

THE HIGH COURT

COMMERCIAL

[2022] IEHC 178

Record No: 2020/3998P

BETWEEN

**PREMIER DALE LIMITED
(TRADING AS THE DEVLIN HOTEL)**

PLAINTIFF

- AND -

ARACHAS CORPORATE BROKERS LIMITED

- AND -

RSA INSURANCE IRELAND DESIGNATED ACTIVITY COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 30th March, 2022

1. I am asked to address a number of issues of interpretation of a particular provision (which the parties have described as “*the Closure/Disease clause*”) in a policy of insurance issued by the second named defendant (“*RSA*”) in respect of the premises of the plaintiff known as the Devlin Hotel in Ranelagh, Dublin 6 (“*the Premises*”). For completeness, it should be noted that there are other issues raised in the proceedings but, for present purposes, the only issues which I am asked to decide at this point relate to the interpretation of the Closure/Disease clause and an interrelated issue of causation. These issues arise in the context of the availability of insurance cover under the RSA policy in respect of business interruption suffered by the plaintiff as a consequence of the closure of the Premises in the wake of the

Government measures introduced to address the COVID-19 pandemic. The proceedings as between the plaintiff and the first named defendant (“*the broker*”) were struck out by consent in early 2022.

The Disease/Closure clause

2. The RSA policy (which was put in place in October, 2019 in respect of the period from 15th October, 2019 to 15th October, 2020) provides cover in respect of a number of risks including business interruption. The term of the policy was subsequently extended to 29th October, 2020. The business interruption section of the policy firstly addresses losses sustained as a consequence of an interruption or interference in the business caused by risks such as damage to property. In addition, this section of the policy also includes a number of extensions. The Closure/Disease clause is contained in extension 6(A) and is in the following terms:-

“This insurance is extended to include loss as insured in consequence of...

6(A)

A. *‘Closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises’.*

3. The parties agree that the peril insured in the Closure/Disease clause is a composite peril which is triggered when each of the following elements are present (i) closure or restrictions are placed on the Premises (ii) on the advice or with the approval of the Medical Officer of Health of the Public Authority (iii) as a result of a notifiable human disease manifesting itself at the Premises. For there to be cover, *inter alia*, each element of the composite peril must be established as having occurred and each element of the composite peril must be established as having occurred

sequentially in the temporal order specified in the Closure/Disease clause. The parties also agree that the notifiable human disease manifesting itself at the Premises must be a proximate cause of the “*advice...or approval*” given by a medical officer of a public authority to order the closure of the Premises.

The issues to be decided

4. In the agreed issues paper, the parties agreed on the issues that require to be determined by the court in the context of (*inter alia*) the Closure/Disease clause. They identified that the key issue for determination is whether, on the facts, there is cover under the Closure/Disease clause. Without prejudice to the generality of that formulation, the parties have identified the following questions as requiring determination in the context of the consideration of this issue:-

- (a) For there to be cover, does the closure or restriction have to cause a total cessation of business or will a partial restriction suffice?
- (b) What is meant by a notifiable disease “*manifesting itself at the Premises*”? Without prejudice to the generality of the foregoing issue:-
 - (i) Does there have to be a medically confirmed or medically diagnosed case of COVID-19 within the body of the Premises in order to satisfy the requirement of “*a notifiable human disease manifesting itself at the premises*”?
 - (ii) If not, what does the plaintiff need to prove to show that there was a notifiable disease manifesting itself at the Premises?
 - (iii) If a medically confirmed or medically diagnosed case in the vicinity of the Premises has occurred is that sufficient to satisfy the requirement of “*a notifiable human disease manifesting itself at the Premises*”?

- (c) If the insured peril has occurred, is the loss covered under the Closure/Disease clause confined to loss caused by the human notifiable disease manifesting itself at the Premises rather than loss caused by any wider manifestation of a human notifiable disease beyond the Premises?
- (d) If any of the foregoing issues are determined in the Plaintiff's favour, on the evidence, are the requirements satisfied?

The agreed facts

5. For the purposes of determining the issues that arise in relation to the interpretation of the Closure/Disease clause, the plaintiff and RSA have agreed the following facts:-

- (a) The plaintiff is a private limited company incorporated in Ireland under Companies Registration Number 599923 and with a registered office at 41A Pleasant Street, Dublin 8. It operates from the Premises at the Devlin Hotel, 117-119 Ranelagh Road, Dublin 6. The plaintiff is a part of the Press Up Entertainment Group of companies ("*the Group*").
- (b) RSA is a designated activity company incorporated in Ireland under Companies Registration Number 148094 and with a registered office at RSA House, Dundrum Town Centre, Sandyford Road, Dublin 16. It is licensed and regulated as an insurer by the Central Bank of Ireland. At all material times, the plaintiff has operated a hotel, bar, café, restaurant and cinema at the Premises under the trading name of "*The Devlin Hotel*".

- (c) In or about October, 2019, the plaintiff and RSA entered into an insurance contract with policy number COM0041787 (*‘the Contract’*). The contract consisted of:
- (i) a document containing RSA’s terms and conditions (*“the Policy Document”*); and
 - (ii) a policy schedule supplementing (*“Policy Schedule”*).
- (d) The contract included cover in respect of business interruption as confirmed by the terms of the policy schedule. The contract was available to a range of business sectors and is not bespoke to any particular sector. As noted above, the contract contains the Closure/Disease clause described earlier.
- (e) On 31st December, 2019, the World Health Organization (*“WHO”*) was informed of pneumonia cases of unknown cause in the city of Wuhan, in the Hubei province in China. On 12th January, 2020, WHO announced that a novel coronavirus had been identified in samples obtained from cases in China. The virus was named severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, and the associated disease was named COVID-19. On 30th January, 2020, WHO declared the outbreak of COVID-19 a *“Public Health Emergency of International Concern”*.
- (f) On 20th February 2020, pursuant to the Infectious Diseases (Amendment) Regulations, 2020, COVID-19 was made a notifiable disease for the purposes of the Infectious Diseases Regulations, 1981. On 27th February, the first case on the island of Ireland was announced – a woman from Belfast who had travelled from Northern Italy through

Dublin Airport. The first confirmed case of COVID-19 in the Republic of Ireland was announced by the National Public Health Emergency Team (“*NPHET*”) on 29th February, 2020.

- (g) On 11th March, 2020, WHO officially declared the outbreak of COVID-19 to constitute a pandemic. On the same day, the first known COVID-19 fatality took place in a nursing home in Naas. On 12th March, 2020, the Taoiseach, Leo Varadkar, acting on advice from NPHET, announced the closure of all schools, colleges and childcare facilities until 29th March, 2020.
- (h) On 15th March, 2020, the Taoiseach called on all public houses and bars (including hotel bars) to close from that evening until 29th March, 2020. The Premises was closed on 16th March, 2020 except for a coffee hatch/window opening on to Ranelagh Main Street which remained in operation.
- (i) There was no diagnosed or confirmed or identified case of COVID-19 on or at the Premises prior the closure of the Premises and it is not alleged by the plaintiff that there was a manifestation of a notifiable human disease at the Premises (para. 8.4 of plaintiff’s replies to Particulars dated 2nd November, 2020).
- (j) On 20th March, 2020, the Health Act, 1947 was amended by virtue of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 (“*the 2020 Act*”), which empowered the Minister for Health to introduce regulations specifically designed to combat the spread of COVID-19.

- (k) On 27th March, 2020, the Minister for Finance and the Central Bank of Ireland both issued communications to the insurance industry clarifying that the Government's announcement of 15th March (described in sub-para. (h) above) was a direction and/or mandate. The communications made clear that regulated financial services providers should not equivocate on this issue for the purposes of avoiding an obligation under a business interruption insurance policy.
- (l) On 29th March, 2020, the government formally requested that individuals stay at home or within two kilometres of their homes, subject to limited exceptions.
- (m) On 10th April, 2020, the Health Act 1947 (Affected Areas) Order, 2020 (S.I. No. 120 of 2020) was enacted and the entire country was declared an area where there is known or thought to be sustained human transmission of COVID-19. On the same day, the Minister for Health enacted the Health Act 1947 (Section 31A -Temporary Restrictions) (COVID-19) Regulations, 2020 (S.I. No. 121 of 2020) (*“the Restriction Regulations”*).
- (n) The Restriction Regulations were originally specified to remain in force until 12th April, but their operation was extended to 5th May, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (Amendment) Regulations, 2020 (S.I. No. 128 of 2020) and then (with certain modifications) to 18th May, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (Amendment) (No. 2) Regulations, 2020 (S.I. No. 153 of 2020). The Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19)

(Amendment) (No. 3) Regulations, 2020 (S.I. No. 174 of 2020) further extended the operation of the Restriction Regulations to 8th June, 2020, with certain other amendments.

- (o) On 8th June, 2020, the Restriction Regulations were revoked by Health Act 1947 (Section 31A - Temporary Restrictions) (COVID-19) (No. 2) Regulations, 2020 (S.I. No. 206 of 2020) (*“the No. 2 Regulations”*). The No. 2 Regulations again imposed restrictions on individuals’ movements outside their places of residence. Pursuant to Regulation 7 of the No. 2 Regulations certain persons were required to take reasonable steps to ensure that members of the public were not permitted, or otherwise granted, access to a Premises in a relevant geographical location, or to a part of such Premises, where a relevant business or service is carried on or otherwise provided.
- (p) The No. 2 Regulations were due to expire on 29th June, 2020. Certain amendments were made to the No. 2 Regulations on 15th June, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 2) (Amendment) Regulations, 2020 (S.I. No. 209 of 2020) and the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 2) (Amendment) Regulations, 2020 (S.I. No. 212 of 2020).
- (q) With effect from 29th June, 2020, the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 3) Regulations, 2020 (S.I. No. 234 of 2020) (*“the No. 3 Regulations”*) repealed and replaced the No. 2 Regulations. The effect of Regulation 6 of the No. 3 Regulations was that business or services engaged in the sale or supply of

intoxicating liquor for consumption on the Premises were permitted to do so, on condition that where such intoxicating liquor was ordered by a member of the public, this was done in conjunction with a “*substantial meal*” (as defined in the No. 3 Regulations) and consumed by that member during the meal or after the meal has ended (so-called “*dry pubs*”). The No. 3 Regulations were due to last until 20th July, 2020.

- (r) The operation of the No. 3 Regulations was extended to 10th August, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 3) (Amendment) Regulations, 2020, (S.I. No. 252 of 2020) and to 31st August, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No.3) (Amendment) (No.2) Regulations, 2020 (S.I. No. 298 of 2020).
- (s) With effect from 31st August, 2020, the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No.4) Regulations, 2020 (S.I. No. 326 of 2020) (“*the No. 4 Regulations*”) were introduced, repealing and replacing the No. 3 Regulations. The No. 4 Regulations took a similar approach to public houses that the No. 3 Regulations had taken but Regulation 11 of the No. 4 Regulations also introduced an early closing time for public houses of 11.30pm.
- (t) Regulation 13 of the No. 4 Regulations imposed other obligations on the operators of dry pubs, such as the requirement to keep the contact details of those dining on their Premises. Nevertheless, dry pubs were entitled to allow members of the public onto their Premises, while wet pubs could only provide takeaway services.

- (u) The No. 4 Regulations were specified to remain in force until 14th September, 2020. They were extended to 16th September, 2020 by the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No.4) (Amendment) Regulations, 2020 (S.I. No. 343 of 2020). With effect from 16th September, 2020, the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No.4) (Amendment) (No.3) Regulations, 2020 (S.I. No. 347 of 2020) extended the effect of the No. 4 Regulations until 5th October, 2020. At the same time, the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No. 4) (Amendment) (No. 2) Regulations, 2020 (S.I. No. 344 of 2020) made amendments to the No. 4 Regulations to impose certain additional restrictions on the holding of events and on private gatherings specifically in county Dublin, also until 5th October, but made no change to the existing restrictions on public houses.
- (v) The plaintiff pleads that it is entitled to be indemnified as a result of all losses arising as a result of the closure of the Premises since 15th March, 2020. The plaintiff has pleaded that the entitlement to an indemnity arises pursuant to Business Interruption extension 6(A) (Closure/Disease Cover), Business Interruption extension 6(C) (Drains Cover) and Business Interruption extension 6(F) (Prevention of Access Cover). The RSA has refused to so indemnify the plaintiff and pleads that none of the aforementioned clauses of the contract entitles the plaintiff to an indemnity.

6. RSA has highlighted that, among the agreed facts, the plaintiff has expressly agreed that there was no diagnosed or confirmed or identified case of COVID-19 on

or at the Premises prior to its closure on 16th March, 2020. RSA has also highlighted that it is not alleged by the plaintiff that there was a manifestation of a notifiable human disease at the Premises. This is also confirmed at para. 8.4 of the plaintiff's response dated 2nd November, 2020 to a request for particulars delivered by RSA. This is an issue which was emphasised by counsel for RSA in the course of his closing submissions. Counsel went so far as to submit that, in light of these agreed facts, the claim made by the plaintiff must fail. This submission is addressed further in para. 10 below.

Additional evidence at the hearing

7. It should be noted that, in addition to the agreed facts, there was also additional expert evidence given at the hearing. Evidence was given on behalf of the plaintiff by Professor Patrick Mallon, a professor of microbial diseases at University College Dublin. Professor Mallon is also director of the Centre for Experimental Pathogen Host Research at University College Dublin. Professor Mallon has significant clinical experience in that he is a specialist in infectious diseases at St. Vincent's University Hospital in Dublin 4 with over twenty years' experience in the clinical management of a range of infectious diseases. In addition, Mr. Feargal O'Neill, gave evidence on behalf of the plaintiff. Mr. O'Neill is the Chief Executive Officer of Gamma Location Intelligence ("*Gamma*") which provides consultancy to the public and private sector in the area of demographic and spatial analysis.

8. On behalf of RSA, expert evidence was given by Professor Mary Horgan who is a professor in the school of medicine in University College Cork and she is a former dean of the medical school there. She is a consultant in infectious diseases with over thirty years' clinical experience in the area. She is President of the Royal College of Physicians of Ireland and she is a frontline clinician who has been involved

in caring for patients during all of the waves of the COVID-19 pandemic. She is a member of NPHEAT. In addition, Professor Patricia Fitzpatrick gave evidence on behalf of RSA. She is the head of public health in University College Dublin. She is also a consultant in preventative medicine in St. Vincent's University Hospital. She is Dean of the Faculty of Public Health Medicine and is on the specialist register for public health in Ireland with the Medical Council. In addition, she has taught statistics to students and doctors as part of the work of the Faculty of Public Health Medicine and she is on the board of the Centre for the Support and Training in Analysis and Research ("*CSTAR*") which provides specialist statistical support.

9. At this point, in the judgment, it would be premature to describe the detail of the evidence given by each of the experts outlined above. Their evidence will make more sense in the context of the issues which arise and the arguments made by the parties. I will therefore defer any further consideration of their evidence until a later point in this judgment.

The issues to be decided

10. Although a number of issues are identified in the agreed issues paper, the principal issue which falls to be determined relates to the meaning of the words "*manifesting itself at the Premises*" in extension 6(A). That is the issue which took up most of the time at the hearing. It should also be noted in the context of that issue that there is a significant dispute between the parties as to the effect of the concessions made in the list of agreed facts that there was no diagnosed or confirmed or identified case of COVID-19 on or at the Premises prior to its closure in March, 2020 and that it is not alleged by the plaintiff that there was a manifestation of a notifiable human disease at the Premises (as confirmed in para. 8.4 of the plaintiff's response dated 2nd November, 2020 to RSA's notice for particulars of the claim). At the commencement

of RSA's closing submissions on Day 3 of the hearing, its counsel submitted that these concessions are fatal to the plaintiff's claim.

