the 2020 Act provided for the establishment of the TWSS. The relevant provisions of s. 28 are addressed in more detail below. Before doing so, there are a number of other measures taken by the State at this time which should be noted. In the first place, the enactment of the 2020 Act was followed immediately afterwards

on 28th March 2020 with an order requiring that everyone should remain at home for a two-week period and that people could only leave their homes for essential reasons such as to buy food or to undertake exercise within a two-kilometre radius of their homes. This was subsequently formalised by S.I. No. 121 of 2020 issued on 7th April 2020 under powers conferred on the Minister for Health by new provisions inserted into the Health Act 1947 (*"the 1947 Act"*) by the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 which was also enacted in March 2020. Among the new provisions inserted in the 1947 Act at this time was s. 31A which empowered the Minister for Health to impose requirements to stay at home and to impose restrictions on travel. It also empowered the Minister to prohibit gatherings for social and recreational purposes. It should further be noted that, on 7th April 2020, the Minister for Health, in the exercise of the powers conferred by s. 31B of the 1947 Act declared that every area or region of the State is an area *"where there is known or thought to be sustained human transmission of COVID-19"*. The relevant declaration is to be found in S.I. No. 120 of 2020.

78. The 2020 Act was plainly enacted as part of a suite of measures to address the COVID-19 pandemic, some of which are outlined in paras. 76 to 77 above. In parallel with the imposition of new restrictions imposed under the Health Act 1947 (as amended), the 2020 Act sought to address the economic consequences that flowed from the imposition of such restrictions. There are a number of features of the 2020 Act which make this clear. In the first place, the long title of the Act spelt out a number of specific purposes for its enactment. In particular, the long title spoke of the need to make exceptional provision, in the public interest, for a number of matters including the need:-

> *"to mitigate the adverse economic consequences resulting, or likely to result from the spread of...* [COVID-19]*"*

79. The 2020 Act also included a recital that an emergency has arisen in the State by virtue of the spread of COVID-19 and that *"it is necessary for compelling reasons of public interest and for the common good that extraordinary measures should be taken to mitigate, to the extent practicable, the adverse economic consequences resulting, or likely to result, from the spread of that disease"*.

80. As noted above, s. 28 of the 2020 Act deals with the establishment of the TWSS which is plainly one of the extraordinary measures contemplated by the recital quoted above. The TWSS was expressly designed to mitigate the adverse economic consequences of the disruption to business caused by the pandemic. As previously noted, it was introduced in lockstep with the ongoing closure orders which had immediate adverse economic impacts on businesses including public houses. Section 28(2)(a) provided that s. 28 should apply where:-

> *"the business of an employer has been adversely affected by Covid-19 to a significant extent with the result that the employer is unable to pay to a specified employee the emoluments the employer would otherwise have normally paid to him or her"*.

81. It is apparent from the language used in s. 28(2)(a), that it applied only where the business of the employer had been adversely affected by COVID-19. Unlike the Australian JobKeeper rules considered in *Marrickville,* the payment was therefore directly dependent on adverse impact as a consequence of COVID-19. The 2020 Act envisaged that the TWSS would be administered by the Revenue Commissioners. Section 28(3) provided that the Revenue Commissioners were to issue guidelines for this purpose and it also made clear that, to qualify for the scheme, employers would

have to demonstrate that their business was disrupted by COVID-19. Section 28(3) provided as follows:-

> *"The business of an employer shall be treated as being adversely affected to the extent referred to in subsection (2)(a) where, in accordance with guidelines published by the Revenue Commissioners under subsection (19), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce, there will occur in the period of 14 March 2020 to 30 June 2020 at least a 25 per cent reduction either in the turnover of the employer's business or in customer orders being received by the employer."*

82. There is no dispute between the parties in the present case that each of the affected plaintiffs were in a position to demonstrate to the Revenue Commissioners that, by reason of COVID-19, there was significantly more than a 25% reduction in the turnover of their business or in customer orders being received. Nor is there any dispute between the parties that each of the affected plaintiffs received the benefit of reimbursements from the Revenue Commissioners in accordance with the TWSS.

83. In turn, the provisions of s. 28(3) of the 2020 Act were reflected in the terms of the Guidelines issued by the Revenue Commissioners in respect of the TWSS. The Guidelines provided that, to qualify for the Scheme, *"a business must be experiencing a significant negative economic disruption due to the COVID-19 pandemic"*. This repeats the language of s. 28 of the 2020 Act. For present purposes, it is important to note that the Guidelines expressly acknowledged that some businesses and sectors had to close their premises. Having referred to the fact that businesses must be experiencing a significant economic disruption due to COVID-19, the Guidelines continued:-

"In general, this will be readily apparent; some businesses and some sectors have had to close their premises, while the impact of public health advice on individual businesses in terms of restrictions on trade, physical distancing and the nature of essential and non-essential businesses will be obvious."

84. Thus, if a business was subject to an imposed closure (as was the case for the plaintiffs), the requirement to demonstrate impact was easily established. But it is clear from the guidelines that a claimant did not need to establish that there had been a complete closedown of the business; a partial closure or a restriction on trade could also be sufficient. The requirement to keep the bar counters closed (which I have held to be a partial closure) would therefore also have qualified for the scheme provided, of course, that the relevant 25% threshold in lost turnover could also be established.

85. Consistent with s. 28(3) of the 2020 Act, the Guidelines provided that, in the case of a retail business such as a pub, a 25% reduction in overall sales would be regarded as substantiating eligibility for the application of the Scheme. The Guidelines also made clear that the Scheme was confined to employees who were on the employer's payroll as of 29th February 2020 and for whom a payroll submission had already been made to the Revenue Commissioners in the period from 1st February 2020 to 15th March 2020. However, it also envisaged that employees who had been laid off after 29th February 2020 could be taken back onto the payroll for the purposes of the Scheme. This is consistent with the terms of the announcement made on 24th March 2020 (as summarised in para. 76 (b) above). There was nothing in the terms of the Guidelines which suggested that any repayment would be required in the event that any employer receiving TWSS payments had the benefit of business interruption insurance cover. Nor has any claim been made by the State to that effect. In this regard, it should be noted that the Chief State Solicitor had confirmed in advance of the hearing

scheduled in November 2022 that the State did not seek to be heard in these proceedings.

86. The TWSS was operated in a very straightforward manner. The amount of the subsidy paid to the employer was based on the average net weekly pay before the pandemic affected the employer's business. This was calculated by reference to the pay and tax information for the months of January and February 2020. There was, however, a small gap in time between the payment made by the employer to the employee and the date of reimbursement by Revenue. Employers had first to submit a payroll notification to Revenue on or before the day payment was made to their employees. Thereafter, Revenue would transfer the subsidy payment to the employer within two working days after receipt of the payroll.

87. In so far as its duration is concerned, it was originally envisaged that the TWSS would be in place up to 5th May 2020 but this was subsequently extended to 31st August 2020. This reflected the fact that significant restrictions remained in place in the intervening period. It is unnecessary, for present purposes, to go through each of the individual steps that were involved in this process. It is sufficient to note that, on 1st May 2020, the Government announced a further extension of the COVID-19 measures until 18th May 2020 (albeit that there was some relaxation of them in certain limited respects). On 18th May 2020, the restrictions were further extended until 8th June 2020. On 5th June 2020, the Taoiseach announced certain relaxations of the restrictions and, on the same day, the TWSS was extended to the end of August 2020. As noted in para. 7 of my judgment in *FBD No. 2*, public houses which were in a position to serve a *"substantial meal"* were permitted to reopen (subject to certain restrictions) on 29th June 2020. However, they were not permitted to open their bar counters and I held in *FBD No. 2* and in *FBD No. 3* that this constituted a closure of a part of the insured

premises. Public houses which were not in a position to serve such a meal (described as *"wet pubs"*) were still subject to the full closure imposed by the announcement of 15th March 2020 (albeit that, from 27th March 2020, they were permitted to provide a takeaway service). This was the effect of Regulation 6 of S.I. No. 234 of 2020 which came into operation on 29th June 2020. Under S.I. No. 298 of 2020, this regime continued in place until 31st August 2020.

88. In my view, it is very clear that the insured peril was a concurrent proximate cause of the TWSS payments received by the plaintiffs. As I outlined earlier, I have previously held that the outbreaks of COVID-19 within a 25 mile radius of the plaintiffs' respective public houses were each a concurrent cause of the Government imposed closures which caused the interference to their business. Each element of the composite insured peril was therefore satisfied. In turn, there is a direct causative link between the eventuation of that composite peril (i.e. the imposed closure caused by the outbreaks) and the provision of the TWSS payments. That causative link is found in the terms of the 2020 Act and the Revenue Guidelines. In the first place, as recorded in para. 79 above, the recital to the 2020 Act made clear that its purpose was to mitigate the adverse economic consequences of the spread of COVID-19. I appreciate that the recital made no mention of closure but one cannot lose sight of the fact that the 2020 Act was enacted in parallel with very extensive and far reaching amendments made to the 1947 Act which permitted the Minister for Health to introduce swingeing measures to control the spread of disease including the prohibition of social gatherings and the closure of premises. At the time the 2020 Act was enacted, there was a closure order in place which, as outlined in para. 87 above, was continued in force up to 31st August 2020 in the case of wet pubs and was also continued in force, to an appreciable extent, even after 29th June 2020 in the case of those pubs serving a substantial meal.

89. If one asks oneself why public houses qualified for the TWSS, it was because of the closure orders in place from time to time. That is acknowledged in the Revenue Guidelines where, as noted in para. 83 above, the Revenue Commissioners stated that the s. 28(2)(a) condition (i.e. that business had been adversely affected by COVID-19 to a significant extent) was *"readily apparent"* where a business was the subject of a closure order. As previously held by me in *FBD No. 1*, the closures were, in turn, proximately caused by each outbreak of COVID-19 (including those within the relevant 25 mile radii) each such outbreak being a concurrent cause of the closure. One can therefore see an unbroken chain of proximate causation between the receipt of TWSS payments and the insured peril (namely the imposed closure proximately caused by an outbreak of COVID-19 within the relevant 25 mile radius). Not only is the chain of causation unbroken but the insured peril is also properly characterised as the proximate cause of the TWSS payment. *Buckley* in *Insurance Law* (5th ed., 2021) provides a very useful explanation of proximate cause where he says at para. 8-99: *"A cause is said to be proximate when it sets in motion a chain of events that results in a loss without the intervention of any new or independent force. ... Proximate cause is that which, in a natural sequence, unbroken by any new cause, produces the result which would not otherwise have occurred".* While *Buckley* was there referring to the proximate cause of losses rather than savings, the underlying rationale is equally applicable to savings. Here, the relevant chain of events in respect of the savings is easily mapped. First, there were the outbreaks of COVID-19 within the 25 mile radii; second, there were the series of Government closures, each of which was concurrently proximately caused by each of those outbreaks and by all outbreaks outside those radii; third, the 2020 Act was enacted to address the economic fallout from the restrictions and closures imposed by the Government as a consequence of the outbreaks. While s. 28 of the 2020 Act may be

said to have been intended to apply more widely than in the context of closures, it could not plausibly be suggested that the closures in place at the time of its enactment (and which were expected to continue thereafter) were not a proximate cause of the TWSS scheme established under the section. Given that those closures were proximately caused by the outbreaks within the 25 mile radii, it follows that the savings available under the TWSS were proximately caused by the insured peril. Furthermore, there can be no question but that the payments were made *"in respect of ... the charges and expenses of the business payable out of gross profit"* to quote the language of the savings clause. The payments were made solely in respect of the salaries and wages of employees and they were accordingly made in respect of the expenses of the business payable out of gross profits. It follows that all of the conditions of the savings clause have been satisfied in respect of the TWSS payments. I am therefore of the view that the payments fall to be deducted under the savings clause.

The Employment Wage Support Scheme (*"EWSS"*)

90. The EWSS replaced the TWSS from 1st September 2020. The EWSS provided a flat rate subsidy to qualifying employers based on the number of eligible employees on the employer's payroll and gross pay paid to employees. For similar reasons to those set out in para. 89 above, the EWSS payments were clearly made in respect of an expense of the business payable out of gross profit – namely employment costs. In order to qualify for the payment of EWSS, there had to be at least a 30% reduction in turnover in the period from 1st July 2020 to 31st December 2020 (based on turnover or customer order in reference to the corresponding period in July-December 2019). The system operated in a very similar way to the TWSS in that, on receipt of the eligible payroll submission, the Revenue Commissioners would reimburse the payment to the employer's bank account within two working days.