11. In response, the plaintiff has argued that, given the status of this case as a test case in relation to the RSA policy, and given that the parties have agreed that the court should consider the issues in relation to manifestation (summarised in para. 4(b) above), the court should consider the issues notwithstanding what has been agreed in the list of agreed facts. In particular, counsel for the plaintiff highlighted the question identified in para. 4(b)(i) above where, by agreement of the parties, the court is asked to address the issue as to whether there has to be a medically confirmed or medically diagnosed case of COVID-19 "*within the body of the Premises*" in order to satisfy the requirement imposed by extension 6(A) that the disease manifests itself "*at the Premises*". Counsel for the plaintiff submitted that it was clear from the agreed list of issues that the parties had explicitly agreed that this is a question that should be decided by the court and that the evidence which had been adduced on behalf of the plaintiff in the course of the hearing addressed that issue. Counsel made a similar submission in the context of the question raised in para. 4(b)(iii) above in which the court is asked to consider whether a medically confirmed or diagnosed case in the vicinity of the Premises would be sufficient to satisfy the requirement that the disease manifests itself "*at the Premises*". Counsel accordingly argued that it follows from the terms of these agreed questions that the parties envisaged that the court would be required to consider a wider context than the facts pleaded in the statement of claim or agreed in the list of agreed facts.

12. Counsel for the plaintiff acknowledged that the statement of claim was based solely on the March, 2020 closure and did not extend to the subsequent government measures introduced in September and December, 2020 in response to the state of

transmission of COVID-19 prevailing at those times (about which Professor Mallon gave evidence at the hearing). Counsel for the plaintiff argued that it was in the interests of all those affected by the test case that the court, in addressing what is meant by the words “*manifesting itself at the Premises*”, should consider the position as of September, 2020. However, it was accepted, in the course of counsel’s closing submissions that the plaintiff could not ask me to consider the position in relation to the December 2020 closure which, on the facts, is not relevant to the Devlin Hotel. This is so in circumstances where cover under the policy ceased in October, 2020 and was not renewed.

13. I agree with the submission made by counsel for the plaintiff that, notwithstanding the concessions made by the plaintiff in the list of agreed facts, I should nonetheless address the questions summarised in para. 4 above. This is a test case. It has ramifications for many RSA policyholders. It is in the interests of those policyholders and RSA itself that the questions should be resolved. Moreover, RSA has agreed to the determination of the questions in the specific form agreed between the parties and, on Day 1 of the hearing, counsel for RSA expressly confirmed that RSA was asking the court to address the issues relating to the meaning of the words “*manifesting itself at the Premises*” in extension 6(A). I am therefore of the view that I must address the issues. I am also of the view that I should not confine my consideration of those issues solely in respect of the March, 2020 closure but that I should also address the subsequent closure imposed in September, 2020. I have heard all of the evidence in relation to the latter period and I believe that it is in the interests of all parties that I should address it. That said, if the issues are ultimately decided in favour of the plaintiff, a further issue will arise as to the extent to which the plaintiff may be entitled to take the benefit of that decision insofar as the claim made by it for

an indemnity under the policy is concerned. In that eventuality, it will be necessary to consider in more detail the effect of the concessions made and the limits of the plaintiff's pleaded case.

The substantive debate

14. In order to fall within extension 6(A), it is necessary to show that the closure or restrictions placed on the Premises arose on the advice of or with the approval of the “*Medical Officer of Health of the Public Authority*” as a result of “*a notifiable human disease manifesting itself at the Premises*”. Those elements of the extension are not in controversy. No issue arises in relation to whether there was a closure of the Premises or whether that occurred on the advice of the Chief Medical Officer. Nor is there any dispute that the closure was proximately caused by a notifiable human disease. At the time of both the March, 2020 and the September, 2020 closures, COVID-19 was a notifiable human disease. As outlined in para. 5(f) above, it had been made a notifiable disease for the purposes of the Infectious Diseases Regulations, 1981 on 20th February, 2020. Instead, the debate in this case centred on what is required in order to show that COVID-19 manifested itself at the Premises. This is what each of the questions identified in para. 4(b) above are designed to elucidate. In addition, there was also extensive debate in relation to the issue as to whether, if there was any manifestation of COVID-19 at the premises, it could be said to be the proximate cause of the relevant advice to close the premises. There was intensive debate of those issues and the legal argument took up almost half of the four-day hearing time. In these circumstances, I propose to set out the competing arguments in some detail and the evidence relevant to those arguments. I am grateful to counsel for the clarity and depth of their arguments.

The plaintiff's case on " a notifiable human disease manifesting itself at the Premises"

15. In his closing submissions, counsel on behalf of the plaintiff relied upon the explanation given by me of the word "*manifested*" in respect of the Murder, Suicide and Disease ("*MSDE*") clause at issue in *Brushfield v. Arachas Corporate Brokers Ltd. & AXA Insurance* [2021] IEHC 263 at para. 145 where I said:-

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

underlying SARS-Cov-2 virus anywhere in Ireland prior to the closure of the hotel.”

16. Counsel submitted that if, in the *Brushfield* case, COVID-19 had been included as one of the listed diseases in the MSDE clause, the court would have been compelled to find that there was clearly evidence of that disease being manifest in Ireland prior to the closure of the hotel in issue in that case. That may be so but it is important to keep in mind that the MSDE clause there was a pure disease clause. It did not require that there should be an imposed closure and, more importantly for present purposes, the clause in the AXA policy extended not only to manifestation of disease by any person whilst at the premises but also within a 25-mile radius of the premises. Given that the radius in question included the greater Dublin area, it would have been a very easy matter to bring the claim within the ambit of the MSDE clause in the event that COVID-19 had been included as one of the diseases listed in the clause. COVID-19 had undoubtedly become evident within that area by the time of both the March and September closures.

17. Counsel for the plaintiff also referred to the decisions of the Divisional Court and the U.K. Supreme Court in *Financial Conduct Authority v. Arch Insurance* [2020] EWHC 2448 (Comm) and [2021] UKSC 1 (“*the FCA case*”) insofar as they addressed the meaning of the word “*manifesting*” in the RSA 1 policy considered in that case. The RSA 1 policy contained an MSDE clause providing cover in respect of closure or restrictions of a premises as a result “*of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises*”. Counsel highlighted that, save for the reference to the 25-mile radius, this is the same language as that used in extension 6(A) and, in both cases, the language does not refer

to “*manifested in any person*” (emphasis added). Counsel then referred to para. 295 of the judgment of the Divisional Court which said:-

“As to when a notifiable disease may be said to have ‘manifested itself’, as we said in the context of QBE 1, we consider that there would be no manifestation of the disease by someone who was asymptomatic and undiagnosed. But if a person displayed the symptoms and/or was diagnosed, then there would be ‘manifestation’ of the disease.”

18. Counsel acknowledged that the case made by the plaintiff in these proceedings goes further than the view taken by the Divisional Court in that case. The case made by the plaintiff here lays emphasis on the lack of any reference in extension 6(A) to a disease manifesting itself “*in any person*” which counsel suggested had not been sufficiently recognised by the court in the *FCA* case in the context of the equivalent terms of the RSA 1 policy. That said, counsel for the plaintiff suggested that the judgment was nonetheless useful insofar as it decides that a person who is diagnosed with COVID-19 can be said to manifest the disease even where that person is asymptomatic. Counsel also referred to what was said in the majority judgment of the U.K. Supreme Court in the same case at para. 84, where a similar view was taken. As explained further below, the plaintiff goes further and argues that manifestation of the disease at the Premises can occur in a variety of different ways and does not necessarily require that a person at the Premises should be displaying symptoms or should be diagnosed as COVID positive.

19. Counsel for the plaintiff placed considerable reliance on the evidence given by Prof. Mallon. In particular, counsel for the plaintiff relied upon the evidence given by Prof. Mallon that manifestation of a disease can be said to occur where characteristics are present that suggest occurrence of the disease in the community. Counsel for the

plaintiff stressed that Prof. Mallon's view is just one means by which a disease can manifest itself. In closing the case, counsel also submitted (although this was not mentioned in the plaintiff's written submissions in advance of the hearing or in the opening of the case) that COVID-19 can also manifest itself in the myriad of measures taken to curtail its transmission such as the wearing of masks by the public, the imposition of the requirement of social distancing and the ubiquitous yellow warning signs with which we have become so familiar. He likewise argued that COVID-19 has manifested itself very markedly through the numbers of cases we have seen of infection, hospitalisations and deaths.

20. In order to understand this aspect of the plaintiff's case, it is necessary to consider the opinion offered by Prof Mallon as to the medical meaning of manifestation in the context of COVID-19. Although counsel for the plaintiff accepted that the interpretation of the policy is a matter for the court rather than for a medical expert, significant reliance was nonetheless placed on the evidence of Prof. Mallon. In his report, Prof. Mallon expressed the view that:-

“A manifestation of a disease is the presence of characteristics that suggest occurrence of a disease, rather than proof of the occurrence of the disease itself. In the context of the COVID-19 pandemic, it is estimated that at least one third of those infected may not display symptoms but are capable of onward transmission of the infection. In this context, one important manifestation of COVID-19 would be the background prevalence of the condition within the local population and the likelihood of that resulting in a manifestation of disease on the premises, even if there were no confirmed, symptomatic cases of COVID-19 identified on the premises.”

21. In the course of his oral evidence of Day 1 of the hearing, Prof. Mallon was asked by the plaintiff's counsel to explain what he meant by saying that one important manifestation of COVID-19 would be the background prevalence of the condition within the local population. He responded as follows:-

“So the thinking behind that statement is, trying to provide a rationale for the public health approach that was taken back in March 2020, that was a blanket approach of shutting down a range of premises. The reason behind that ... definitely in March, but was much better defined in both September and December, was taken based on the background prevalence of COVID-19 within the general population, and particularly within certain areas, geographical locations, and the likelihood that, by these premises remaining open, ... the number of cases of SARS-CoV-2 would increase exponentially to a phase where ... we had no ability to control infections and, therefore, we would end up with a subsequent large number of hospitalisations and deaths that would place the health service in peril. So that thinking is really behind the public health decision to close the premises, but it's based on a fact that, by closing the premises, they are removing an environment that favours not only the presence of SARS-CoV-2 but also the transmission of SARS-CoV-2.”

22. That answer is revealing. It demonstrates that, in developing his view as to the meaning of manifestation, Prof. Mallon had in mind the public health rationale for the closure of public houses and similar venues. Having given that answer, it was then put to Prof. Mallon by counsel for the plaintiff that RSA and its experts, had suggested that, for a notifiable human disease to manifest itself at the Premises, there must be a human on the Premises displaying the symptoms or someone who has been diagnosed

as having been infected with the disease. Prof. Mallon was asked for his response to that suggestion. His answer was again anchored in a public health rationale. He said:-

“So I would say, in response to that, that that really isn't how public health measures work in practice. So I could give you an example. If someone walks on to a premises and just, say, eats contaminated food within the premises and gets a foodborne illness - for example, a Salmonella infection or some other infection like the Norovirus infection - from that contamination, it is very unlikely that, by eating a lunch on a premises, that I am immediately going to develop symptoms of food poisoning straight after eating the lunch while I am on the premises. And it's much more standard practice in infectious diseases that there's an incubation period between being exposed to an infection and displaying symptoms. So, for food, usually that could be -- it could be that evening, it could be the following day. And as I have already said previously to you, to actually establish that that infection occurred at the premises, I then need to seek medical advice, I need to undergo diagnostic tests. Those diagnostic tests need to confirm an infection such as Salmonella or Norovirus, and then that triggers the public health investigation, and it's only that public health investigation that will provide an epidemiological link between my presence on the premises and the infection. It is that public health investigation that would then classically lead to the closure of a premises because of a notifiable infection. That is your common, run-of-the-mill type of approach to infections that would be acquired on premises. And none of those approaches really require a person to be physically at the premises displaying symptoms, because that's not the way infections behave.

So if we take it in context, it would be precisely the same approach, I would imagine, would be there for SARS-CoV-2 and COVID-19, that you wouldn't necessarily need someone on the premises to have symptoms; indeed, we know that this disease can occur without symptoms in up to 30% of people, we also know that people are quite highly transmissible for this infection immediately prior to developing symptoms, so this is called the pre-symptomatic phase. So it really doesn't fit with the normal approach to how infections behave, whether it be SARS-CoV-2 or other type infections, to have it as a requirement that someone is actually symptomatic at the premises for there to be a manifestation of a disease.”

23. Prof. Mallon was then asked, by reference to a hypothetical Salmonella example, whether Salmonella can be said to have manifested itself at a restaurant notwithstanding that those infected at the restaurant do not show obvious signs of illness until sometime later. His answer again focused on the public health response to such a situation. He said:-

“Certainly, and that would be the approach that public health doctors would use in terms of conducting an investigation into an infection such as Salmonellosis, which is a notifiable infection, and that public health investigation is really based on an epidemiological link. Subsequently, the public health investigation may involve testing at the premises, for example, to determine if there are infected foodstuffs in the kitchen, and that can then also help to confirm that the disease is manifested on the premises, but none of this involves someone actually displaying symptoms while at the premises.”

24. In my view, there is a significant difference between the hypothetical Salmonella outbreak discussed in that exchange between counsel and Prof. Mallon

and the circumstances giving rise to the closure decisions made by the government in March and September 2020. In the Salmonella example, the outbreak of disease is traced back to a specific restaurant and, as Prof. Mallon explains in the extract quoted in para. 23 above, the presence of Salmonella in that restaurant is detected in infected foodstuffs there. In contrast, there is no evidence to suggest that the government decisions affecting public houses and hotels were linked to outbreaks of COVID-19 attributable to specific premises or to public houses/hotels in general. Nor is there any evidence before the court that the causative pathogen for COVID-19 was detected in such premises. As counsel for RSA observed, in his closing submissions, the government measures were essentially prophylactic in nature designed to reduce transmission of disease by targeting indoor venues where the public is known to congregate at close quarters. Indeed, that is the effect of the evidence given by Prof. Mallon quoted in para. 21 above where he said that, by closing the premises, *“they are recognising an environment that favours not only the presence of SARS-CoV-2 but also the transmission of SARS-CoV-2”*.

25. It is also important to keep in mind that the exercise undertaken by Prof. Mallon is quite different to the task that I must undertake in seeking to construe extension 6(A). From his perspective as a medical expert, Prof. Mallon has offered a view in relation to the concept of manifestation. His evidence was very much focused on the word *“manifesting”* which he considered in isolation from the language used in the extension as a whole. In contrast, as the case law (discussed below) demonstrates, I must construe extension 6(A) as a whole in the context of the terms of the policy as a whole and in the context of the factual and legal background reasonably available to the parties at the time of inception of the policy. In doing so, I must approach the meaning of the words used not from the standpoint of a medical expert but from the

standpoint of a reasonable person in the position of the parties at that time. Thus, I cannot look at the meaning of the word “*manifested*” in isolation. I must construe it in context and I must therefore have regard to all of the language used in the extension.

26. Returning to the case made by the plaintiff, its counsel also sought to rely on some of the evidence given by Prof. Horgan on behalf of RSA. Counsel submitted that, in the course of cross-examination, Prof. Horgan accepted that there is a distinction between the manifestation of a disease in a public health context and what counsel characterised as the “*narrow clinician’s approach*” to the concept of the manifestation of a disease. Counsel highlighted, in this regard, an exchange that took place in the course of cross-examination of Prof. Horgan on Day 2 of the hearing. In the course of that exchange, counsel for the plaintiff returned to the hypothetical example of a Salmonella outbreak that had featured in Prof. Mallon’s evidence. In this hypothetical example, counsel posited that the Salmonella outbreak in a particular locality is traced to an identifiable restaurant as the likely source. Counsel suggested that, in those circumstances, Salmonella had manifested itself at the restaurant even if no one exhibited symptoms there. The relevant exchange was as follows:-

“*Q. And can I just ask you: In that instance, do you agree with me that the infectious disease has manifested itself at the restaurant?*”

A. No, I don't, because the -- if you are in the restaurant and you have manifestation, it would be things like diarrhoea or vomiting, and there are a number of infections that have -- that are on the notifiable disease list that have a very short incubation period and will manifest themselves at the premises, like bacillus cereus, which causes a vomiting food poisoning, or another one would be staphylococcal food

poisoning, causes again a vomiting, and that can manifest itself within 30 minutes of being at a premises.