91. The statutory basis for the EWSS can be found in the Financial Provisions (COVID-19) (No. 2) Act 2020 (*"the No. 2 Act"*) which amended Part 7 of the 2020 Act under which the TWSS had been established. Because this was done by way of an amendment to the 2020 Act, the long title of the 2020 Act and the recitals remain as relevant to the EWSS as they were to the TWSS. Section 2(2) of the No. 2 Act inserted two new provisions into the 2020 Act, namely s. 28A and s. 28B. According to s. 28A, the objectives of s. 28B were to provide *"the necessary stimulus to the economy so as to mitigate the effects on the economy of Covid-19"*. In turn, s. 28B provided for the establishment of the EWSS. Under s. 28B, a wage subsidy payment was to be paid to employers who, in accordance with guidelines published by the Revenue Commissioners, demonstrate to the satisfaction of the Revenue Commissioners that the employer would suffer at least a 30% reduction in turnover (or in customer orders) *"by reason of Covid-19 and the disruption that is being caused thereby to commerce"*. Thus, the requirement to show that the loss in turnover arose by reason of COVID-19 remained in place under the EWSS regime. As in the case of the TWSS, this is an important point of distinction between the terms of the EWSS and the Australian JobKeeper scheme considered in *Marrickville.*

92. A number of public health restrictions of varying intensity were in place during the currency of the EWSS. It is unnecessary to go through the detail of each of them. The restrictions described in para. 87 above continued for part of September 2020. For a brief period towards the end of that month, *"wet"* pubs outside Dublin were permitted to reopen. As described further below, more stringent restrictions were imposed in October 2020. In the period between 22nd October 2020 and 1st December 2020, bars, cafés, restaurants and pubs were restricted to providing takeaway and delivery services and outdoor dining up to a maximum of 15 people. This restriction was imposed

pursuant to Regulation 12 of S.I. No. 448 of 2020. This restriction was relaxed by Regulation 11 of S.I. No. 560 of 2020 in bars and restaurants serving a substantial meal. They were allowed to reopen on 1st December 2020 but *"wet pubs"* were required to remain closed. However, this relaxation ceased at 3.00pm on 24th December 2020 when all restaurants and pubs were required to close except for delivery and takeaway services. This restriction was imposed by S.I. No. 695 of 2020. These restrictions were originally intended to stay in place until 31st January 2021 but, through a series of extensions, the restrictions were continued until 7th June 2021 when outdoor services were permitted to resume for pubs and restaurants. As from 26th July 2021, pubs and restaurants were subsequently permitted to resume indoor service for customers who were fully vaccinated or who had recovered from COVID-19.

93. It seems to me that the same considerations apply in respect of each of the closures described in para. 92 above as those discussed by me in *FBD No. 1*. Just as the initial period of closure commencing in March 2020 was proximately caused by each outbreak of COVID-19; so, too, were each of the subsequent closures. In each case, the Government was reacting to each outbreak and no one could say that any individual outbreak was a more effective cause of the closure than any other. Thus, in the case of each period of closure, I take the view that each outbreak of COVID-19 within each 25-mile radius must be treated as a concurrent proximate cause of the closure. The fact that, at that point, there were likely to have been quite large numbers of outbreaks of COVID-19 throughout the State does not affect this conclusion. As Lord Briggs explained in the *FCA* case, at p. 756, *"What is striking about the present case is that each and every separate case of COVID-19 is identified as an equally operative concurrent cause of the national response to the pandemic, so that the typical number of concurrent causes in the authorities, say two or three, is increased by orders of*

magnitude to something approaching, or even exceeding, a million. ***But there is no reason why the essential logic of concurrent cause cannot be scaled up in that way****."* (emphasis added). While I do not suggest that the outbreaks in this jurisdiction approached anything like the number experienced in England and Wales, the observations of Lord Briggs seem to me to be equally applicable in an Irish context.

94. It seems to me to follow that there is no material difference between the status of the payments made to the plaintiffs under the EWSS and the payments made under the TWSS. In both cases, there is a similar direct causative link between the eventuation of the insured peril and the provision of the payments. The very same considerations apply as those outlined in paras. 88 to 89 above. It is unnecessary to repeat them here. I therefore believe that the payments received by the plaintiffs under the EWSS constitute savings which were proximately caused by the insured peril. As in the case of the TWSS, the payments were also made in respect of an expense of the business (i.e. the payroll expense), Thus, each of the conditions of the savings clause is satisfied in the case of the EWSS. I am accordingly of the view that the EWSS payments fall to be deducted under the savings clause.

The COVID Restrictions Support Scheme

95. As outlined in para. 92 above, pubs and restaurants were required to remain closed for a long period of time. It was against this backdrop that the Covid Restrictions Support Scheme (*"CRSS"*) was introduced in December 2020 in order to provide further supports for businesses which were required by the applicable COVID restrictions either to restrict access to their business or to close completely. The CRSS was introduced by s. 11 of the Finance Act 2020 which inserted a new s. 485 into the Taxes Consolidation Act 1997 (*"the 1997 Act"*). Under s. 485(7), a *"qualifying person"* was entitled, subject to certain conditions, to receive a weekly payment equal

to 10% of average weekly turnover up to €20,000 and 5% of average weekly turnover in excess of €20,000. For this purpose, a *"qualifying person"* was defined in s. 485(4)(b) as follows:-

> *"(b) Subject to subsections (5) and (6), this section shall apply to a person who carries on a relevant business activity and who—*
>
> *(i) in accordance with guidelines published by the Revenue Commissioners under subsection (22), demonstrates to the satisfaction of the Revenue Commissioners that, in the claim period, because of applicable business restrictions provisions that prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity of the person is carried on—*
>
> *(I) the relevant business activity of the person is temporarily suspended, or*
>
> *(II) the relevant business activity of the person is disrupted, such that the turnover of the person in respect of the relevant business activity in the claim period will be an amount that is 25 per cent (or less) of the relevant turnover amount, and*
>
> *(ii) satisfies the conditions specified in subsection (5),*
>
> *(hereafter referred to in this section as a 'qualifying person')"*

96. It will be seen that the relevant business owner was required to establish to the satisfaction of the Revenue Commissioners that the business was suspended or disrupted by *"applicable business restrictions provisions".* For that purpose, it is necessary to consider a number of definitions contained in s. 485(1). In the first place,

that subsection provided that the phrase *"applicable business restrictions provisions"* was to be construed in accordance with the definition of *"Covid restrictions period"* contained in the same subsection. Section 485(1) defined *"Covid restrictions"* as meaning: *"restrictions provided for in regulations made under sections 5 and 31A of the Health Act 1947, being restrictions for the purpose of preventing, or reducing the risk of, the transmission of Covid-19 and which have the effect of restricting the conduct of certain business activity during the specified period"*. That definition therefore explicitly confined the business restrictions to those imposed under the 1947 Act in respect of COVID-19. It will be recalled that, under s. 31A of the 1947 Act (as amended in March 2020), the Minister for Health was given power to impose restrictions on a wide range of activities including gatherings of a social or recreational nature. Section 31A was the statutory provision that was principally invoked in imposing the restrictions discussed above.