Q. Let's assume, using my example, that none of the patients who have been diagnosed by their doctor with this disease displayed these outward symptoms whilst they were on the restaurant, and let's assume that occurred, in that instance do you agree that the infectious disease has manifested itself at the restaurant?

A. No, because, to me, manifestation of a disease in the restaurant means that you have outward manifestation, a symptom or a sign of the infection at the premises.

Q. And even though, in my example, the restaurant may be closed because it is established that the restaurant is the source of the infection?

A. So what would happen is if -- the Public Health people would take histories from people, see if there is a common source, sometimes it's individual cases, sometimes it's clusters. If they found there was a common source, they would go and investigate that particular restaurant or whatever hospitality it is. They may or may not find the source of the infection there, but, as a precaution, they may restrict the activities of that particular restaurant.

Q. And the reason they would do that is because they believe that a disease has manifested itself at that restaurant, isn't that correct?

A. Well, they -- the reason that they would restrict the activity is to investigate, to see if that is the source of the infection in that particular hospitality sector.

Q. And let us assume that they were satisfied, Public Health became satisfied that, yes, this is the source of the infection and they closed it down because they are satisfied it is the source, surely, in that instance, you must accept that the restaurant is the place where the disease has manifested itself?

A. Yes, I mean, that would be the case ... if the Public Health authorities deemed, after their investigation, with certainty, that it would close -- that the activities of the restaurant would be reduced while the -- or temporarily closed while the activity -- or, sorry, the investigation was going on, and make that decision based on the evidence that they find, but it is a big step for the Health and Safety Authority to do, so they would want to have all of their information, as much as they can say that that is the source of a particular infection.”

27. In his closing submission, counsel for the plaintiff submitted that the position taken by Prof. Horgan at the end of that exchange constitutes an acceptance by her that a disease can manifest itself at a premises even though persons suffering from that disease have not displayed outward signs of it at the premises. I am not convinced that Prof. Horgan can be said to have gone that far. I believe that, when her answers are read as a whole, she went no further than to accept that, in the example put to her, public health authorities will intervene where the source of an outbreak of a notifiable disease is identified. She stressed that the public health authorities will only intervene where they can identify the source “*with certainty*”. She accepted that, in such circumstances, the public health authorities do not require evidence that anyone was exhibiting signs or symptoms on the premises which has been identified as the source. But, immediately after that exchange, she emphasised the difference between the

public health approach and a clinician's understanding of manifestation which, according to her, requires the display of characteristic signs or symptoms of a particular illness.

28. Furthermore, for the reasons discussed in para. 24 above, I do not believe that the example of a Salmonella outbreak is an entirely appropriate comparator for present purposes. As noted previously, in such a case, the cause of the incident is traced to a particular premises. The relevant pathogen is identified as being present on the premises or as having once been present there. That is not what occurred in either March or September 2020 in so far as the closure of hotels and public houses is concerned. There is no evidence that government decisions at that time were motivated by a specific case or cases of COVID-19 found at any particular premises. As noted previously, the measures were essentially prophylactic in nature.

29. However, counsel for the plaintiff did not focus exclusively on the public health context. They also strongly relied on the evidence of Prof. Mallon as to the background prevalence of COVID-19 in the vicinity of the Premises. In this regard, Prof. Mallon explained his methodology in s. 2 of his report. In the first instance, he explained that he looked at three different "waves" of COVID-19 infections in Ireland, namely those that arose in March, 2020, September, 2020 and December, 2020. In light of the concession correctly made by counsel for the plaintiff on Day 4 of the hearing, it is unnecessary to consider the December, 2020 position. As outlined in para. 2 above, the relevant term of the policy ran until 29th October, 2020. December, 2020 is, therefore, outside the lifetime of the policy. In so far as the earlier periods are concerned, Prof. Mallon indicated that the epidemiological information available on background prevalence for the first wave in March, 2020 was not as detailed as for the second wave in September, 2020. Although this was disputed by

the experts called by RSA, Prof. Mallon went so far as to suggest that the figures from March 2020 were likely to be inaccurate. He expressed that view for a number of reasons. In the first place, he highlighted what he described as “*the very narrow definition that was used to enable someone to get a test*” at that time. In addition, he referred to the very low testing capacity available at that time. He also stressed that the testing system was quickly overburdened with the result that availability of testing for the general population was very restricted. He suggested that testing was primarily reserved for healthcare workers at that time. On that basis, Prof. Mallon focused his assessment of the likelihood of an individual with COVID-19 being present at the premises in September and December 2020. on background epidemiological data from the dates of closure in September and December 2020. Again, bearing in mind the concession made by counsel for the plaintiff, it is unnecessary to consider the position in December.

30. Prof. Mallon relied on background epidemiological data for September and December 2020. He explained his methodology in the following terms: -

“Based on epidemiological data available from the Health Protection Surveillance Centre (see Table 1), it is possible to calculate the background incidence (new diagnoses of COVID-19) within the Dublin area (where most patrons of the premises would be expected to reside) and to further refine this incidence based on the age groups of individuals most likely to frequent a bar / hotel / cinema premises (assumed to be the age group of 19-54 year olds). Once this age and geographical-specific incidence is estimated, it is then possible to estimate the number of likely individuals with COVID-19 infection at the premises in the two weeks leading up to the dates of closure by comparing incidence rates with estimated number of individuals at the

premises. These calculations and associated explanations are outlined in table 1.”

31. Professor Mallon used information available from the Health Protection Surveillance Centre to calculate the incidence rate of COVID-19 in the Dublin area for the months of September and December 2020. He then sought to apply that, subject to some modifications outlined below, to the numbers of patrons estimated to have visited the Premises during those months. Among the modifications made by him was the exclusion of persons over the age of 54 and under the age of 19. This was done on the basis that the older age group was less likely to be socialising at the Premises during the currency of the pandemic while the younger age group were not likely to be visiting a venue of this kind. In turn, the exclusion of those age groups required an adjustment to be made to the incidence rate reported for Dublin as a whole. When these modifications are taken into account, the adjusted incidence rate for Dublin for September 2020 was calculated to be 1.02 persons per 1,000 people. On the evidence before the court, 2,650 people are estimated to have attended the Premises over the course of September 2020. As confirmed in the last footnote to the table below, this led Professor Mallon to conclude that 2.71 persons infected with COVID-19 were likely to have been on the Premises during September, 2020. His methodology and results are very helpfully summarised in Table 1 to his report where he set out his estimation of the numbers of individuals with SARS-CoV-2 infection at the Premises over the course of September and December 2020. Table 1 is replicated below:

| Month | September 2020 | December 2020 |
|-----------------------------|---------------------------------|--------------------------------|
| Date of closure of premises | 21 st September 2020 | 24 th December 2020 |

| | | |
|---|---|---|
| Reported incidence of COVID19 infection in Dublin area in preceding 14 days* | 138 / 100,000 | 199.4 / 100,000 |
| Proportion of cases within 19-54 age group | 57.9% ** | 60.57% |
| Expected risk ratio of COVID19 infection in 19-54 age group adjusted for population† | 0.741 | 0.828 |
| Expected age-adjusted, 14-day incidence of COVID19 within the age group in the Dublin area | 102.2 / 100,000 Or 1.02/1,000 | 165.1 / 100,000 Or 1.651 / 1,000 |
| Total estimated number of patrons on premises (see appendix 2): Date: Restaurants / bars: Cinema: Hotel guests: Total: | Sept 1 st to Sept 21st 3,149 429 397 3,975 | Dec 1 st to Dec 24 th 4,431 506 848 5,785 |
| Total estimated patrons in premises in 14 days prior to closure | 2,650 | 3,374 |
| Expected incident cases among patrons on/at premises in 14 days prior to closure‡ | 2.71 cases | 5.57 cases |

* Incidence derived from average incidence reported for the Dublin Local Health Office areas as outlined in reports from the Health protection Surveillance Centre. Epidemiology report for Sept 21st 2020:

https://www.hpsc.ie/a-z/respiratory/coronavirus/novelcoronavirus/surveillance/covid-1914-dayepidemiologyreports/2020/september2020/COVID-19_14_day_epidemiology_report_20200921_Website.pdf

Epi report for Dec 24th 2020:

https://www.hpsc.ie/a-z/respiratory/coronavirus/novelcoronavirus/surveillance/covid-1914-dayepidemiologyreports/2020/december2020/COVID-19%2014%20day%20epidemiology%20report_v0.1_24.12.2020%20Website.pdf

** estimated assuming 50% of the percentage of the 15-24 age group would be ≥ 19 years old

† Risk ratio estimated assuming 65% population of people in Dublin are aged 19-54 (census 2011) and population of covered by Dublin Local Health Office area is 1.347 million individuals.

‡ Calculated by multiplying the age-adjusted, 14-day incidence/1,000 in the 19-54 age group in the Dublin area by the number of estimated patrons on / at the premises in the 14 days prior to closure.

32. The estimated number of people on the premises was calculated by reference to occupancy levels of different aspects of the hotel business at the premises in September 2020 compiled by the plaintiff (and analysed by Mr. O’Neill of Gamma in part 4 of his report). Prof. Mallon extracted those figures from Mr. O’Neill’s report and replicated them in appendix 2 to his own report. The occupancy levels relate to the number of rooms occupied in the hotel, and the number of covers at the Americana Bar and Layla’s Rooftop Restaurant (both of which contribute significantly to the overall footfall at the hotel). The numbers of persons attending the hotel over the 14-day period prior to closure was then multiplied by the age adjusted 14-day incidence rate per 1,000 in the 19-54 age group. According to Prof. Mallon, this estimate represents *“a clear manifestation of this notifiable condition at the premises and would support the order to close that was made at each of these times”*. Prof. Mallon suggested that his calculation is likely to be a significant underestimate on the basis that recorded incidence using public health testing (used to derive his figures) underestimates the true incidence of the condition within a population. He highlighted that asymptomatic infection can occur in at least one-third of individuals who, notwithstanding their lack of symptoms, still carry the virus and are capable of transmitting onward infection.

33. Prof. Mallon also emphasised that the largely indoor environments within the Premises would have facilitated close contact between individuals (defined as spending fifteen minutes or more, face to face, within two metres of another individual). He also highlighted that the activities carried on there (including drinking and dining) would have been conducted without mask wearing. He suggested that these characteristics of the Premises “*would have resulted in a greatly increased risk of transmission and manifestation of COVID-19*” at the Premises. He furthermore stressed that the “*attack rate*” of the virus is estimated to be approximately 16% which he said is considerably higher than other infections associated with restaurants and hotels, such as Legionnaires disease which has an attack rate of 2-7% and that this has a different dynamic compared to food borne infections, such as Salmonella, where the attack rate is proportional to the inoculum of infection (the amount of bacteria to which an individual is exposed) as well as the type of Salmonella bacteria involved. In this context, Prof. Mallon made clear that the transmission of food borne infections requires direct contact with the infection (through active ingestion of the infected food) while transmission of SARS-CoV-2 does not require direct contact but only close contact.

34. Prof. Mallon also emphasised that the hotel is located in a high-density area attracting a population of younger people who are more likely to be asymptomatic and involved in activities that would encourage onward transmission of COVID-19. He referred, in this context, to a paper by Rubin published in 2020 in the American Journal of Medicine which suggests, by reference to a review of county level factors in 211 U.S. counties between February and April 2020, that, in areas of higher density, the presence of COVID-19 was likely to be encountered at a higher level than

in other areas. The study concentrated on state capitals and cities with a population of at least 100,000 residents in 26 States and the District of Columbia.

35. In his closing submission, counsel for the plaintiff strongly relied on the conclusions reached by Prof. Mallon and submitted that the function of the court is to establish, on the balance of probabilities, whether or not the disease manifested itself at the Premises. He argued that, based on the evidence put forward by Prof. Mallon in the table outlined above, the court can readily conclude, on the balance of probabilities, that 2.71 cases of COVID-19 must have been present at the Premises in September, 2020. Counsel suggested that RSA had not come up with any coherent evidence to undermine or challenge the evidence put forward by Prof. Mallon.

36. Counsel also highlighted the conclusion reached by Prof. Mallon in his report where he said:-

“The high estimated incidence of COVID-19 within the surrounding population of the Premises at specific times during 2020, as well as the characteristics of the Premises outlined above, would have led to a high likelihood of a manifestation of COVID-19 at the Premises given its geographical location, surrounding high population density, lack of restriction on movement to and from the premises and the indoor environment within the Premises. These characteristics would have significantly increased the risk of transmission (including ‘super spreader’ transmission) of COVID-19 at the premises.”

37. I will leave it to later in this judgment to express a final view in relation to this aspect of the plaintiff’s case. At this point, it is sufficient to note that several issues arise with regard to Prof. Mallon’s conclusions in relation to the number of infected people likely to be present at the Premises in September 2020. In particular, a

significant question arises in relation to whether those conclusions can be said to be relevant to extension 6(A). In this context, it is important to recall that extension 6(A) is not expressed to be concerned with the **occurrence** of cases of notifiable disease at the premises but with the **manifestation** of disease at the premises. That issue as to whether occurrence of disease can be equated with manifestation of disease is discussed further below. Secondly, the exercise undertaken by Prof. Mallon does not address the very substantial rate of compliance with public health advice on self-isolation which has the capacity to undermine the conclusion that 2.71 infected persons are likely to have been at the Premises in the 14-day period prior to closure in September, 2020. In this context, Prof. Fitzpatrick referred to a study audited by Prof. Patricia Kearney in October 2020 which found that, in Ireland, advice to self-isolate was followed by 96.6% of those who tested positive for COVID-19 and by 95.3% of those awaiting the result of a COVID-19 test. If those percentages are factored into Prof. Mallon's exercise (as summarised in his Table 1), it would substantially undermine the estimate that 2.71 persons infected with COVID-19 are likely to have been at the Premises in September, 2020.

38. In addition to relying on the evidence of Prof. Mallon, counsel for the plaintiff also strongly criticised the approach proposed by RSA. In his closing submissions, he characterised the case made by RSA as requiring that, in order for cover to be triggered under the policy, the plaintiff would have to be in a position to identify a person sitting in the lobby or the bar of the Devlin Hotel who exhibited symptoms of COVID-19 or who has tested positive for the disease. Counsel suggested that this was an absurd hurdle which does not provide a coherent, consistent or intelligible understanding of extension 6(A). Counsel suggested that, if the court were to uphold the approach advocated by RSA, this would make it extremely difficult and

challenging for any policy holder to make a claim under the RSA policy. Counsel concluded his submission in relation to the meaning of “*manifesting*” in extension 6(A) in the following trenchant terms:-

“Judge, just to conclude on this issue of manifesting itself, if someone was to ask in five years from now, someone who was doing a medical history of the pandemic, and if they asked whether or not COVID manifested itself in Ireland, I don't think there'd be any doubt or dispute but that everyone would say yes; if they asked whether or not COVID-19 manifested itself in Dublin I don't think there'd be any doubt but everyone would say yes; if they asked whether COVID-19 manifested itself in Ranelagh I don't believe there'd be any doubt but that people would say yes; and if they said whether or not it manifested itself on the main road in Ranelagh, at the Devlin Hotel, I think it would be the same answer - the answer would be yes. And the reason for that, Judge, is because, as we all have got to know unfortunately, this disease is everywhere, was everywhere in Ireland and because of its prevalence we were led to extraordinary actions such as the closure of the premises in question here.”