97. Section 485(1) defined *"Covid restriction period"* as meaning, in relation to a relevant business activity *"a period for which the person is required by provisions of Covid restrictions to prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity is carried on (referred to in this section as 'applicable business restrictions provisions') and is a period which commences on the Covid restrictions period commencement date and ends on the Covid restrictions period end date"*.

98. In order to understand the statutory definition of *"Covid restriction period"*, it is also necessary to consider the definition of the *"Covid restrictions period commencement date"* and the *"Covid restrictions period end date"*. Insofar as the former is concerned, s. 485(1) defined that term as meaning either 13th October 2020 or the day on which the applicable business restrictions came into operation (whichever

fell later in time). The latter term was defined in s. 485(1) as either 31st March 2021 or a series of dates when the relevant restrictions might expire (whichever fell earlier in time).

99. The extent of the payment to be made was governed by s. 485(7). It is unnecessary for present purposes to consider the detail of the provision other than to note two aspects of it. First, the sub-section envisaged that businesses on the scale of the plaintiffs would be paid a weekly sum based on pre-COVID turnover. Second, the sub-section expressly treated this weekly payment as an *"advance credit for trading expenses".*

100. The Revenue Commissioners published guidelines on the operation of the CRSS. These guidelines provide a very useful overview of the scheme. They also identify a number of key features of the scheme. On p. 6 of the guidelines, it is explained that:-

> *"Where a company, self-employed individual or partnership is either forced to temporarily close their business, or the business operates at significantly reduced levels, because of the restrictions, the company, self-employed individual or partnership will qualify for the support."*

101. On the same page, it is explained that, to qualify under the scheme in the period prior to 20th December 2021, *"a business must be able to demonstrate that, because of the Covid restrictions, the turnover of the business in the period for which the restrictions are in operation, and for which a claim is made, will be no more than 25% of an amount equal to the average weekly turnover of the business in 2019 (or average weekly turnover in 2020 in the case of a new business) multiplied by the number of weeks in the period for which a claim is made"*. This restates, in non-statutory language,

the statutory requirement that a business owner was required to demonstrate that the downturn in turnover was caused by the COVID-19 restrictions.

102. The Revenue guidelines also helpfully explain the target of the CRSS scheme as follows:-

> *"The CRSS scheme is targeted at those businesses which, under the specific terms of public health Regulations,* ***are required to prohibit or significantly restrict customers from accessing their business premises*** *such that the business is required to temporarily suspend its activities, or its business is significantly disrupted."* (emphasis in original)

103. The guidelines also seek to identify what is meant by a *"significant restriction"* on access to business premises. The guidelines state:-

> *"A significant restriction in this context will depend on the individual circumstances of the business, the relevant business sector, the geographical location of the business and the level of Covid-19 restrictions in place at a particular time. To be eligible for CRSS, it is not sufficient that a business premises is located within a region that is subject to Covid restrictions or that there is a general domestic restriction on inter-county travel in place."*

104. In the updated version of the guidelines published in 2022, it is noted that restaurants, bars and cafés were permitted to reopen to the public on 7th June 2021 for outdoor services only. It is also noted that from 26th July 2021:-

> *"businesses in the hospitality sector, including restaurants, bars and cafés, may reopen for indoor hospitality services, which can be provided to individuals who are fully vaccinated, or have recovered from Covid-19 in the past six months, as well as to children under eighteen in their care. A business in the hospitality sector who was not in a position to provide outdoor services from 7 June 2021,*

or which could only do so to a limited extent, such that it continued to be significantly restricted from operating up to 26 July 2021, will, on the easing of restrictions from 26 July 2021, no longer be regarded as being significantly restricted from operating and may make a claim for the enhanced restart week where the business activity is recommenced."

105. It will be seen from this language that the Revenue Commissioners considered that there had to be some form of prohibition on opening of the premises or an access by members of the public to the premises. This is consistent with the language in s. 485(4)(b) and with the definition of COVID restrictions period in s. 485(1). The updated guidelines also noted that, from 22nd January 2022, a full return to normal trading activities has been permitted for businesses in the hospitality and indoor entertainment sector such as bars, restaurants and nightclubs. Unsurprisingly, the updated guidelines noted that such businesses are no longer regarded as being restricted for the purposes of the CRSS.

106. There is a particularly relevant example addressed on p. 53 of the guidelines, namely Example 24 dealing with a claim by a hypothetical public house. The example is in the following terms:-

"Example 24

Mr. A has been running a pub (that does not serve food) in Dublin City for many years. In the year ended 31 December 2019, his turnover from the business was €663,000 (excluding VAT). His VAT returns are up to date and he has tax clearance. On 15 March 2020, he closed the pub to customers in line with Government restrictions. The pub has remained closed for business since that time.

As of 13 October 2020 (the date the CRSS was announced), restrictions under the Living with Covid-19 Plan are in place for Co. Dublin and are expected to be in place for 6 weeks. The restrictions mean that the pub will have to remain closed until 3 December. As a result of these restrictions, Mr. A expects that he will have no turnover in the period 13 October to 2 December.

Based on:

a) the fact that official Covid restrictions are in place which prohibit customers from accessing the pub, requiring him to temporarily close his pub between 13 October and 2 December, and

b) Mr. A's reasonable expectation that he will have no turnover between 13 October and 2 December,

he is entitled to apply to Revenue for an Advance Credit for Trading Expenses (ACTE) for the period 13 October to 2 December, which constitutes a claim period.

The amount of the ACTE that he is entitled to for this claim period will be calculated by reference to his turnover for 2019 and the number of full weeks that comprise the claim period, as follows:

Average weekly turnover 2019	*€12,750 (i.e. €663,000 / 52)*
10% of €12,750	*€1,275*
Number of full weeks	*7*

€1,275 X 7 *ACTE is €8,925*

If the restrictions are extended, with the result that his pub remains closed and the pub will have no turnover, he can make a subsequent claim for the extended period of restrictions, which will constitute a new claim period, and on making a further claim he will be entitled to a payment of €1,275 for every week of the new claim period."

107. That example very clearly illustrates the way in which payment of the CRSS subsidy depended on a business owner demonstrating that the business premises (a public house in this example) were either closed or subjected to restrictions on access as a consequence of the *"Covid restrictions"* (i.e. the Regulations introduced under the 1947 Act to address the spread of COVID-19). In so far as causation is concerned, it seems to me that similar considerations arise in respect of those payments as previously discussed in relation to the TWSS and the EWSS. I have already identified the most relevant of the regulations enacted under the 1947 Act. While the extent of the restrictions varied from time to time, the regulations required either the total closure of public houses or the closure of parts of public houses. If one asks oneself why public houses qualified for the CRSS, it was because of the closures imposed by those regulations. As the terms of s. 485 and the Revenue guidance made clear, the closures were the effective cause of the payments. They were accordingly the proximate cause of the payment. In turn, each of the outbreaks of COVID-19 (including those which arose within the relevant 25 mile radii) were a proximate concurrent cause of the enactment of the regulations. I have already explained the chain of proximate causation in the context of the TWSS and the EWSS and a similar chain exists here.

108. The only relevant distinction that arises in the context of the CRSS is that, unlike payments made under the TWSS and EWSS, the payments made under the CRSS were not expressly linked to any specific business charge or expense. In the case of the TWSS and EWSS, the payments were made in respect of payroll costs which, very plainly, constitute business expenses. Can it therefore be said that the CRSS payments arise *"in respect of … the charges and expenses of the business"*? In my view, they do so arise. In this context, it is necessary to recall that, as discussed in paras. 22 to 23 above, the words *"in respect of"* are capable of being given a wide meaning. Those words do not suggest that it is necessary to demonstrate a causal link between the receipt of the payment in question and an expense of the business. It is also essential to keep in mind that, as both s. 485(7) and the extract from the Revenue Guidelines quoted in para. 106 above make clear, the CRSS payment was treated as an advance credit for trading expenses. That is very significant. Having regard to the wide meaning to be given to the words *"in respect of",* that seems to me to readily establish that the receipt of CRSS payments by the plaintiffs was in respect of the charges and expenses of their business. In those circumstances, it seems to me to follow that the CRSS payments fall to be deducted under the savings clause.

The Restart Grant and Restart Grant Plus for small businesses

109. On 15th May 2020, the Government announced the establishment of a €250 million *"Restart Grant"* scheme to give direct aid to certain micro and small businesses to help them with the costs associated with re-opening and re-employing workers following Covid-19 closures. The scheme was operated and funded by the Department of Enterprise, Trade and Employment but administered via local authorities, with applications being accepted from 22nd May 2020 onwards. It applied to businesses within a given local authority's commercial rates payment system. Local authorities

were given advance notice of the scheme in Circular Fin 06/2020 issued by the Department of Housing, Planning and Local Government on 2nd May 2020. The circular stated that the grant was to be made available to small businesses *"that have suffered a dramatic loss of turnover due to the COVID-19 restrictions and which require assistance in reconnecting with the marketplace."* The circular also stated that the grant would be *"a recognition for those businesses who have maintained engagement with their staff and would be linked to ongoing employment of those staff."*

110. The grant was not the subject of legislation or regulation. Instead, it was set up on a relatively informal basis. The conditions for availability were published in a press release issued by the Minister for Enterprise, Trade and Employment on 22nd May 2020. That press release made clear that the grant was available where the business in question (a) had an annual turnover of less than €5 million and employed between 1 to 50 people; (b) had closed or suffered a projected 25%+ loss in turnover to end June 2020; (c) committed to remain open or to re-open if closed; and (d) declared the intention to retain employees that were on the TWSS and to re-employ staff on the Pandemic Unemployment Payment where applicable. It will be seen from these conditions and from the terms of the circular described in para. 109 above, that the grant was expressly linked to the retention of employees who had been retained under the existing TWSS scheme. It will also be seen that the purpose of the grant was to provide assistance to businesses which had been affected by the COVID-19 restrictions and which required assistance with re-opening. The affected plaintiffs satisfied those conditions.

111. The *"Restart Grant"* scheme ran from May to June 2020 and was expanded in August 2020 under the *"Restart Grant Plus"* scheme which ran from August to October 2020. The Restart Grant Plus was announced by the Tánaiste in a press release dated 10th August 2020. The stated purpose of the Restart Grant Plus was to support

businesses in re-opening. The requirements to make a claim for Restart Grant Plus were that a business must:-

(a) be a commercial trading entity;

(b) have less than 250 employees;

(c) have a turnover of less than €100,000 per employee subject to a maximum of €25 million;

(d) have suffered a greater than 25% loss in turnover between 1st April and 30th June 2020;

(e) commit to remain open or to reopen if closed and

(f) intend to retain employees that are on the TWSS.

112. Again, it is evident that the purpose of the Restart Plus Grant, like the earlier iteration described in paras. 109 to 110 above, was to provide assistance with reopening or keeping open in the wake of the COVID-19 restrictions. It should be noted that, at the time of the announcement of the Restart Grant Plus, the Tánaiste made specific reference to the position of pubs which had remained closed:-

"This package, in addition to the grants and subsidies already available, will help pub owners with expenses to do with getting ready for re-opening. The increase in the Restart Grant Plus means pubs that are remaining closed will receive a minimum of €5,600. We want to make sure that our pubs are in a position to reopen as soon as it is safe to do so."

113. In addition, the Minister for Finance said at the same time:-

"The Government is acutely aware of the unique circumstances which pub owners find themselves in as a result of Covid-19. The package of measures announced today build on the supports already available and will help to address some of the unique challenges faced by this sector."

114. In my view, it is clear that the effective cause of both the Restart Grant and Restart Grant Plus schemes was the restrictions imposed by Government which I have previously held were concurrently proximately caused by each outbreak of COVID-19 (including those within the respective 25 mile radii surrounding each of the plaintiffs' public houses). I therefore believe that, as in the case of each of the TWSS, the EWSS and CRSS, the insured peril was a concurrent proximate cause of the payments received by the plaintiffs under the Restart Grant and Restart Grant Plus schemes. In each case, the same chain of proximate causation exists.

115. There is one potentially material point of difference between the Restart schemes and each of the TWSS, the EWSS and the CRSS. In the case of the Restart schemes, there is no express requirement that the payments made to the recipient should be used to defray the expenses of the business or that they should be treated as an advance payment against such expenses. However, the reality is that both of the Restart schemes were designed to assist a business in opening or reopening with the existing employees in place. Keeping existing employees was a requirement of both iterations of the Restart grant. Such a requirement inevitably involves expense to the business. In that way, it seems to me that the payments made under the Restart schemes can be said to have arisen *"in respect of the … expenses of the business"* and that, to the extent that they were used to defray the expenses of the business that would normally be paid out of gross profits, they accordingly fall to be deducted under the savings clause.

116. I was informed at the hearing that the parties had agreed that, if any part of the Restart scheme payments had not been used to defray the expenses of the business, they would not be deducted under the savings clause. In the circumstances, it is unnecessary to consider the question whether the entire of the Restart payments fall to be deducted under the savings clause.