39. It will be necessary in due course to reach a conclusion in respect of this aspect of the plaintiff's case. With regard to counsel's characterisation of RSA's position as absurd, it should be kept in mind that, in accordance with Supreme Court authority (addressed further below), the court should not approach the interpretation of a contractual provision through the prism of the dispute between the parties. Instead, the court should seek to ascertain how the words used would have been understood by a reasonable person in the position of the parties at the time the contract was made. Accordingly, it is important to recall that, at the time of inception

of the policy in 2019, COVID-19 was unknown. Of course, that does not mean that it does not fall within the ambit of the extension. But it does highlight the need to avoid interpreting the extension through the lens of the present dispute.

40. The next aspect of extension 6(A) explored by counsel for the plaintiff was in relation to the meaning of the words “*at the Premises*”. Counsel highlighted the use of those words “*at the Premises*” in the context of the manifestation of a notifiable human disease while, in contrast, the opening words of extension 6(A) refer to “*closure or restrictions placed **on** the Premises...*” (emphasis added). Counsel suggested that, in common speech, we distinguish “*at the premises*” from “*in the premises*” or “*on the premises*”. Counsel suggested that, when we are ordinarily arranging to meet somebody “*at*” a place, this is a reference to a location. This is to be distinguished from meeting someone in a premises. Counsel went so far as to suggest that “*I suppose if somebody phoned me up and said ‘Where ... are you?’ and I said ‘I’m at the Devlin’ I think it’s clear that I am not in the Devlin Hotel. If I was in the Devlin Hotel when somebody phoned me, I would say ‘I’m in the Devlin’*”. I am not sure that this is necessarily the case. It is not unusual for someone at the receiving end of a telephone call or a text to use the word “*at*” as a synonym for “*in*” when describing their location. One frequently comes across responses such as “*I am at the bank*” or “*at the post office*” or “*at the dentist*” or “*at the doctor*” which would usually be understood as indicating that the person concerned is in the bank (or post office) rather than outside it or in the doctor’s (or dentist’s) surgery rather than outside it.

41. Counsel submitted that, when the preposition “*at*” is used in ordinary speech, this is always a reference to an approximate location. In this context, counsel referred to the Shorter Oxford Dictionary which defines “*at*” as “*an exact, approximate or*

vague spatial or local position". Again, I am not sure that "at" can always be construed as an approximate location. Going back to the examples given by me in para. 40 above, I think they would usually be understood as referring to an exact location. Indeed, counsel for the plaintiff accepted that the word "at" can also mean "in" such that, if a person manifested COVID-19 in the Premises, this would fall within the meaning of "at" in extension 6(A). At the same time, counsel submitted that the word "at" has a much broader meaning than the word "in" and that, having regard to the definition in the Shorter Oxford Dictionary, the preposition does not exclusively designate an exact position; it can be an approximate or vague spatial or local position. On that basis, counsel submitted that there was plainly evidence of COVID-19 at the Premises *"just as there was evidence of the disease at the Four Courts or at the Phoenix Park or at the Shelbourne Hotel"*. Again, in this context, counsel relied on the evidence given by Prof. Mallon. Counsel submitted, on the basis of his evidence, that even if one did not have the benefit of the exercise summarised in Table 1 to Prof. Mallon's report, there is evidence of the incidence of the disease manifesting itself at the location of the Premises in Ranelagh.

42. Counsel for the plaintiff contrasted the terms of extension 6(A) with the language used in extension 6(B). He submitted that there was nothing in the language of extension 6(A) to suggest that the manifestation must occur within the Premises. He further submitted that RSA was well capable of limiting the language used in extension 6(A) in terms of the Premises in a similar way to extension 6(B). The latter covers losses arising from *"injury or illness sustained by any customer or employee arising from or traceable to foreign or injurious matter in food or drink sold from the premises"*. Counsel submitted that RSA could have been similarly precise when it came to the language used in extension 6(A).

43. Counsel also sought to rely on the decision in *Hyper Trust Ltd. t/a The Leopardstown Inn v. FBD Insurance plc* [2001] IEHC 78 (“*the FBD decision*”). He referred to a number of aspects of the principal judgment in that case. In particular, he highlighted what was said in para. 143:-

“As noted in paragraph 126 (e) above, I believe that public houses would likely be perceived by reasonable persons in the position of the parties to the FBD policy to be places where disease can be easily transmitted. While that is so, it is equally likely that reasonable persons in that position would also consider that an extreme step such as a closure of public houses would only occur where there were significant numbers of infections occurring in the community or where, having regard to the nature of the disease itself, there was a pressing concern that significant numbers of infections would be likely to occur if closures of public houses were not ordered. Thus, it seems to me that the language used in extension 1(d) must envisage that, in the case of off premises outbreaks, the outbreaks are likely to be of a highly significant kind.”

44. Counsel submitted that, although extension 6(A) does not extend cover to cases within a 25-mile radius of the insured premises, this passage in the *FBD* judgment is nonetheless relevant as demonstrating that, “*anyone back in October, 2019*” (i.e. at the time the RSA policy was put in place) would plainly have contemplated that the policy was intended to cover the spread of a disease of a highly significant kind – namely one that would lead to the closure of a hotel premises. Counsel also relied on paras. 144 and 145 of the same judgment for the purpose of his submission that extension 6(A) envisages a serious outbreak of disease. It will be necessary at a later point in this judgment to address this argument in more detail. At

this point, it should be noted that there are some significant differences between the language used in extension 6(A) and the language of the relevant extension in the FBD policy. The latter made no mention of manifestation. It spoke of “*outbreaks of ... infectious diseases on the premises or within 25 miles of same*”. It was therefore expressly contemplated by the FBD policy that closure of the insured premises might flow from outbreaks at some distance from the premises (which is suggestive of a significant outbreak of disease). In contrast, extension 6(A) expressly requires that the disease manifests itself at the Premises.

45. Counsel for the plaintiff also addressed the question of proximate cause. In this context, he relied on the approach taken by the Divisional Court in the *FCA* case where, at para. 532, the court said:-

“One of the fundamental fallacies in the insurers’ approach is to treat the occurrence of COVID-19 within the relevant radius or ‘vicinity’ of the insured premises as completely separate from its occurrence elsewhere in the country as a whole. As we have said in our analysis of several of the disease clauses, the proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts, in other words the disease in the UK is one indivisible cause.”

46. Counsel suggested that the manifestation of COVID-19 at the Devlin Hotel was to be treated in the same way. In other words, all of the manifestations of the disease at all of the places within the State where such manifestation occurred were each a proximate cause of the decision by the Government in March, 2020 to close public houses and also the decision to introduce the COVID-19 Regulations enacted thereafter. In my view, that submission must be treated with caution given that, in that extract from its judgment quoted in para. 45 above, the Divisional Court was

addressing clauses which were similar in their terms to the FBD extension. The clauses were not focused solely on the insured premises but expressly extended to a radius or area around it. This is an issue that I address further below.

The case made by RSA in relation to the meaning of extension 6(A)

47. Counsel for RSA agreed that, in seeking to ascertain the meaning of extension 6(A), the court has to look at the position as it stood in October, 2019. He also accepted that the interpretation of the policy was a matter for the court rather than for medical evidence. However, he highlighted that it was the plaintiff who has sought to put forward a definition or a meaning to be attributed to “*manifesting*” by reference to medical evidence and, in particular, by reference to the evidence of Prof. Mallon. Counsel suggested that RSA had simply responded to this evidence and, for the reasons outlined in more detail below, he submitted that the evidence is “*very firmly against the proposition*” put forward by the plaintiff.

48. Counsel for RSA submitted that the ordinary meaning to be given to the word “*manifestation*” is an outward display of symptoms. He argued that this is how it had been construed both in the *FCA* case and in *Brushfield*. Counsel contended that it does not include asymptomatic cases of the disease unless and until there is a positive diagnosis, at which point the disease becomes manifest to the diagnoser. Counsel made the case that the court can determine the issue of interpretation in relation to “*manifesting*” on the basis of the authorities and by applying the ordinary meaning of the word as it would be understood in everyday speech. Counsel stressed that the word is not a term of art; it is not a medical term as such, and therefore, it is to be given its ordinary meaning. Counsel also submitted that, to the extent that the court considers it appropriate to have regard to the medical evidence, the word has the same meaning in a clinical context as it does as a matter of ordinary language and general

discourse, namely the outward display of or signs of disease. Counsel argued that Prof. Mallon's approach to the interpretation of "manifesting" is not actually anchored in any clinical understanding of the term at all. Counsel further submitted that, contrary to the approach signalled by O'Donnell J, (as he then was) in the *MIBI* case, the plaintiff and its witnesses were looking at the meaning of the word "manifesting" through the prism of the dispute between the parties. On that basis, counsel submitted that, in circumstances where COVID-19 was not known in October, 2019, it is inappropriate, in seeking to interpret the policy, to have regard to the characteristics of COVID-19 as they are now known and understood.

49. In his submissions, counsel for RSA also contrasted the meaning to be given to the word "manifesting", on the one hand, and "occurrence", on the other. He drew attention to the meaning given to the word "occurrence" by the Divisional Court in the *FCA* case at para. 93 of its judgment (dealing with the RSA 3 wording):-

"We consider that there will have been an occurrence of COVID-19 within an area when at least one person who was infected with COVID-19 was in the relevant area. We do not consider that it is necessary for there to have been an occurrence of the disease that the case should have been diagnosed. The definition of notifiable disease is, in relevant part, illness sustained by any person resulting from any human infectious or human contagious disease. Such a disease thus occurs when the illness is sustained by the person, which we consider means, in simple terms, that they are suffering from it, not that they have been diagnosed with it."

50. Counsel for RSA submitted that, having regard to the approach taken in the *FCA* case, "occurrence" is quite a wide concept. It will capture not only diagnosed asymptomatic cases of the disease but also instances where the person is not

diagnosed as having the disease at all. Counsel submitted that the existence of a case of COVID-19 is enough to constitute an “*occurrence*”. There does not have to be a diagnosis either through the display of signs and symptoms or through a diagnostic test. Counsel submitted that manifestation is very different. Counsel referred, in this context, to the judgment of the Divisional Court in the *FCA* case at para. 224, where the court said: -

“Clearly someone who is displaying symptoms of a disease can be said to manifest it. We consider that it would also be the case that a person manifested the disease if, though superficially asymptomatic, he or she was diagnosed with the disease because the disease would have manifested itself to the diagnoser. We do not consider that it is possible to speak of someone who is asymptomatic and has not been diagnosed as having the disease, as having manifested it.”

51. It should be noted that this interpretation of the word “*manifested*” was not questioned in the U.K. Supreme Court (as para. 84 of the majority judgment confirms). Counsel also submitted that the approach taken by the Divisional Court is consistent with the approach taken in para. 145 of the judgment in *Brushfield* (quoted in para. 15 above). Counsel submitted that it is clear both from the judgment of the Divisional Court and the judgment in *Brushfield*, that the concept of “*manifesting*” or “*manifestation*” is narrower than that of “*occurrence*”, the main difference being that, with an occurrence, there is no requirement that there should be an outward sign of the disease or even a diagnosis of the disease. In contrast, before a disease can be said to have “*manifested*”, there must (according to counsel for RSA) be an outward sign of the disease or a diagnosis of the disease. Counsel argued that this is a significant difference in circumstances where, on the evidence before the court,

approximately one-third of persons who contract COVID-19 do not actually display any symptoms of the disease. Counsel, accordingly, argued that the approach advocated by the plaintiff in this case went considerably further than any of the existing authorities and was inconsistent with the approach taken in *Brushfield*.

52. With regard to Prof. Mallon's evidence, counsel for RSA highlighted the evidence given on Day 1 of the hearing (quoted in para. 21 above). Counsel characterised that evidence as an explanation by Prof. Mallon for the decision taken by Government in March 2020 to close down certain types of premises in order to minimise or eliminate the risk of transmission of COVID-19. Counsel submitted that such evidence has nothing to do with the question as to whether or not COVID-19 has manifested at a particular premises which he argued is the relevant consideration in the context of extension 6(A). Counsel submitted that Prof. Mallon was, in substance, making it clear that the closure orders were prophylactic in nature. They were aimed at stemming the transmission of the disease and avoiding public services being overwhelmed.

53. Counsel for RSA then referred to the exchange between Prof. Mallon and counsel for the plaintiff recorded in paras. 22 to 23 above and he submitted that it is clear from the answers given by Prof. Mallon that he was concerned with how public health measures work in practice rather than with any question of manifestation of a disease. Counsel also referred to the Salmonella analogy utilised by Prof. Mallon and sought to distinguish it. He submitted that, where there is an outbreak of food poisoning at a particular premises, the public health authorities may close it down if the source of the poisoning is traced back to the premises. The closure will occur even though nobody displayed symptoms of the poisoning while actually on the premises. Counsel submitted that there is a very important difference between cases where

premises are identified as the source of infection, on the one hand, and cases of manifestation of a disease while patrons are at the premises, on the other. In particular, counsel urged that, while an epidemiological link to the premises might be sufficient for there to be a public health intervention, this does not equate to a manifestation of disease at the premises. Counsel suggested that this was accepted by Prof. Mallon while under cross-examination. Counsel referred, in particular, to the following exchange between counsel for RSA and Prof. Mallon on Day 2: -

“Q. You used the food poisoning analysis, if I eat, say, chicken and I go home and I leave the premises, obviously I haven’t manifested any symptoms of Salmonella in the premises, isn’t that correct, but what has happened then when I go home and I get sick and I get a fever, I am now manifesting the symptoms, isn’t that correct?”

A. That’s correct. You’re manifesting the symptoms but not at the premises.”

54. While counsel for RSA may be correct in so far as that particular exchange is concerned, I believe that Prof. Mallon’s evidence, like that of Prof. Horgan and Prof. Fitzpatrick, must be read as a whole. When read in that way, I do not believe that the above exchange can be said to undo or override the other aspects of Prof. Mallon’s evidence.

55. Returning to the Salmonella analogy, counsel for RSA referred to the terms of extension 6(B) which specifically covers food poisoning. He submitted that, in contrast to extension 6(A), extension 6(B) expressly envisages circumstances where a customer or employee becomes ill off the premises as a consequence of infected food consumed on the premises. If the illness is traceable to food consumed on the

premises, cover is available under extension 6(B) (quoted in para. 42 above). Counsel suggested that this is much closer to the scenario painted by Prof. Mallon than the circumstances envisaged by extension 6(A) and he maintained that the difference in language between the two extensions is instructive. The concept of traceability is absent from extension 6(A).

56. Counsel for RSA next turned to the way in which Prof. Mallon had sought to link the concept of manifestation to the risk of transmission. Counsel identified, in this context, the evidence given by Prof. Mallon on Day 2 where he said that: -

“Now the definition of manifestation that I am referring to is the definition that is outlined in page 1 of the report, which is:

“The presence of characteristics that suggest occurrence of a disease, rather than proof of the occurrence of the disease itself”.

And I think the point I am trying to make within that particular paragraph, a higher risk of manifestation, would be that there would be a higher risk within that environment, that you would end up with increased risk of transmission, an increased risk of transmission would subsequently represent a higher risk of manifestation of the disease should it occur.”

57. Counsel for RSA submitted that transmission of the disease or risk of transmission of the disease is not the same thing as manifestation of the disease. Counsel referred to the fact that many infected persons are entirely asymptomatic and undiagnosed. Yet, they can transmit the disease. However, in the absence of a diagnosis, counsel submitted that asymptomatic cases are not manifesting the disease. Counsel further submitted that the test under extension 6(A) is not whether the business being carried out on the premises or the way in which the premises are laid

out is such that there is an increased risk of transmission vis-à-vis some other premises. Instead, the test is whether there has actually been a manifestation of COVID-19 at the Premises. On that basis, counsel submitted that Prof. Mallon's evidence in this regard is entirely off-point.

58. With regard to Prof. Mallon's evidence as to the likelihood of disease manifesting itself at the Premises (as summarised in Table 1 replicated in para. 31 above), counsel for RSA submitted that the evidence fell far short of establishing, on the balance of probabilities, that COVID-19 had manifested itself at the Premises. Insofar as March 2020 is concerned, counsel highlighted the evidence given by Prof. Fitzpatrick that there were 51 cases in Dublin in the week prior to the closure of the Devlin Hotel in March 2020, a rate of just 3.8 per 100,000. Counsel submitted, with some force, that, based on those figures one could not possibly attempt to establish a likelihood of an occurrence of the disease at the premises of the Devlin, still less a manifestation of disease. While Prof. Mallon had suggested that the March 2020 figures were unreliable due to the low testing capacity and the fact that the testing of healthcare workers was prioritised over the general population, counsel maintained that, even if Prof. Mallon's view were to be preferred over the evidence of Prof. Fitzpatrick, the evidence could not satisfy any requirement of proof on the part of the plaintiff. Either the data does show an extremely low risk or likelihood at that time or else the data is too unreliable to draw any conclusion.

59. Insofar as September, 2020 is concerned, counsel for RSA submitted that there are a number of problems with the conclusions identified in Table 1 to Prof. Mallon's report that, in the fourteen days prior to closure of the Premises in September, 2020, the likelihood was that there were 2.71 cases of COVID-19 at the Premises. In the first place, counsel drew attention to the evidence of Prof. Fitzpatrick that the

incidence in the local area (namely the Pembroke Local Electoral Area) was only 61.6, which was less than half of the figure of 138 per 100,000 that Prof. Mallon had used to come up with his calculation. However, I am not persuaded that the local electoral area is the correct catchment area to take. By September 2020, there was much greater movement of people about the city than had been the case when the population was required to keep within a narrow radial distance from home (as had been the case at the earlier stages of the pandemic).

60. Secondly, counsel suggested that the conclusion reached by Prof. Mallon ignores the fact that approximately one-third of the persons who test positive are asymptomatic and, therefore, do not clinically manifest the disease. Thirdly, counsel relied upon the evidence of Prof. Fitzpatrick as to the nature of the public health advice given to persons with symptoms of COVID-19 and those who were tested or awaiting a test. Such persons were advised to self-isolate. Counsel also relied on the evidence given by Prof. Fitzpatrick as to the very high rate of compliance there was with such public health advice. In particular, counsel drew attention to the evidence given by Prof. Fitzpatrick in relation to the compliance study audited by Prof. Kearney described in para. 37 above. Based on a cohort of 1,027 cases studied in October, 2020, the study concluded that 96.6% of those testing positive for COVID-19 complied with the self-isolation requirement and that 95.3% of the cohort reported complying with self-isolation after a COVID-19 diagnostic test while awaiting a result. Counsel for RSA forcefully argued that Prof. Mallon had not taken account of the fact that such a large percentage of infected or potentially infected people were self-isolating and not going out socially. On all of these bases, counsel for RSA submitted that the evidence given by Prof. Mallon as to the probability of cases

manifesting themselves at the Premises could never satisfy the burden of proof on the insured.

61. With regard to the medical evidence more generally, counsel for RSA submitted that, to the extent that the court considers such evidence to be relevant to the meaning to be attributed to the concept of “*manifestation*”, the evidence of Prof. Horgan and Prof. Fitzpatrick should be preferred over that of Prof. Mallon. Counsel referred to what he suggested is the very clear evidence given by Prof. Horgan as to how manifestation is understood from a clinical perspective. In para. 7 of her report, Prof. Horgan said: -

“From a clinical perspective, my understanding of a disease manifesting itself at the Premises is when the symptoms and/or signs of the disease are outwardly evident in an individual at that specific Premises. In other words, from a medical viewpoint, the individual(s) is experiencing symptoms of the said disease and/or a doctor notes objective evidence of the disease which is confirmed by investigations that are available for that disease. Clinical criteria, i.e. outward manifestation of the disease, are outlined in the HPSC case definition for diagnosis and notification of notifiable infectious disease (see below for COVID-19).”

62. On that basis, counsel for RSA submitted that manifestation is a very straightforward, understandable and common-sense concept. Counsel referred, in this context, to an issue that I raised in the course of the medical evidence as to whether a person infected with the herpes simplex virus can be said to be manifesting the disease if no cold sores are evident. Counsel submitted that, absent a cold sore, the herpes simplex disease cannot be said to be manifested.

63. While a suggestion had been made by counsel for the plaintiff that there is a difference between the clinical understanding of manifestation and the public health understanding of manifestation, counsel for RSA submitted that the evidence of Prof. Fitzpatrick was to the contrary effect. Counsel stressed that, unlike Prof. Mallon, Prof. Fitzpatrick is a specialist in public health medicine. Counsel identified, in particular, the evidence given by Prof. Fitzpatrick on Day 3 of the hearing where, in the course of her direct examination, the following evidence was given: -

“Q. All right. From a public health perspective, is there any difference between the two, between your understanding of and the definition of manifesting and the clinical or medical definition?”

A. No. And in relation to COVID, we are all working off the Health Protection Surveillance Centre definitions, which look at the clinical signs and symptoms of COVID, the criteria for making diagnoses and then looking at asymptomatic cases. There are lots of testing.

Q. ...So from a medical and public health perspective could you help the court in what you understood by the expression “manifesting”?

A. So I would say that means that the patient, the person is manifesting clinical signs and symptoms. So, they are complaining or they have evidence. So, complaining of feeling unwell and then complaining of feeling hot or cold and then their sign would be that they have a temperature or they are complaining of a cough and then they are found to have abnormalities when you listen to their chest. They are

the symptoms and signs. And then, people who have a positive test for COVID would be considered to be manifesting that, to the person who has done the test, they are manifesting COVID.”

64. Counsel submitted that Prof. Fitzpatrick’s evidence “*actually dovetails very closely*” with the approach taken by the Divisional Court in the *FCA* case, even though that court did not have the benefit of any expert evidence in that case.

65. With regard to the argument made by counsel for the plaintiff that manifestation of the disease can be said to have occurred as a consequence of all of the very visible measures taken in response to its presence in the community (such as the wearing of masks, the yellow warning signs and the requirement of social distancing), counsel for RSA characterised this aspect of the plaintiff’s case as absurd. He suggested that the argument completely subverts the meaning of manifestation of a disease. He observed that virtually all hospitality premises in the State will have signs in the kitchen or at the bathroom encouraging everyone to wash their hands. Yet, on the plaintiff’s case, a disease prevention measure of that kind can be treated as manifestation of COVID-19. Counsel submitted that such an approach was utterly implausible. He argued that this is even more apparent when one has regard to the requirement of social distancing. He stressed that social distancing was promoted by public health advice, not just in restaurants or hotels or bars, but in every commercial premises, every shop and office. It was even to be practised by persons in their own homes in the event that a visitor called by. As the signs outside all our public parks proclaimed, it was to be practised even when people left their houses and went to the park for a walk. Thus, on the plaintiff’s case, there has been a manifestation of the disease everywhere in the State since March 2020. Counsel submitted that this is to render the concept of manifestation utterly meaningless. He stressed that extension

6(A) requires manifestation of disease “*at the Premises.*” If the plaintiff’s suggested approach were to be adopted, counsel said that there would be no geographic restriction whatsoever; the disease would be manifest everywhere. Paraphrasing the language previously used by counsel for the plaintiff, he submitted that this would not be a coherent, consistent or intelligible understanding of extension 6(A).

66. Counsel stressed the importance of the words “*at the Premises*” in extension 6(A). He referred to the insuring clause within the business interruption section of the policy which uses the same words. The insuring clause is in the following terms:-

“If damage by any of the covers insured occurs at the premises (A) to property used by the insured for the purpose of the business which causes interruption of or interference with the insured’s business at the Premises, then the company would pay to the insured...”

67. Counsel submitted that it is immediately evident that the words “*at the Premises*” are intended to and have the effect of confining coverage to events that occur at the Premises. Counsel submitted that this is consistent with the provisions of the policy as a whole. In this context, he referred to the way in which, with the exception of claims under the extensions, cover under the policy will not be triggered in the absence of physical damage to the property insured. Counsel also identified that the words “*at the Premises*” are used repeatedly in many of the extensions under the policy. However, counsel highlighted that, in the case of extension 6(F), the policy used quite different language. Extension 6(F) is in the following terms: -

“F. Loss destruction or damage caused by any of the covers to property in the vicinity of the Premises which prevents or hinders the use of the premises.”

68. Counsel placed considerable emphasis on the much wider language used in extension 6(F) – in particular the words “*in the vicinity of the Premises*” – and he made the point that, in contrast, extension 6(A) uses the much narrower formula “*at the Premises*”. Counsel for RSA also drew my attention to extension 7 (a variant of which is common to many policies of this kind). Extension 7 is designed to provide cover where the business is interrupted by a loss of electricity, gas or water as a consequence of damage to the property of the relevant utility operator. It provides as follows: -

“Damage by any of the covers insured to property at any generating station or substation of the public electricity supply undertaking land based premises of the public gas supply undertaking or of any natural gas producer linked therewith waterworks or pumping station of the public water supply undertaking from which the insured obtains electricity, gas or water shall be deemed to have resulted from damage to property at the premises.”

69. Counsel submitted that, in the case of extension 7, a deeming clause is necessary. This is for the obvious reason that damage at the generating station or other utility is not damage that occurs at the Premises. Accordingly, in order to bring it within the scope of the insuring clause, there must be a deeming provision to deem such damage to have resulted from damage to property at the Premises. It was argued by counsel for RSA that, in reality, the plaintiff is seeking to read a deeming provision of this kind into extension 6(A) whereby something that occurs away from the premises can be deemed to have occurred at the premises. Counsel argued that the words “*at the Premises*” has to be given a consistent interpretation throughout the policy. He submitted that, if the court were to accede to the submission made that, somehow “*at the Premises*” does not mean at the Premises but means in the vicinity

of the Premises, that would “*massively increase*” the scope of the cover under the policy, not just in respect of this extension but in respect of the physical damage cover and in respect of the business interruption cover generally.

70. Counsel for RSA also addressed the argument made on behalf of the plaintiff that the words “*at the Premises*” are wider than words such as “*in the Premises*” or “*on the Premises*”. Counsel submitted that, at the margins, that might be so. He accepted that there may not be a completely exact correlation between “*on the Premises*” and “*at the Premises*”, but he suggested that the meaning is so close that, at least in the particular circumstances of this case, there is no material difference. Insofar as there might be a difference between the two, counsel put forward the example of a visitor presenting at the entrance to a premises while exhibiting signs of a disease with the result that the visitor is refused entry. He suggested that such a scenario could be regarded as having happened at the premises. Strictly speaking, it occurred outside the confines of the premises, but it is so proximate that it would be regarded as being at the premises. I enquired of counsel whether that would extend to people visiting the coffee hatch at the Premises. Counsel responded that a person standing at the coffee hatch could potentially be regarded as being at the Premises, but a person who is walking down the street towards the Devlin Hotel to get a coffee could not be said to be at the Premises.

71. Counsel for RSA submitted that, in accordance with established principles of contractual interpretation, extension 6(A) must be construed as a whole and by reference to what a reasonable person at the time of inception of the policy would have understood it to mean. For that reason, counsel suggested (and this was accepted by counsel for the plaintiff) that it is wrong to “*atomise*” the terms of the extension. Thus, it is wrong to look at the word “*manifesting*” in isolation. It must be considered

by reference to the words as a whole – in particular the words “*notifiable human disease manifesting itself at the Premises*”. In this context, counsel for RSA addressed the plaintiff’s reliance on the absence in extension 6(A) of any reference to the manifestation of disease in a “*person*”. Instead it refers to a “*human notifiable disease manifesting **itself***” (emphasis added). Counsel drew my attention in that context to the way in which the Divisional Court in the *FCA* case treated such a clause in the same way as a clause which was triggered by manifestation of a disease in a human person. In particular, the court treated the RSA 1 wording in that case (which spoke of “*a notifiable human disease **manifesting itself** at the premises*”) in the same way as the QBE 1 wording (which insured against business interruption arising from “*any human infectious... disease... an outbreak of which the local authority has stipulated shall be notified to them **manifested by any person** whilst in the premises...*”). This is clear from para. 224 of the judgment (where the Divisional Court dealt with the QBE 1 wording) which I have already quoted in para. 50 above and from para. 295 of the judgment (where the court addressed the RSA 1 wording) which I have already quoted in para. 17 above. In both cases, the court took precisely the same approach in relation to the meaning of manifestation namely that it required the display of symptoms or, alternatively, a positive diagnosis of disease. In both cases, the court took the view that the disease could not be said to be manifest in the case of an asymptomatic undiagnosed person.

72. In addition, counsel for RSA submitted that, as a matter of first principle, a human notifiable disease can only manifest through a human person. However, in response to a question from me, counsel accepted that the virus could exist on a surface within the Premises which could be detected by a test although he also made

the point that, if the virus was detected on surfaces within a premises, the relevant source must have been aerosols from a person.

73. Counsel for RSA also maintained that, when the language of extension 6(A) is read as a whole, it is quite narrow in scope. That is because the concept of manifestation is inextricably linked to the requirement that the manifestation occur at the Premises. This element of counsel's argument brings into play the issue of proximate cause. Counsel for RSA argued that, in order to succeed, the plaintiff has to establish that the notifiable human disease manifesting itself at the Premises was the proximate cause of the closure of the Premises. Counsel contended that there is an important distinction to be drawn between occurrences of the disease generally and a specific manifestation of the disease at the Premises. He argued that extension 6(A) contains the narrowest possible geographic limit by requiring the manifestation to occur at the Premises. He submitted that the only reading of the clause reasonably open is that the particular manifestation at the Premises was the proximate cause of the closure or restrictions. Counsel submitted that, in contradistinction to the types of clauses that were under consideration in the *FCA* case or the *FBD* case, extension 6(A) provides cover in particular circumstances which are unique to the Premises. He argued that it does not provide cover for closures arising from disease in the general community.

74. Counsel for RSA stressed that there is a wide variety of clauses available in the market. There are pure disease clauses, hybrid clauses and, in terms of geographic restriction, there are 25-mile clauses and one-mile clauses. In addition, there are, as here, "*at the Premises*" clauses. Counsel submitted that those words "*at the Premises*" are an integral part of the insured peril and he contended that this has

significant consequences when it comes to the application of the test of proximate causation and also when it comes to any argument as to concurrency of causes.

75. Counsel for RSA drew a distinction between the extension in issue in the *FBD* case and the terms of extension 6(A). Counsel highlighted the “*sheer size*” of the geographic area covered by the FBD extension. He referred to para. 126(e) of the principal judgment in the *FBD* case in which I noted that the area generated by a 25-mile radius extends to 1,963 square miles and that, in the context of pubs situated in the Dublin region, that is a highly populated area. Counsel also referred to what I had said in para. 126(d) of the *FBD* judgment where I had contrasted the position under the FBD extension with clauses which confined themselves to closures as a result of outbreaks on premises. In para. 126(d), I said:-

“It is also clear from the terms of this part of s. 3 of the policy that it was envisaged that a public house could be the subject of an imposed closure following an outbreak of contagious or infectious disease not only on the premises but within 25 miles of the premises. It may be stating the obvious but this demonstrates very clearly that such a circumstance was expressly envisaged and was insured against. The policy did not confine itself (as it could have done) to closures as a result of outbreaks on premises. In the context of infectious or contagious diseases, it is, perhaps, unsurprising that reasonable people in the position of the parties would envisage that public houses could be the subject of a closure order in respect of outbreaks of contagious disease which arise some distance from the premises given the facility with which an infectious disease could be transmitted within the confines of a public house.”