The Fáilte Ireland Grant Scheme

117. In August 2020, Fáilte Ireland published guidelines in respect of a further fund to assist with re-opening of tourism businesses. The guidelines explained the purposes of the fund in the following terms:-

> *"In recognition of the re-opening costs incurred by tourism businesses, the purpose of this Adaptation Fund ("the Fund") is to contribute to the costs of implementing Fáilte Ireland's Guidelines for Re-opening. It is intended to help support tourism businesses through grant payments to make either the structural adaptations required for fixed, visitor-facing premises, or to cover the cost of COVID-19 related consumables (such as sanitiser or Personal Protective Equipment (PPE)) for those businesses which provide a visitor experience but do not have significant visitor-facing premises, most notably activity/experience providers and some accommodation providers. Maximum grant amounts are available based on the type and size of the tourism business and the relative costs incurred.*
>
> *Through these support measures, Fáilte Ireland is seeking to encourage and support tourism businesses to re-commence trading, re-engage their employees and relaunch Ireland's tourism sector in 2020. Businesses must be open at the time of application in order to be eligible for this Fund, in line with the Government's Roadmap for Re-opening Society and Business. Businesses will also be required to commit to opening for a minimum period of time between 29 June and 31 December in 2020 in order to be eligible for this Fund."*

118. In order to qualify for a grant, the following criteria had to be complied with:-

(a) Firstly, the applicant was required to be tax compliant;

(b) The business seeking the grant must have been in existence and trading prior to 13th March 2020;

(c) The business must have suffered a 25%+ loss in turnover between 1st April 2020 and 30th June 2020;

(d) The business was required to commit to retaining employees on the EWSS;

(e) The business was required to implement the Fáilte Ireland guidelines for re-opening. The criteria expressly referenced in this context the fact that the grants were being provided to assist business to adapt to trading in the context of the ongoing COVID-19 pandemic;

(f) The business was also required to complete the Fáilte Ireland COVID-19 Safety Charter;

(g) The business was also required to declare its re-opening date and must commit to re-opening in 2021.

119. On p. 11 of the guidelines, it was explained that the grants were being provided:-

"to support capital expenditure adaptations which are required by businesses to re-open and continue in business in accordance with the Fáilte Ireland Guidelines for Re-opening. Eligible expenditure includes adaptation and reconfiguration costs of fixed visitor-facing premises to include outdoor areas, buildings and room layouts to allow for physical distancing. Examples of eligible items include internal and external signage, queuing system materials, screens and barriers, technology enhancements etc."

120. Very similar considerations arise in respect of the Fáilte Ireland scheme as those discussed above in respect of the Restart schemes. In both cases, the schemes were non-statutory in nature. In both cases, the insured peril was a concurrent proximate cause of

the schemes. Both schemes were plainly put in place to assist businesses which had suffered closure as a consequence of the COVID-19 restrictions imposed by the Government as a consequence of each outbreak of COVID-19 which had occurred (including those which occurred within the relevant 25 mile radii).

121. It is also the case that, in both schemes, there was no express requirement to use the proceeds of the payment to defray an expense of the business. However, the underlying rationale of both schemes was to assist with the expenses of reopening. In both cases, the conditions of the scheme came with a cost to the recipient. In the case of the Restart payments, the recipient had to keep on employees thereby giving rise to an obvious expense to the business that is payable out of gross profits. Similarly, in the case of the Fáilte Ireland payments, the recipient had to commit to retaining employees on the EWSS and to implement the Fáilte Ireland guidelines for reopening which also involved expense for the recipient. Thus, I reach the same conclusion in respect of the Fáilte Ireland payments as I did in relation to the Restart payments. It seems to me that, at least in so far as they were used to defray the expenses of the business payable out of gross profits, the Fáilte Ireland payments constitute savings which fall to be deducted under the savings clause. I do not need to go any further in circumstances where the parties have reached a similar agreement to that described in para. 116 above. They have agreed that, in so far as the payments were not used to defray the expenses of the business, they do not require to be deducted.

Waiver of Rates

122. As noted previously, all non-essential retail premises were required to close following a Government announcement to that effect made on 24th March 2020. On the same day, the Department of Housing, Planning and Local Government (*"the Department"*) issued Circular Fin 4/2020 in which it was announced that the

Government had agreed with county and city managers that local authorities should defer rates payments due for businesses impacted by COVID-19 including in the hospitality sector. While this initial announcement spoke of a deferral of rates, it was quickly followed by a further circular issued on 2nd May 2020 (namely Circular Fin 06 of 2020 which I have previously described in respect of the Restart Grant). The latter circular provided for a waiver of rates for a period of three months beginning on 27th March 2020. The circular stated that this applied to *"all businesses that have been forced to closed due to public health requirements"*.

123. A further circular was issued following the events of December 2020 when there was a steep rise in the number of outbreaks. On 27th January 2020, the Department issued Circular Fin 1/2021 providing for a further rates waiver for the first quarter of 2021. The circular noted the restrictions which had been imposed and stated that *"In order to reflect these restrictions and to continue the supports available for rate payers and in recognition of the impact of the ongoing trajectory of COVID 19, a further waiver of commercial rates will apply to specified businesses in the first quarter of 2021"*. Among the businesses identified as eligible for this purpose was the hospitality sector. The circular also stated that the waiver would only apply to businesses *"closed by, or badly impacted by, Level 5 restrictions…"*.

124. In light of the terms of the circulars described above, it is readily apparent that the insured peril was a concurrent proximate cause of the waivers of rates. Very plainly, the effective cause of the introduction of the waivers was the series of Government imposed closures which I have held were in turn proximately caused by the outbreaks of COVID-19, each outbreak being a concurrent proximate cause of the closure. Thus, as in the case of the other supports previously described, there is a clear chain of proximate causation between the insured peril and the waivers. The waivers therefore

constitute a saving *"in consequence of the damage"* within the meaning of the savings clause.

125. Unsurprisingly, it was accepted by Mr. Paul Jacobs, the accountancy expert retained by the Leopardstown Inn and Sinnotts plaintiffs, that these rates waivers led to a saving in respect of rates. It is also very clear that the rates waived would ordinarily be a charge or expense payable out of gross profits of the insured's business. The waivers accordingly constitute savings *"in respect of the charges and expenses of the business payable out of gross profit".* It follows that both the causation and business expense conditions of the savings clause are satisfied in respect of the waivers of rates. The amounts waived thus fall to be deducted as savings under the savings clause.

126. It was agreed between the parties that, where part of the business of a plaintiff was open and part of it was closed (such as where the public bar counter was closed but the rest of the premises was open), any deduction to the payment to be made by FBD to the plaintiffs in respect of the saving of rates should be proportionate to the parts of the business closed relative to the parts of the business that were open. An appropriate formula for that purpose was included in the draft order submitted to the court and, as explained further below, I have already made an order in those terms.

Subrogation

127. For completeness, it should be noted that, in addition to making the case that the savings discussed above fell within the ambit of the savings clause, counsel for FBD also made an alternative argument by reference to the doctrine of subrogation that FBD should be entitled to the benefit of the savings. In light of the findings made by me in respect of the applicability of the savings clause, it is unnecessary to express any view on this alternative argument.

The calculation of the loss

128. I now turn to a second issue debated at the November hearing. This concerns the calculation of the losses suffered by the plaintiffs arising from a closure of part of their premises. In my judgment in *FBD No. 3*, I sought to address the issue as to how the losses stemming from the closure of the bar counters of the plaintiffs' premises should be calculated. In that judgment, I emphasised that what is covered by extension 1(d) of the policy are the losses which flow from a closure of a physical premises or part of the premises. I took the view that extension 1(d) is not triggered by a closure of an element of the business that does not involve a closing down of the insured premises or a part of the premises. Having considered expert evidence on behalf of all parties, I set out, in paras. 176-181, a proposed methodology as to how the losses attributable to the closure of the bar counter might be calculated. Importantly, I acknowledged that improvements or refinements might well be possible to the method of assessment suggested by me. I further acknowledged in para. 186 that there might be workable modifications or adjustments that could be shown to be reasonable or necessary.

129. I believe it is fair to describe the approach taken by me in *FBD No. 3* as an attempt to divide the losses suffered by a premises and to apportion them as between the closed part of the premises and the open part of the premises so that the affected plaintiffs will be indemnified in respect of those losses which were causatively linked to the insured peril, namely the partial closure of the premises. On the basis of the approach taken by me in that judgment, FBD made the case that one could not have a situation where, when the losses calculated in respect of the closed portion of the premises were added to the gross profits earned in respect of the open portion of the premises, the aggregate figure would be higher than that in the relevant comparator period, after all necessary adjustments for trends and circumstances.

130. Following the judgment delivered in *FBD No. 3*, the parties agreed that, in approaching the calculation of the indemnity, it was necessary to break down the indemnity period into sub-periods. That was for the simple reason that the applicable restrictions varied over the course of the indemnity period. If there was a total closure of the entire public house premises during one of those sub-periods, the loss of gross profits suffered by the plaintiffs can be relatively readily calculated by comparing the period of closure against the relevant comparator period in the preceding year, adjusted for trends and circumstances. However, in a partial closure scenario, the position becomes more difficult. In such circumstances, a calculation is required to be made in respect of the losses arising from the closed part of the premises notwithstanding that there was a business operating from the open part of the premises in respect of which losses might arise which are not within the ambit of the cover provided by extension 1(d). For that reason, the experts agreed that it was necessary to break up the indemnity period into sub-periods comprising times when the public houses were subject to full closure, with further sub-periods for times when (a) the bar counter was closed but not the balance of the premises but with no early closure; and (b) there was both closure of the bar counter and also a requirement to close early. In addition, in certain premises such as the Leopardstown Inn, there were several bars and, accordingly, an individual calculation had to be made by reference to each bar counter that was closed.

131. FBD was concerned that, for certain sub-periods when the bar counter was closed but the premises were otherwise open, the losses sustained by the closure of the bar counter were more than off-set by the profits made in the open part of the premises such that indemnification in respect of the losses suffered by a plaintiff in respect of the closure of the bar counter would result in the plaintiff earning more in that period than in the relevant comparator period prior to the onset of the COVID-19 pandemic. FBD

was concerned that this approach would lead to the plaintiffs being overcompensated in respect of their losses. For that reason, FBD's expert, Mr. O'Brien, proposed that, as a sense-check, it is necessary to calculate the actual loss incurred in respect of the entire premises and to utilise this as a *"cap on the indemnifiable loss"*. By approaching the matter in that way, one could make sure that the aggregate of the gross profits lost from the closed bar area (or the early closure) and the profits made from the open area should not exceed the figure produced by the comparator period, adjusted for trends and circumstances.

132. In preparation for the hearing in November 2022, the plaintiffs, in the course of their submissions, accepted that there should be a cap imposed but there was still disagreement between the parties as to the nature of the cap which should be deployed. FBD was also concerned that the plaintiffs were claiming too much in the way of loss of gross profits in respect of the closed portions of the premises and were not allowing sufficient savings in respect of the closed portions of the premises. However, in the period leading up to the hearing in November 2022, there was significant engagement between the parties with input from the experts for both sides. Ultimately, the parties were able to agree a number of adjustments to the methodology proposed by me in *FBD No. 3* which, in the words of counsel for FBD, *"respect the principle of indemnity, provide for the cap to make sure that there isn't excessive compensation and which also… ensure that there is a fair allocation and proportionate allocation of the costs of the business as between the closed and the open portions of the premises"*.

133. Counsel for the Leopardstown Inn and Sinnotts plaintiffs explained that the experts on both sides had *"struggled"* to work out how to reach a fair and just conclusion on the basis of the methodology proposed in *FBD No. 3*. He also sought to explain how the problem arises and how it is now properly addressed in what the parties

have agreed. In this context, counsel drew my attention to the definition of *"Gross Profit"* in s. 3 of the FBD policy which is in the following terms:-

> *"The money (less discounts allowed) paid or payable to the Insured for goods sold and delivered (less the net purchase price of such goods)… in the course of the business at the premises."*

134. Counsel characterised the gross profit figure as the input cost in buying drinks and other products to be sold in the public house and the publican's margin in selling those products. Counsel for the Leopardstown Inn and Sinnotts plaintiffs also drew my attention to the provisions dealing with cover. He suggested that there are three variables in this context. The first is to be found in para. (A) of section 3 of the policy which makes clear that FBD is to indemnify the insured in respect of:-

> *"The loss of gross profit during the indemnity period calculated by comparing the gross profit earned during the indemnity period with the gross profit earned during the corresponding period in the previous year, adjusted for the trend and other circumstances affecting the business."*

135. As counsel noted, if a public house was closed from March 2020, one would look at the gross profit earned in the equivalent period in 2019 in order to apply this element of the formula (subject to any adjustments that might be required in respect of trends and circumstances).

136. The second variable identified by counsel was the increase in the cost of working. This is dealt with in para. (B) which, insofar as relevant, provides:-

> *"the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during the indemnity period…"*

137. Counsel suggested that, accordingly, if a public house was completely closed, para. (B) would not feature at all because there is unlikely to be any increased cost of working.