76. Counsel for RSA suggested that the geographic scope of cover available under the FBD policy and the geographic scope of cover available under extension 6(A) of the RSA policy, are at opposite ends of the spectrum. Counsel also referred, in this context, to the judgment in the *Brushfield* case insofar as it addressed a denial of access non-damage clause which provided cover in respect of a restriction on access to premises

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

77. Counsel for RSA referred to a number of passages in the *Brushfield* judgment dealing with that clause. For present purposes, it is only necessary to refer to para. 190(d) where I said: -

“In common with the Divisional Court in the FCA case, I cannot see how it could plausibly be contended that the measures taken at a national level by the Government or the Minister for Health could be said to have been proximately caused by a risk of COVID-19 within a one-mile radius of the hotel. The measures in question were taken in response to the position in the State as a whole. In my view, there is a significant difference between the terms and the effect of the denial of access clause in the AXA policy and the clause successfully relied upon by the plaintiffs in the FBD case. In the latter case, the clause was expressly referable to an outbreak of disease; it covered outbreaks within a much wider 25 mile-radius (which extends to 1,963 square miles); and, as explained in paragraphs 143 to 144 of the judgment in that case, the language used in the clause envisaged that, in the case of off-premises outbreaks, the outbreaks were likely to be of a highly significant

scale such as to require national measures to be taken. In my view, the same considerations cannot be said to apply in the case of the AXA denial of access clause. On the contrary, for the reasons outlined above, the clause has a local focus and appears to me to be concerned with actions taken to address local events in the nature of dangers or disturbances.”

78. Counsel for RSA made the case that, if the AXA clause at issue in *Brushfield*, with a one-mile radius, can be considered to have a local focus, a clause that is confined to something that occurs on the premises or at the premises is “*hyper localised*” in its focus, and the court’s reasoning in that case applies with even greater force in the context of extension 6(A). Counsel also sought to rely on a further aspect of the *Brushfield* judgment insofar as it addressed the MSDE clause in issue in that case. That clause provided cover in respect of the closure of premises by order of a public authority as a result of a defect in the drains or other sanitary arrangements “*at the premises*”. Counsel submitted that, while the peril is different, it is, nonetheless, very similar in terms of the structure of the clause in that it is covering a closure of the premises as a result of something that occurred at the premises. Counsel sought to rely on what was said in para. 167 of the judgment in that case: -

“In light of my conclusion in relation to the previous question, it is unnecessary to determine whether para. 5 of the MSDE clause is intended to address an order directed solely at the individual hotel premises rather than at all hotels or all bars in general. However, were it necessary to decide that question, it seems to me, from a consideration of the language used in para. 5 as a whole, that it is designed to deal with a closure of the Clarence Hotel specifically rather than with a closure of hotel premises throughout the country as part of a general measure closing hotels or bars. The language of

*para. 5 of the MSDE clause is specific to the premises. It refers to an order of the public authority closing the whole or part of the premises ‘as a result of a defect in the drains or other sanitary arrangements **at the premises**’ (emphasis added). Those words “at the premises” are also to be found in paras. 2 and 3 of the MSDE clause where they are clearly used in a premises specific sense. The inclusion of the word’s ‘at the premises’ strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an order directed at the particular defect found at the premises. This suggests that the order will be a premises specific one.”*

79. Counsel for RSA submitted that the same reasoning applies equally to extension 6(A) of the RSA policy. Counsel highlighted that the plaintiff, in putting forward its case, had made no reference to the contents of the government advice of 15th March, 2020 or any of the minutes of NPHEAT meetings (which predated that advice or which predated any of the subsequent measures taken by the government). He suggested that this was for the simple and straightforward reason that the government measures introduced in March, 2020 and, subsequently, in September, 2020 were implemented as public health measures in order to address the risk of transmission of COVID-19 generally and not in response to any particular occurrence of disease and, certainly, not in response to any manifestation of disease at the Devlin Hotel. On that basis, counsel submitted that, having regard to the wording of extension 6(A), the plaintiff simply cannot satisfy the proximate cause requirement.

He maintained that there is no causative connection whatsoever between the closure orders made by the government and a manifestation of disease at the Devlin Hotel. He further submitted that there is no basis in the language of extension 6(A) to suggest that the occurrence of disease off the Premises can be regarded as having a causative contribution. Counsel characterised this as a “*a fundamental difficulty*” which cannot be overcome by retrospectively seeking to suggest (as Prof. Mallon has done) that there is some data available from which it can be inferred that it is likely that there was someone on the Premises who had COVID-19 during the course of September, 2020. The simple fact is that no such manifestation was known at the time the closures took place. Counsel submitted that it cannot be said that something that was unknown could be said to be the proximate cause of the government advice to close public house premises. In support of this argument, counsel referred to the approach taken by me in the *Brushfield* case where I dealt with the proximate cause requirement in the context of the MSDE clause (which required that acute encephalitis be manifested by any person whilst at the premises or within a 25-mile radius of it). In para. 146 of that judgment, I said: -

“In the circumstances, there is no evidential basis upon which to form the view that the interruption ... to business of the hotel or the Octagon Bar was caused by any occurrence of acute encephalitis manifested in that way. It follows that there is no basis in this case to conclude that the interruption to the business arose as a result of acute encephalitis. While the plaintiff has suggested that it might be possible for it to demonstrate, in the course of the next module of the hearing, that a case of acute encephalitis had arisen within the 25-mile radius in advance of the Government measures taken in March and April 2020, it seems to me to be impossible to establish by reference to

such retrospective evidence that the plaintiff's loss of business arose as a consequence of the manifestation of acute encephalitis. If there was no reported case of acute encephalitis prior to the closure in March 2020, I can see no basis on which the plaintiff can prove that a case was manifested prior to that date or that the closure of the hotel arose as a consequence of the manifestation of such a case. Bearing in mind the meaning of the word 'manifested', it would be impossible to hold, in the context of the requirement of proximate causation, that the closure occurred as a consequence of the manifestation of something that was unreported and unknown at the time of the closure. For para. 1 of the MSDE clause to apply, the interference with the business of the hotel must be shown to have been proximately caused by at least one case of acute encephalitis which was manifested by a person prior to its closure. If no one was aware of such a case at the time of the closure, no case could be said to have been manifested. Accordingly, I fail to see how the proximate cause test can be said to have been met. In the absence of knowledge of the occurrence of the case, the link between the closure and that occurrence could not be shown."

80. Counsel for RSA maintained that precisely the same logic applies in the context of extension 6(A). Counsel suggested that the situation here is "*even starker*". Not only has there been no reported or known case of the disease manifesting at the premises prior to the closures in March or September, 2020 but, until the delivery of the expert reports in this case on behalf of the plaintiff, there had been an acceptance on the part of the plaintiff that there had never been a manifestation at the premises. On that basis, counsel submitted that it could not plausibly be suggested that the

proximate cause requirement could be satisfied by a manifestation of disease which neither the government nor the plaintiff knew about.

The response of the plaintiff to the closing submissions made on behalf of RSA

81. In response, counsel for the plaintiff rejected the criticisms advanced by RSA of Prof. Mallon’s approach. Counsel submitted that, on the basis of the exercise undertaken by Prof. Mallon, it was probable in September 2020 that there had been a case of COVID-19 at the Premises. Insofar as the arguments as to proximate cause are concerned, counsel for the plaintiff sought to rely on the principal judgment in the *FBD* case. Counsel argued that there was a clear parallel with that case insofar as it was held there that each outbreak of COVID-19 in the State was instrumental in the government decision to close down all public houses wherever they were in the State. Counsel submitted that the word “*manifestation*” could be substituted for the word “*outbreak*” or “*occurrence*” in para. 190 of that judgment where I said: -

“In circumstances where FBD accepts, for the purposes of these proceedings, that there were outbreaks within 25 miles of each of the plaintiffs’ premises, those outbreaks were, at minimum, a cause of the decision to close each of the public houses the subject matter of these proceedings. As the Divisional Court observed in paragraph 111 of its judgment each occurrence of the disease was part of a wider picture which dictated the response of government which led to the interruption in business. As the Divisional Court said in paragraph 112, the alternative way of looking at the matter is to regard each of the individual occurrences as a separate but effective cause of the government closure.”

82. Counsel also sought to rely on what was said in para. 199 of the same judgment in relation to what I described there as the *Miss Jay Jay* principle emanating from the decision of the Court of Appeal of England & Wales in *J.J. Lloyd*

Instruments Ltd v. Northern Star Insurance Co. Ltd [1987] 1 Lloyd's Rep. 32. In this context, counsel again submitted that the word "*manifestation*" could be substituted for the word "*causes*" or "*outbreaks*" in para. 199 where I said: -

"It seems to me that the principle identified in Miss Jay Jay is equally applicable in this case. While there are more causes (i.e. outbreaks) operating here than the two causes identified in Miss Jay Jay, the fact remains that, like in Miss Jay Jay, they are each equal in force and they operated in combination to lead to the imposition of the closures. There is no relevant exclusion in the FBD policy. Thus, once the local outbreaks within that radius were an efficient cause of the closure, that is sufficient to satisfy the proximate cause test in relation to that issue even if each of the other outbreaks in every other part of the country were also efficient causes of the closure. I am therefore of opinion that, even if the word 'following' connotes proximate cause, that test is satisfied. In my view, the plaintiffs have succeeded in establishing that the outbreaks within 25 miles of their respective premises were each a proximate cause of the government decision of 15th March."

Discussion and analysis

83. Having set out the arguments of the parties and the relevant evidence on which they seek to rely, it is next necessary to make findings as to the proper interpretation of the policy. In this context, there was no dispute between the parties as to the principles to be applied. In simple terms, both parties were agreed that the court must approach the question of interpretation of the policy by reference to the "*text in context*" approach. Under that approach, the court is required to consider the language of the policy in the context of the relevant factual and legal background as it existed at the time the contract was concluded. The court approaches the interpretation of the

language used in the policy through the prism of a reasonable person in the position of the parties at that time, such person being deemed to be aware of the relevant factual and legal context.

Relevant principles of interpretation

84. The relevant principles are to be found in a number of cases including *Rohan Construction v. Insurance Corporation of Ireland* [1986] ILRM 419 (High Court) and [1988] ILRM 373 (Supreme Court), *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274 (which applied the principles formulated by Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896), *ICDL GCC Foundation v. European Computer Driving Licence Foundation* [2012] 3 I.R. 327, *Emo Oil Ltd v. Sun Alliance and London Insurance plc* [2009] IESC 2 and *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 (“*the MIBI case*”). I have previously sought to summarise the principles which emerge from those authorities in a number of judgments which I have given in relation to the interpretation of insurance policies. In *Headfort Arms Limited T/A The Headfort Arms Hotel v. Zurich Insurance plc* [2021] IEHC 608, I summarised the principles in the following terms:-

- (a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;
- (b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would

have been reasonably available to the parties at the time of conclusion of the contract;

- (c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;
- (d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;
- (e) A distinction is to be made between the meaning that a contractual document would convey to a reasonable person and the meaning of the individual words used in the document if considered in isolation. As Lord Hoffmann explained in the *Investors Compensation Scheme* case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and, as noted in sub-para. (c) above, it is also necessary to consider the relevant factual and legal context;
- (f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties

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

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

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

- (h) In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the *contra proferentem* rule. This principle was affirmed by the Supreme Court in *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274 and in *Emo Oil Ltd v. Sun Alliance & London Insurance plc* [2009] IESC 2. In the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, *“usually be an approach of last resort”* albeit that he also stated that it may be *“more readily resorted to in respect of routine standard form commercial insurance policies”*. Later, in *Danske Bank v. McFadden* [2010] IEHC 116, Clarke J. (as he then was) explained the *contra proferentem* principle as follows, at paras. 4.1 to 4.2:-

“4.1 *The... contra proferentem rule is... only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question...*

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

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

create the ambiguity it is then employed to solve.

First, there must be genuine ambiguity”’.

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

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

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

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

‘Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness. It is the duty of the insurers to accept their liability in clear and unambiguous terms.’”

- (j) In the case of an insurance policy, it is also well settled that the use of words such as “*as a result of*” or “*resulting from*” are ordinarily construed as connoting proximate cause. This is consistent with the provisions of s. 55(1) of the Marine Insurance Act, 1906 (“*the 1906 Act*”) which provides that, in the absence of an indication to the contrary in the terms of the policy, the insured must prove that his or her loss was proximately caused by an insured peril. Section 55 (1) states:-

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

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

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

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

‘What does ‘proximate’ here mean? To treat proximate as if it was the cause which is proximate in point of time is... out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.’”

85. In addition, the parties have referred to a number of recent Irish and U.K. authorities which addressed a number of different business interruption clauses in the context of the COVID-19 pandemic. These included my own judgment in the *FBD* case, my supplemental judgment in the same case [2021] IEHC 279 (“*the*

supplemental FBD decision”) and also my decision in *Brushfield* and the decisions of the Divisional Court and the U.K. Supreme Court in the *FCA* case.

The meaning to be given to extension 6(A)

86. Notwithstanding the extensive arguments of the parties as to its meaning, extension 6(A) is expressed in relatively straightforward language. My task is to examine that language in context. Understandably, the parties’ arguments concentrated on how the extension might (or might not) be applied in the context of COVID-19. However, for the reasons identified by O’Donnell J. (as he then was) in the *MIBI* case, I must begin my task by seeking to understand the meaning of the extension at the time that the policy was put in place in October 2019. At that time, COVID-19 was not known. However, the concept of a notifiable human disease was well known. At that time, there were a significant number of notifiable diseases identified in the Infections Diseases Regulations 1981 (as amended). These included everything from influenza to plague. Among the infectious diseases included were mumps, malaria, cholera, Salmonellosis, Legionellosis, measles, yellow fever and typhoid. The existence of the 1981 Regulations and the broad range of notifiable diseases identified in the Regulations form part of the relevant context against which the words of extension 6(A) fall to be construed. It is clear from the judgment in the *MIBI* case that the context against which a contract is to be construed is not confined to the factual context but extends also to the legal context.

87. A further element of the relevant context is the fact that the policy was not tailored specifically to the hospitality sector. As the parties have acknowledged in their list of agreed facts, the policy was available to a range of business sectors and was not bespoke to any individual sector. That said, the fact that the insured premises comprises a hotel with accommodation and a cinema, bar and restaurant facilities is

also a very relevant part of the factual matrix which must be kept in mind. The parties clearly intended that the policy would be of use to such a business. One can readily see that cover for business interruption stemming from a notifiable infectious human disease would be relevant for such a business where significant numbers of people are known to gather and mingle.

88. It is also necessary to bear in mind that the hotel has the capacity to serve customers who never enter the Premises. There is a coffee hatch through which takeaway food and coffee is sold. There is also a small outdoor seating area adjoining the side of the hotel on Anthony Cronin Walk which provides a pedestrian link between the main village street of Ranelagh and Mornington Road.

89. Another aspect of the business which is potentially relevant is the location of the Premises in an area within the inner suburbs of Dublin. In the words of Mr. Feargal O'Neill of Gamma, the hotel is an attractive destination point over the day in Ranelagh "*particularly for many of the younger and more affluent socio-economic groups who reside in the Ranelagh area and for those visitors who frequent the locality because of its lively social, eating and entertainment scene*". Mr. O'Neill also identified that a relatively high proportion of the local population is in the 15 to 44 age bracket. However, it would be wrong to focus solely on the bar, cinema and restaurant elements of the business which may have a particular attraction for those living in the local area or in Dublin, more generally. It is also necessary to keep in mind that the Premises comprises a hotel with 40 bedrooms. Thus, a proportion of its clientele at any time is likely to be from outside the Dublin area. They are also likely to be on the Premises for longer than someone who drops in for a drink at the bar or a meal in the restaurant.