138. The third variable identified by counsel for the Leopardstown Inn and Sinnotts was the savings clause which, as previously noted, provides:-

> *"Less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross profit as may cease or be reduced in consequence of the damage."*

139. Counsel suggested that, taking his example of a fully closed premises in March 2020, the application of the savings clause is straightforward. However, the process becomes *"hugely problematic in many ways"* where there is a closure of a part of the premises or where there is both a closure of a part of the premises and early closing of the entire premises. One also has the further variable that, in some cases, such as the Leopardstown Inn, there are a number of individual bar counters. As each variable is added, the process becomes much more complex. There is also the difficulty as to how the savings clause is to be applied in circumstances where a part of the premises is closed. Thus, counsel for the plaintiffs argued that, if a bar counter is closed but the premises is otherwise open to serve patrons (albeit subject to all of the restrictions on the mode of operation), a publican must still have a barman behind the bar to prepare drinks. Lighting and electricity also give rise to cost. There is no saving in respect of any of those items. In addition, if the bar counter is closed and the barman is working and preparing drinks behind the bar counter, a publican may have to engage additional staff in the open parts of the premises in order to generate profit in the open part. For that reason, the plaintiffs had argued that this increased cost of working has to be taken into account.

140. In order to take account of these issues, while at the same time ensuring that there is no overcompensation, the parties have agreed a methodology. This methodology is best illustrated in the context of the closure of a bar counter. In such a case, the lost gross profit from the bar counter is calculated in accordance with the methodology proposed in *FBD No. 3*. This is added to the gross profit earned in the open area of the same premises. This gives an overall gross profit figure. One must then take into account the other variables in the formula such as additional costs of working and saved sums. This must be done in order to reach a figure that can then be compared to the equivalent period in 2019. The additional costs of working and the saved sums are taken into account in respect of both the closed part and the open part of the premises. The object of the exercise is to use the methodology for quantifying partial closure losses that, in broad terms, maps the calculation that would be made in the case of a full closure. Counsel for the parties acknowledged that this is not a perfect exercise but both sides submitted that, in the round, it produces a fair result.

The agreed solution

141. In broad terms, the solution agreed between the parties involves the following:

(a) In respect of periods of early closing, the loss recoverable under the policy is to be calculated by subtracting (i) the gross profit earned (if any) during the hours during which the early closing was in effect from (ii) the gross profit earned during the equivalent hours in an equivalent period in 2019, adjusted for the trend and any circumstances affecting the business;

(b) The loss recoverable in respect of the closure of the bar counter in any period when it was required to be closed is to be calculated by (i) identifying the bar counter area as being an area four people (standing) deep from the bar counter, subject to any physical impediments and any applicable fire safety or circulation

requirements (ii) identifying the average total drink sales achieved during each hour of each day in 2019 when the public house was at maximum capacity, (iii) calculating the proportion of the average total drink sales achieved during periods of maximum capacity identified in (ii) attributable to the capacity of the bar counter as calculated under (i) above, (iv) applying the proportion calculated in (iii) to the total drink sales for the public house during equivalent periods in 2019 to those when the bar counter was closed, and (v) adjusting the result from (iv) for the trend and other circumstances of the business;

(c) During any period of full closure, the amount to be paid is to be calculated as the sum of (A) the loss of gross profit during that period calculated by comparing the gross profit earned in that period with the gross profit earned during the corresponding period in 2019 adjusted for the trend and other circumstances, (B) the additional expenditure necessarily incurred for the sole purpose of avoiding or diminishing the reduction in gross profit during that period but not exceeding the sum which would be payable under (A) had such additional expenditure not been incurred (which I will refer to as the *"increase in the cost of working"*) and (C) auditors charges in connection with the claim, less any savings which fall within the savings clause;

(d) During any period of partial closure, the payment is to be calculated as the sum of the recoverable loss calculated under (a) or (b) above together with any increase in the cost of working and auditors' charges less any savings within the ambit of the savings clause;

(e) In calculating savings during periods of partial closure, (i) any sums saved wholly in consequence of the closure are to be deducted in their entirety from the payment to be made to the plaintiffs, (ii) any sums saved partly in

consequence of the closure and partly for any other reason are to be apportioned to the closed part of the premises in the same proportion as the gross profit generated from the closed part of the premises bears to the gross profit generated from the entirety of the business with the apportioned amount only to be deducted from the payment, and (iii) any sums not saved in consequence of the closure are not to be deducted from the payment;

(f) During any period of partial closure, if the calculated amount for the business as a whole calculated in accordance with (c) above is less than the calculation made in accordance with (d) and (e) above, then the payment to be made will be calculated in accordance with (c) above but otherwise it will be calculated in accordance with (d) and (e) above.

(g) The indemnity owed to the plaintiffs is to be calculated in the manner set out above (including, where applicable, any set-off as provided for in (h) below) provided always that the total indemnity amount so calculated (less auditors' charges) cannot exceed the gross profit earned by the entire of the plaintiff's business during a period in the previous year(s) corresponding to the indemnity period, prior to the commencement of the indemnity period, adjusted for the trend and other circumstances;

(h) If the calculated amount calculated for any period is less than €0, then no indemnity will be payable for that period and the amount by which it is less than €0 will be offset against the indemnifiable loss in other periods within the overall indemnity period.

142. In my view, the mechanics agreed between the parties, as set out in para. 141 above, are consistent with the underlying rationale of the mechanism proposed by me in *FBD No. 3.* At the same time, they take into account the need to ensure that the

calculation does not result in an artificially inflated payment being made to the plaintiffs. I am very grateful to the parties and their advisors for the extensive work done in arriving at a formula that seeks to give effect in a fair and balanced way to the calculation provisions in section 3 of the FBD policy and I have no hesitation in approving their agreed approach.

The Order already made

143. I should record that I have already made an order in the terms agreed between the parties. However, I did not do so until I had an opportunity to properly consider each of the issues addressed in this judgment. The matter was listed for mention before me on 26th April 2023. On that occasion, I indicated that, although I was not then in a position to write this judgment, I had by then had the opportunity to fully review the submissions, the case law and the materials before the court and that I was satisfied to make an order in the terms agreed between the parties, should the parties wish me to do so. I indicated that, in so far as the savings clause was concerned, I had reached my conclusion solely on the basis of what I believe is the correct construction of the terms of the policy and that, in those circumstances, it was neither necessary nor appropriate to embark on a consideration of FBD's alternative argument based on the doctrine of subrogation.

144. I was subsequently informed in June 2023 that the parties wished me to proceed with the making of the order and, accordingly, an order was made in those terms on 19th June 2023.

Further steps

145. Given that an order has already been made in terms which are consistent with the views expressed in this judgment, I do not believe that it is necessary to list the

matter before the court again. In my view, it is sufficient to direct that the proceedings should now be struck out but, lest the parties have anything further that they wish to raise on foot of this judgment, I will direct that this order will not take effect until 16th October 2023. There is liberty to all parties to apply in the intervening period. If no application is made prior to that date, the proceedings in all four cases will stand struck out as of 16th October 2023.