90. Bearing these background facts in mind, it is next necessary to consider the language used in the policy. Before addressing the specific terms of extension 6(A), it is noteworthy that it is one of a number of extensions of business interruption cover available under the policy. The principal business interruption cover available is intended to address circumstances where the business of the insured is interfered with as a consequence of physical damage to the Premises or its contents. However, each of these extensions extends the basic business cover to specific circumstances that do not require any interference to the business arising from damage to the insured property. These include extension 6(B) which counsel for both sides highlighted in the course of their closing submissions. It extends cover to injury or illness sustained by any customer or employee *“arising from or traceable to foreign or injurious matter in food or drink sold from the premises”*. The utility of that extension to a hotel premises serving food and drink is immediately obvious. In addition, as outlined above, counsel for RSA has emphasised the use of the words *“traceable to ... injurious matter ...”* and has contrasted that language with that used in extension 6(A). He suggested that the approach taken by Prof. Mallon in relation to the meaning of *“manifesting”* would sit more comfortably with this *“traceable to”* language, than it does in the context of the words used in extension 6(A).

91. As noted by counsel for RSA, different language is also used in extension 6(F). It extends the cover to deal with circumstances where use of the Premises or access to it are hindered or obstructed by damage to property *“in the vicinity of the Premises”*. This language is to be contrasted with the words used in the remaining extensions (including extension 6(A) itself) all of which include the words *“at the Premises”*. Thus, extension 6(D) provides cover for interruption to the business caused by murder or suicide at the Premises. Likewise, extension 6(E) provides cover

for interruption to the business as a result of vermin and pests at the Premises. Extension 6(C) is similar to para. 5 of the clause in the AXA policy considered in paras. 150 to 168 of the *Brushfield* judgment. It provides cover in respect of closure of the Premises by order of a public authority as a result of defects in drains or other sanitary arrangements at the premises. In para. 167 of my judgment in *Brushfield*, I expressed the view that the words “*at the premises*” strongly suggest that the relevant closure order should be prompted by a defect in the drains or sanitary arrangements at the insured premises and not as a consequence of concerns about the way in which hotels or bars are run more generally. It is important, however, to note that this view was expressed on a purely *obiter* basis. I will return in due course to the significance of the use of those words in extension 6(A).

92. Turning now, to the specific language of extension 6(A), both sides accepted that its words should be construed as a whole. This is a basic proposition when construing the terms of any contract. It is equally important to keep in mind that, as Lord Hoffmann indicated in *West Bromwich Building Society*, the meaning of the word used in a contractual provision will not necessarily coincide exactly with their dictionary meaning. It is necessary to keep in mind the way in which the words are used in the contract as that may throw light on the way in which they would be understood by a reasonable person in the position of the parties. Furthermore, as previously mentioned, it is essential to always keep the context in mind since that can also affect the way in which the words would be understood by the parties. For this purpose, the approach to be taken is to consider how the words would be understood by a reasonable person possessed of all of the knowledge of the relevant background that would have been reasonably available to the parties at the time the contract was put in place.

93. As noted in para. 86 above, the language used in extension 6(A) is quite straightforward. It speaks first of closure or restrictions placed on the Premises on the advice of the “*Medical Officer of Health of the Public Authority ...*”. There is no disagreement between the parties in relation to that element of the extension. Both parties accept that the closures of March and September 2020 are capable of falling within those words. The debate between the parties is focused on the words which follow: “*as a result of a notifiable human disease manifesting itself at the Premises*”. However, although there is a dispute as to the meaning and effect of those words, the parties agree that, as recorded in para. 3 above, those words form part of the relevant insured peril.

94. The next relevant words refer to “*notifiable human disease*”. It is perfectly clear what they mean. The concept of notifiable diseases was well established by the time the RSA policy was put in place in October 2019. As noted in para. 86 above, those words plainly refer to one of the diseases which are specified from time to time in the schedule to the 1981 Regulations (as amended). As discussed further below, those regulations make clear that diseases specified in the schedule are all notifiable. It is thus obvious that, in referring to “*notifiable human disease*”, extension 6(A) has these diseases in mind. The real debate is as to the meaning of the words that immediately follow namely “*manifesting itself at the Premises*”. As the outline of the parties’ arguments set out above demonstrates, the most controversial issue which arises is as to the meaning of the word “*manifesting*”. While it will, of course, be necessary to consider the arguments put forward by the parties, I believe that no one could plausibly suggest that, at minimum, the display of symptoms characteristic of a notifiable disease is not a manifestation of that disease. In this context, as para. 145 of the judgment in *Brushfield* suggests, the ordinary meaning of the verb “*manifest*” is

to reveal or to make evident. That was not disputed by either side. As noted in para. 15 above, counsel for the plaintiff expressly relied on para. 145 of *Brushfield* where I addressed the meaning of the verb “*manifest*”. Thus, a disease can be made evident by symptoms. A fairly obvious example is the tell-tale sign of a cold sore on a person’s lip. As discussed in the course of the evidence, that is a manifestation of the herpes simplex (type 1) virus which may otherwise be entirely asymptomatic. Of course, not all symptoms can necessarily be seen with the eye. Thus, it may be necessary, for example, to measure a patient’s heart rate by pressing on a pulse point or to monitor the condition of a patient’s lung using a stethoscope. Depending on the disease in question, such steps might also reveal a symptom even if that symptom is not capable of being seen with the eye. If so, that would also appear to fall within the concept of manifestation.

95. Likewise, as the decision in the *FCA* case makes clear, the results of a diagnostic test may also be said to reveal the existence of a disease. So, that, too, would constitute a manifestation of disease even if the patient otherwise displayed no symptoms. Ultimately, that was accepted by both sides although the plaintiff has suggested that RSA was slow to do so. Hepatitis C provides a neutral example of a notifiable human disease which, notoriously, may not show any outward symptoms for many years. However, if an asymptomatic person were to test positive following the taking of a HCV antibody test, this would clearly be a manifestation of Hepatitis C. This is a disease which was well known at the time the policy was put in place. It is a disease which had come to public prominence through a succession of well publicised court cases including that brought by the late Brigid McCole which was the subject of sustained public discourse. Although not especially relevant to a hotel, restaurant or pub business, Hepatitis C nonetheless usefully illustrates the way in

which, at the time of inception of the policy, the concept of a commonly asymptomatic disease was well known. It was also known that the disease could be diagnosed by a HCV antibody test.

96. As outlined in para. 18 above, counsel for the plaintiff emphasised that, in contrast to many other policies available in the insurance market, extension 6(A) does not require that the disease should manifest itself in a human person. Counsel suggested that this is very significant in the context of the meaning to be given to the word “*manifesting*” in extension 6(A) and he argued that this suggests that a more expansive meaning should be given to it than was taken by the Divisional Court and the U.K. Supreme Court in the *FCA* case. In contrast, counsel for RSA argued that the only way in which a disease can manifest itself is in a human person. As previously outlined, he relied strongly on the approach taken in the *FCA* case by the Divisional Court in respect of the RSA 1 wording where, as noted in para. 71 above, the court took the same approach to that wording as it did to the QBE wording, notwithstanding the absence of any reference in the former to a disease manifesting itself in a human person.

97. However, I am not convinced that counsel for RSA is right to place so much emphasis on this aspect of the *FCA* judgment. It is not clear from that judgment whether any argument was made by the FCA based on the absence in RSA 1 of the words “*manifested by any person*” (emphasis added). In my view, the absence of those words is significant. In this context, it is necessary to keep in mind the backdrop of the 1981 Regulations (as amended). The 1981 Regulations are directly relevant to the meaning of a “*notifiable disease*”. They expressly envisage that such a disease embraces not only the illness which manifests itself in a human person but also its causative pathogen which, at least in some cases, can exist outside the human body.

As I have previously noted, in referring to a “*notifiable human disease*”, extension 6(A) plainly had in mind those diseases which are notifiable under the 1981 Regulations. It is under those regulations (in particular Regulation 14) that obligations are imposed on medical practitioners and others to notify cases of infectious diseases to a medical officer of health. The 1981 Regulations give an expansive definition to the term “*infectious disease*”. As noted above, the definition is not limited to the disease experienced by the patient but also expressly includes the causative pathogen of the disease. As amended by the Infectious Diseases (Amendment) (No. 3) Regulations 2003 (S.I. 707 of 2003), Regulation 6 of the 1981 Regulations makes this clear. It provides that: “*The diseases **and their respective pathogens** listed in the Schedule are specified to be infectious diseases and the expression ‘infectious disease’ shall be construed as meaning any disease **or causative pathogen** so listed.*” (emphasis added).

98. The fact that both the disease and the pathogen are treated as notifiable diseases is important for present purposes because it is known that the causative pathogen of COVID-19, namely the SARS-CoV-2 virus, is capable of detection on surfaces and is capable of surviving for a time outside the human body. That would suggest that it could be manifested even in the absence of a human person displaying symptoms of COVID-19. But, bearing in mind the *MIBI* approach, it would be wrong at this point in the analysis to bring COVID-19 into consideration. It was not known at the time the policy was put in place. For that reason, it may be helpful to look to a neutral example to illustrate the significance of the effect of Regulation 6.

99. Legionellosis (which includes legionnaires’ disease) provides a more useful example which has a particular resonance in the context of a hotel business. The schedule to the 1981 Regulations (as amended) lists not only the disease itself but also

its causative pathogen, legionella species. It is well known that the legionella pathogen is capable of existing outside the human body in water systems. A very recent example occurred in the course of writing this judgment. It was reported in the Irish Examiner in February 2022 that the legionella bacteria had been detected in a shower room in the Department of Health in Baggot St. It is equally well known that the legionella pathogen has caused outbreaks of legionnaires' disease in hotels. Indeed, the disease has acquired its name from an outbreak among U.S. army veterans attending a conference in the Bellevue Stratford hotel in Philadelphia in the 1970s. Given the terms of Regulation 6 of the 1981 Regulations (as amended), it seems to me that both Legionellosis and the causative bacteria (namely legionella species) would both fall to be considered as human infectious diseases. Furthermore, given the terms of extension 6(A) – and, in particular, the absence of any express suggestion that the disease must manifest itself in a human person – it seems to me to follow that a reasonable person in the position of the parties, at the time of inception of the policy, would consider that a manifestation of disease would not be limited to cases where a human person manifests the disease at the Premises. Having regard to the 1981 Regulations (as amended) the reasonable person would also envisage that the detection of the causative pathogen of a notifiable disease at the Premises would equally be capable of constituting a manifestation of the disease in question. Indeed, even in the absence of the 1981 Regulations (as amended), it strikes me that a reasonable person might well regard the detection of the causative pathogen of legionnaires' disease in premises to be the detection of the disease itself. That was how the Irish Examiner reported the discovery of the pathogen in the shower room of the Department of Health in February 2022. The article began by saying that “*the shower room has been infected with Legionnaires' Disease...*”.

100. Thus, manifestation in the form of the detection of the causative bacteria in the water systems of the Premises would be sufficient to trigger cover if its presence was the proximate cause of advice from a medical officer of health to close or otherwise restrict the business carried on at the Premises. I can see no conceptual difference in this context between the detection of disease (or its causative pathogen) and a diagnosis of disease. If diagnosis of a disease in an asymptomatic person is considered to be a manifestation of disease, it seems to me to follow that a scientific test which detects the presence of the causative pathogen must equally be considered to be a manifestation of disease. In either case, the fact that no human person at the Premises is displaying the outward symptoms of legionnaires' disease would not alter this conclusion. Likewise, the fact that no person at the Premises was diagnosed with the disease would not matter. The discovery of the causative pathogen at the Premises would be sufficient in itself to be a manifestation of disease. For the same reason, it seems to me that, if its causative pathogen, *Salmonella enterica*, was detected on the Premises, the *Salmonella* example posited by Prof. Mallon (as summarised in para, 23 above) would readily fall within the meaning of "*manifesting*" even though no one showed any sign of food poisoning while present at the Premises.

101. In these circumstances, I reject the argument made on behalf of RSA that there is no significance to the absence of any reference in extension 6(A) to the words "*manifested by any person*" which are the words used in QBE and many other policies available on the market. On the contrary, it seems to me that the absence of those words means that extension 6(A) does not necessarily require that there should be a human person on the Premises displaying symptoms of such a disease there or diagnosed with such a disease. Accordingly, if, for example, the SARS-CoV-2 virus

had been detected on a table or a bed at the Premises, that would, in my view, constitute a manifestation of COVID-19 for the purposes of extension 6(A).

102. However, there is no evidence that the virus was ever detected at the Premises. Instead, the plaintiff has sought to rely on Prof. Mallon's conclusion as to the likelihood of infected persons having been at the Premises in the 14-day period prior to closure in September 2020. On the strength of his evidence, there is a basis to conclude that, in September 2020, one or more persons infected with COVID-19 may have been present at the Premises. While the figure of 2.71 may be an overestimate, there is nonetheless a plausible basis to think that at least one person infected with the disease may have set foot on the Premises at that time. This is especially so in circumstances where the footfall figures used by Prof. Mallon in his Table 1 calculation do not take account of those who ordered coffee or other takeaway items at the coffee hatch adjoining Anthony Cronin Walk. As counsel for RSA correctly conceded, a person buying an item at the coffee hatch must be said to be "*at the Premises*" even though that person never enters the Hotel.

103. The problem from the plaintiff's perspective is that undiagnosed or asymptomatic people attending the Premises cannot be said to be manifesting the disease. Extension 6(A) requires manifestation which, as previously explained, involves some element of revealing or making evident. The approach taken by Prof. Mallon, as summarised in Table 1 of his report shows, at most, that there may have been an occurrence of COVID-19 at the Premises. However, as the passage from the judgment of the Divisional Court in the *FCA* case (quoted in para. 49 above) illustrates, occurrence is different to manifestation. A disease can occur without any manifestation at all. Indeed, that has been one of the principal reasons why COVID-19 has been so successful in terms of its transmissibility. The fact that an infected person

can pass on the virus before any symptoms become manifest or before a positive test has been a major factor in its transmission.

104. In my view, the fact that no one was aware of any cases of COVID-19 at the Premises during September 2020 creates a fundamental difficulty for the plaintiff in seeking to suggest that COVID-19 had manifested itself at the Premises at that time. It seems to me that the plaintiff here faces a very similar difficulty to that which arose for the plaintiff in *Brushfield* in so far as para. 1 of the MSDE clause was concerned. In that case, there was nothing to show that a case of COVID induced acute encephalitis had become evident at the time of the closure of the Clarence Hotel. No one was aware of any such case and I came to the conclusion accordingly that the requirement of manifestation had not been satisfied. Similarly, there is nothing in this case to show that any instance of COVID-19 had become evident or had been detected at the Premises at the time of its closure. In this regard, subject to what I say below in relation to the evidence of the medical experts, I can see no basis – either in the language of the policy or the relevant context – on which to give the word “*manifesting*” anything other than its ordinary and natural meaning. That is how it would be understood by a reasonable person in the position of the parties. In saying that, I have not lost sight of the trenchant criticism made by counsel for the plaintiff of the position taken by RSA that manifestation of disease requires that the disease should become evident. Counsel submitted that it was absurd to suggest that the plaintiff would have to be able to identify some person sitting in the lobby or the bar of the Premises displaying the symptoms of COVID-19. He argued that such an approach would create obvious difficulties for an insured. The point was cogently made and I was initially concerned that such an interpretation of “*manifesting*” would render unattainable any prospect of cover under extension 6(A).

105. Nonetheless, on further reflection, I do not believe that the point withstands closer analysis. In the first place, the RSA policy is not industry specific so it would not necessarily be surprising that an element of the policy would not neatly fit with a particular business. Secondly, RSA's position is consistent with the ordinary and natural meaning of the word "*manifesting*". The word cannot be said to be ambiguous. Furthermore, the terms of extension 6(A) remain perfectly workable when the word "*manifesting*" is given its ordinary meaning. Cover under the extension is not rendered illusory by requiring that there must be a known case of a notifiable disease at the premises. For example, the extension will be capable of application in the event that the causative pathogen of legionnaires' disease is detected there. As discussed above, that is a particularly apt example in the context of a hotel business. It will also be well capable of application in the specific context of COVID-19 and its causative pathogen, the SARS-CoV-2 virus. If present, the latter could be detected on a surface at the Premises. Moreover, the criticism made by counsel for the plaintiff overlooks the fact that not everyone on the premises is there for a transient visit. For those who drop in for a drink or a meal, it may be difficult to see how the extension could realistically be engaged in the particular context of a disease such as COVID-19. Transient patrons may not be at the Premises for long enough for definitive symptoms to become evident and it is unlikely that any diagnosis they receive will come to the attention of the insured. However, the business insured under the RSA policy is not confined to the provision of services to transient diners and drinkers. The business includes the operation of a hotel where guests may stay for several days. It is also a business that requires a significant workforce. It is not difficult to see how the policy would be capable of responding where members of staff fall ill or where hotel guests fall ill. In both such cases, their symptoms may become very evident during the

course of their employment or during the course of their stay (as the case may be). In their case, they may also be in receipt of a diagnosis. A staff member who receives a positive diagnosis will very likely wish to report that to an employer in order to protect co-workers. A guest who tests positive will very likely have to report that to the hotel in order to ensure that appropriate isolation conditions can be put in place. In these ways, disease is well capable of manifesting itself in the ordinary meaning of that word. It is important in this context to keep in mind that this might arise in connection with any one of the many notifiable infectious diseases identified in the schedule to the 1981 Regulations. It is wrong to look at the interpretation of extension 6(A) with COVID-19 solely in mind. In addition, as previously outlined, the causative pathogen of such a disease could be detected on the Premises. In all these cases, there would be a manifestation of disease sufficient to come within the ambit of extension 6(A). It cannot therefore be said that cover under extension 6(A) would be rendered illusory if the word “*manifesting*” is given its ordinary and natural meaning.

106. As noted in para. 19 above, the plaintiff argues that, even if “*manifesting*” is to be given such a meaning, COVID-19 has become apparent at the Premises through all of the ways in which the existence of the pandemic has been highlighted such as the yellow warning signs, the physical distance requirement that was in place in 2020 and the wearing of masks. As outlined in para. 41 above, counsel submitted that, in this way, COVID-19 manifested itself at the Premises just as it did at the Four Courts, the Phoenix Park and the Shelbourne Hotel. Again, this point was powerfully made although, strictly speaking, the measures identified by counsel are reactions to COVID-19 designed to limit its spread rather than evidence of the existence of disease at any particular place. That said, in a very broad sense, the presence of COVID-19 in the community might be said to have manifested itself through the steps taken by us in

reaction to it. Were it not for its presence, there would have been no need to wear masks or keep a distance from one's neighbour or to place signs in every building and public park entered by the public.

107. However, it is again essential to keep in mind that it is wrong to construe the policy through the prism of the present dispute. It is therefore dangerous to focus solely on COVID-19. It is also dangerous to focus solely on the word "*manifesting*". That word must be read in context and, in particular, it must be read in conjunction with the words "*at the Premises*" which immediately follow. It cannot be considered in isolation. The words "*manifesting itself at the Premises*" are clearly intended to be read together. When read in that way, it seems to me that the manifestation of disease is intended to be a Premises specific manifestation. Had something broader been intended, one would expect to see different language used such as the words "*in the vicinity of*" as used in extension 6(F) or a reference to a radial distance around the Premises (which was the approach taken, for example, in the FBD policy). In contrast, the use of a very simple and straightforward combination of words "*manifesting itself at the Premises*" plainly suggests that the disease must manifest itself at the hotel. In my view, that is the way in which the words would be understood by a reasonable person in the position of the parties at the time the policy was agreed. In this context, I do not accept that the use of the word "*at*" suggests an approximate location. While some support for that suggestion is found in the Shorter Oxford Dictionary quoted in para. 41 above, I do not believe that a reasonable person reading the simple words used in extension 6(A) would so understand the reference to "*at the Premises*". I believe that the reasonable person would understand it to be a reference to the Devlin Hotel itself. Having said that, I would accept that the use of the word "*at*" conveys a somewhat broader meaning than the use of the word "*in*". The latter would suggest a

manifestation that is confined to an interior setting within the hotel while the word “*at*” would also extend to the immediate exterior of the hotel. Thus, for example, a manifestation of disease at the coffee hatch or at the outside dining area on Anthony Cronin Walk would be capable of falling within the extension. In my view, a reasonable person would consider a person at either of those locations to be “*at the Premises*”.

108. The meaning of the words “*manifesting itself at the Premises*” must also be ascertained by reference to how they would be understood at the time the policy was put in place and not by reference to events which have happened more recently. It is open to question whether any reasonable person in the position of the parties at that time would have envisaged that physical distancing and mask wearing would be required in response to infectious disease. Prior to the advent of the COVID-19 pandemic, such measures had not been widely experienced in Ireland in living memory. However, warning signs against dangers on premises have a long lineage. One could see that there might be circumstances where a sign at a premises would be a manifestation of infectious disease at that premises in much the same way that the dreaded red or black cross daubed on the front of a house occupied by a victim of plague might once have signified. For example, a sign warning against entry posted on a doorway highlighting the presence of the causative pathogen for Legionnaires’ disease would readily be understood by a reasonable person (in the position of the parties to the RSA policy) as a manifestation of that disease at that premises. On the other hand, it seems to me that the reasonable person would have significantly more difficulty in treating signs which are not premises specific in the same way. Why would a sign warning generally of the dangers of a particular disease – or of the measures to be taken to minimise its transmission – be regarded as a manifestation of

that disease at the premises at which the sign is displayed? Such signs were commonplace in the 1980s and early 1990s warning of the dangers of AIDS and the manner in which it is transmitted. However, I do not believe that anyone would consider that such signs were a manifestation of AIDS at the premises where they were displayed. For similar reasons, I cannot see any proper basis to form the view that the warning signs with which we are now so familiar, warning of the need to wash one's hands or to maintain a safe distance from our neighbours could be said to constitute a manifestation of COVID-19 at the Premises or at any premises where they are or were displayed. While they may manifest the existence of disease in the community generally, I do not believe that they can plausibly be characterised as manifestation of the disease at any particular premises.

109. Likewise, in so far as the wearing of masks and the requirement of physical distancing are concerned, they could not be said to be specific to any particular premises. The fact that patrons of a bar or hotel are wearing masks or observing physical distancing requirements does not suggest that they are doing so in response to the presence of disease at that premises. They are not premises specific in any way and are simply prophylactic measures adopted to address the spread of disease in the community generally. I do not see how they can properly be characterised as a manifestation of disease "*at the Premises*".

110. That brings me to the evidence of Prof. Mallon as summarised in paras. 20 to 23 above. As noted in para. 20 above, Prof. Mallon expressed the view that manifestation of COVID-19 extends to the "*background prevalence*" of the condition and the likelihood of that resulting in manifestation of disease on the Premises even if there were no confirmed or symptomatic cases of COVID-19 there. When asked to explain what he meant, he said that what he was seeking to do was to provide a

rationale for the public health approach which involved a blanket shutting down of a range of premises. He further explained that, had such premises been allowed to remain open, this would have led to an exponential growth in cases. The decision to close down such premises was motivated by the need to remove an environment that favours the presence and transmission of the virus. He also drew an analogy with a Salmonella outbreak and he highlighted that, where public health authorities trace the source of such an outbreak to a particular food outlet, they may close it down even if none of the victims of the outbreak displayed any symptoms of the disease there.

111. It is necessary at this point to recall that the interpretation of the language used in extension 6(A) is a matter for the court and is not a matter for a medical expert. That was expressly accepted by both sides at the hearing. There is nothing to suggest that the words “*manifesting itself at the Premises*” were intended to be read in any technical or special sense. They are ordinary words in common usage and medical evidence is not required in order to understand their meaning. That said, the words are used in the context of notifiable human infectious diseases which, of course, medical experts are well qualified to address. It was therefore useful to hear some of the medical evidence in relation to COVID-19 and the public health response to it.

112. The next point to keep in mind is that the evidence given by Prof. Mallon on this issue was not accepted by Prof. Horgan or Prof. Fitzpatrick. Their evidence as to the accepted meaning of manifestation in a medical context was more consistent with the approach taken by the Health Protection Surveillance Centre. They took the view that, for manifestation of disease to occur, a patient must either be displaying known symptoms of the disease or have tested positive for the disease in question. Their view seems to me to chime very closely to the ordinary and natural meaning of the word “*manifesting*” as explained above although, based on the text of extension 6(A), I

would go further that Prof. Horgan and Prof. Fitzpatrick and treat the detection of the causative pathogen at the Premises as falling within the particular language used in extension 6(A).

113. The approach taken by Prof. Mallon as to the meaning of manifestation seems to me to be very much a personal view on his part. Nevertheless, I have no difficulty accepting his thesis that a disease such as Salmonella can manifest itself at a premises even where no human person has exhibited symptoms of that disease while physically on the premises. That can occur where the causative pathogen of the disease in question (i.e. Salmonella enterica in his example) is detected at the premises. I have already explained that I believe that the detection of the presence, at a premises, of the causative pathogen of a notifiable infectious disease is a manifestation of that disease within the meaning of extension 6(A). As previously outlined, extension 6(A) does not require that the disease should manifest itself in a human person. In those circumstances, the detection of the pathogen involves the making evident of the disease and is as much a manifestation of that disease as a positive diagnosis of it in a human person. However, that does not assist the plaintiff because there is no evidence that the SARS-CoV-2 virus was ever detected at the Premises.

114. As noted above, Prof. Mallon also expressed the view that the background prevalence of COVID-19 was an important element of its manifestation. When asked to explain this evidence, he highlighted the public health rationale for the blanket approach taken to shut down a range of premises including bars and hotels. He identified such premises as an environment that favours the presence and transmission of COVID-19. I accept that the closure was motivated by the need to reduce transmission of COVID-19. I also accept that, being places where people mingle and where alcohol may lower inhibitions, hotels and bars were among the venues targeted

by the public health measures as places where COVID-19 could circulate more freely. However, I do not accept that this entirely understandable public health concern can be equated with the manifestation of COVID-19 at the Premises. As outlined earlier, the ordinary and natural meaning of the words “*manifesting itself at the Premises*” requires that something should occur at the Premises that reveals the presence of the disease or its causative pathogen there. That could occur through the detection of the pathogen there or by a diagnosed or symptomatic case of COVID-19 there. In each such case, the disease would become evident at the Premises so as to fall within the plain words of extension 6(A).

115. In my view, the approach put forward by Prof. Mallon fails to have regard to the ordinary meaning of the word “*manifesting*” and to the fact that the word must be read in conjunction with the words that follow namely “*at the Premises*”. While Prof. Mallon has identified that the public health authorities perceived a hotel or bar premises to be an environment that favours the presence and transmission of the disease, there is no evidence that anything was ever detected at the Premises to reveal the presence there of either COVID-19 itself or its causative pathogen, the SARS-CoV-2 virus. The approach taken by the authorities in March and September 2020 was quite different to the classic approach taken in reaction to an outbreak of Salmonella which is traced to a food outlet. In the latter case, the authorities, in ordering the closure of the source, are reacting to the detection of its causative pathogen at the food outlet in question. As explained above, the detection of the causative pathogen is a manifestation of disease. In contrast, in March and September 2020, the authorities were taking pre-emptive steps to minimise transmission of disease without taking any steps to first detect the source of the disease at any of the premises affected by the closure order. In other words, the authorities did not wait for

the disease or its causative pathogen to manifest themselves at the Premises or at any of the other public house or hotels affected by the closure. As counsel for RSA correctly submitted, the steps taken by the authorities at that time were prophylactic in nature. Accordingly, I cannot accept that a reasonable person in the position of the parties would regard the public health measures in question as a manifestation of COVID-19 at the Premises.

116. Nor can I accept that the reasonable person would equate the background prevalence of COVID-19 with a manifestation of the disease at the Premises. Again, it seems to me that, in relying on the background prevalence of the disease, Prof. Mallon has overlooked the importance of construing the word “*manifesting*” in context. The word is not used in isolation. One must always keep in mind that it is used directly in conjunction with the words “*at the Premises*”. When read in that way, I do not believe that one could plausibly conclude that the background prevalence of COVID-19 can be said to constitute a manifestation of the disease at the Premises. The very fact that Prof. Mallon refers to it as “*background*” prevalence underscores this point.

117. For all of the reasons outlined above, I cannot accept this aspect of Prof. Mallon’s thesis. It goes beyond the ordinary meaning of the words “*manifesting itself at the Premises*” as understood by a reasonable person in the position of the parties. There is nothing in the wider context which would support attributing a more expansive meaning to those words. It follows that I can find no basis on which to conclude that there has been any manifestation of COVID-19 at the Premises such as to engage the provisions of extension 6(A) of the policy.

Causation

118. In light of the conclusion which I have reached as to the meaning of extension 6(A), it follows that no issue of causation arises. On the basis of the evidence before

the court, there is nothing to show that anything occurred at the Premises sufficient to constitute a manifestation of COVID-19 at the Premises. There is accordingly no basis to conclude that the decisions in March and September 2020 to close the Premises were proximately caused by a manifestation of a notifiable human disease at the Premises.

Developments subsequent to the hearing

119. It should be noted that, in advance of delivery of this judgment, I drew the attention of the parties to the recent decision of Cockerill J. in *Corbin & King Ltd. v. AXA Insurance* [2022] EWHC 409 (Comm.) and invited them to consider if they wished to make further submissions on foot of it. I was subsequently informed on 14th March, 2022 that the parties did not believe that her decision could have a bearing on the issues which arise here. For that reason, the parties did not make further submissions and, for the same reason, I have not considered the decision in this judgment.

Conclusions on the questions posed

120. Having regard to the views outlined above, I must hold against the plaintiff in relation to its case based on extension 6(A). For completeness, I now set out my conclusions on the questions posed by the parties as set out in para. 4 above (in so far as those questions remain live):

- (a) There was no significant controversy between the parties in relation to the question raised in para. 4(a) and, for that reason, I have not addressed this issue in detail. Both sides were agreed that, having regard to the language used in extension 6(A), cover, if otherwise available, was not restricted to circumstances where there is a total cessation of business. That was expressly accepted by RSA in its written submissions. Given my

conclusions on the other questions, it is unnecessary to consider any issue as to the severity of restrictions required to trigger cover under extension 6(A).

- (b) With regard to what is meant by a notifiable disease “*manifesting itself at the Premises*”, I have concluded, for the reasons outlined above, that this requires at least one of the following: a symptomatic case of a notifiable disease at the Premises, a diagnosed case of a notifiable disease at the Premises or the detection of the causative pathogen at the Premises. In so far as the further sub-questions posed are concerned, my views are as follows:
- (i) While a symptomatic or diagnosed case of COVID-19 or the detection of its causative pathogen within the body of the Premises will qualify as a notifiable disease manifesting itself at the Premises, extension 6(A) also extends to such a case immediately outside the Premises such as at the coffee hatch or the outside dining area.
 - (ii) The answer at (i) above also addresses the question posed at para. 4(b)(ii);
 - (iii) Save to the extent that a case arises immediately outside the Premises, a symptomatic or diagnosed case of COVID-19 or the detection of its causative pathogen in the vicinity of the Premises does not fall within the ambit of extension 6(A).
- (c) In light of the conclusions set out above, the question posed at para. 4(c) above does not arise;

(d) For similar reasons, the question posed at para. 4(d), does not require consideration.

Next Steps

121. I will list the matter before me remotely at 10.30 a.m. on 8 April 2022 to consider whether any further issues arise in the proceedings and, if so, what steps should be taken to bring the proceedings to a conclusion. I will also address any issues in relation to costs.

High Court Practice Direction HC 101

122. Finally, in accordance with the above practice direction, I will direct the parties to file their written submissions (subject to any redactions that may be permitted or required under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.