Neutral Citation Number: [2025] EWHC 1870 (Comm)

Case No: CL-2023-000064

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/07/2025

Before:

Sean O'Sullivan KC
(sitting as a Deputy Judge of the High Court)

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Between:

BATH RACECOURSE COMPANY LTD (and 21 other Claimants listed in Appendix 1 to the Particulars of Claim)	**Claimants**
- and -	
(1) LIBERTY MUTUAL INSURANCE EUROPE SE **(2) ALLIANZ INSURANCE PLC** **(3) AVIVA INSURANCE LTD**	**Defendants**

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ADAM KRAMER KC and **WILLIAM DAY** (instructed by **STEWARTS LAW LLP**)
for the **Claimants**
DAVID SCOREY KC and **DAVID WALSH KC** (instructed by **DAC BEACHCROFT LLP**)
for the **Defendants**

Hearing dates: 20 and 21 May 2025

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Approved Judgment

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 22 July 2025 at 10:30am.

Sean O'Sullivan KC (sitting as a Deputy Judge of the High Court):

1. This is a yet further trial of preliminary issues concerning cover for business interruption and interference ("BI") losses suffered as a result of measures implemented during the COVID-19 pandemic. Since the decision of the Supreme Court in Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1, it feels as if there has been a never-ending procession of such issues coming before the English Courts; testament, no doubt, to the extent of the losses suffered, but perhaps also to the ingenuity of lawyers (on both sides).

2. In the present case, it is questionable whether this process of identifying and resolving further preliminary issues has really hastened final resolution of the claim. In some instances, the fact that other issues were not yet ripe for a decision made it slightly more difficult to answer the issues which were before me, or left me wondering whether my answer on a particular issue would really make any material difference to the outcome in the long run.

3. However, while there was inevitably a feeling of trepidation at being presented with a series of exam questions to answer, in the end most of them were presented for decision in a way which was manageable. I had no shortage of assistance from Counsel, who showed great patience with my questions.

4. I did not hear any live evidence, but instead was provided with an extensive set of agreed or assumed facts, in a document called "Statement of Agreed and Assumed Facts". Where I have referred in this judgment to facts being agreed, I am referring to the contents of that document. It was common ground that, to the extent my answer to any issue depended on facts which lay outside the compass of that agreement (and where the agreed facts did not enable me to draw inferences), I would have to make that clear and the final resolution of that issue would have to wait for another day.

The background and the procedural history

5. It is probably easiest to introduce the issues which I was asked to decide by explaining briefly how the parties have reached the present stage in their dispute. I will have to descend further into some of the details as I work through the disputed issues, but for the most part what I say below will suffice.

6. The Claimants ("the Cs") are all within the 'Arena Racing' group. At the relevant time, they operated racecourses, greyhound tracks, golf clubs, hotels, and a pub at various locations in England and Wales. The Cs provided me with lists of the different facilities (to use a neutral word) which they operated. Most of the Cs have a single facility: so, for example, Bath Racecourse Company Limited operates Bath Racecourse. But some also have a hotel, and perhaps even a golf course as well. Lingfield Park Limited. operates Lingfield Park racecourse, Lingfield Park golf club and the Lingfield Park Marriott hotel.

7. Two of the Cs (the 21st and 22nd Claimants) did not have physical facilities of that kind. Instead, I understand that one of them provided services (stalls, equipment, security and presentation screens) to others of the Cs, and the other managed and exploited media rights (i.e. broadcasting races to betting shops via a TV channel).

8. As many will recall, on 16 March 2020, the Prime Minister gave instructions that people should stop non-essential contact, stop all unnecessary travel, avoid public venues, and start working from home where possible. A similar statement was made by the Welsh First Minister on 17 March 2020.

9. On 18 March 2020, the British Horseracing Authority ("BHA") and the Greyhound Board of Great Britain ("GBGB") gave instructions that, respectively, horseracing should be suspended in England and Wales, and that greyhound racing should be moved behind closed doors (i.e. without spectators at the venue).

10. On 20 March 2020, the Prime Minister and the Welsh First Minister gave instructions that public venues including pubs should close that night. Those instructions were implemented by regulations[1] the next day, which also required (for example) the closure of bars in hotels.

11. On 23 March 2020, the Prime Minister announced the first nationwide "lockdown". The Welsh First Minister made a similar statement the same day. Following that announcement, England Golf confirmed the closure of golf clubs (the same day) and the GBGB gave instructions to suspend all greyhound racing (the next day). Hotels were also closed, subject to limited exceptions. That first lockdown was implemented by regulations on 26 March 2020.[2]

12. The measures adopted at the start of the first lockdown were relaxed in certain respects over time. Relevantly for present purposes: (1) golf courses were permitted to re-open, but still subject to a number of restrictions, from 13 May 2020; (2) horse and greyhound racing in England recommenced behind closed doors on 1 June 2020; and (3) horse racing in Wales recommenced behind closed doors on 15 June 2020.

13. On 4 July 2020, the first lockdown was brought to an end. The Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020 permitted pubs, bars, and restaurants to serve food and drink for consumption on the premises. Hotels could provide accommodation to all and gatherings of up to thirty people were permitted, although the Government was still recommending that people avoid gatherings larger than six.

14. On 14 September 2020, the "rule of six" was enacted by the UK Government and announced the same day. The rule of six prohibited any gathering of more than (i) six people (from any number of households), (ii) one household (which may include more than six people), or (iii) two linked households (which again may include more than six people), unless a valid exemption applied.

15. On 24 September 2020, the Health Protection (Coronavirus, Restrictions) (No 2) (England) (Amendment) (No 5) Regulations 2020 came into force, permitting outdoor sports gatherings (without spectators) and introducing restricted hours for trading of restaurants, bars and pubs (prohibiting the service for food and drink for consumption on the premises between the hours of 22:00 and 05:00) and requiring that customers

[1] Specifically, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 and the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020.

[2] Specifically, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020.

remained seated whilst consuming food or drink on the premises.

16. On 14 October 2020, the regime was changed again, with a three-tier regional system introduced, with different tiers containing different restrictions for different types of venue.[3]

17. On 31 October 2020, the Prime Minister announced a second lockdown which was implemented by regulations on 5 November 2020. This came to an end on 2 December 2020 and was replaced with another three-tier regional system of restrictions.[4] On 20 December 2020, a fourth tier was added.[5]

18. There was a third lockdown in early 2021, but that falls outside the policy period and is not important for present purposes.

19. The Cs had a Material Damage and Business Interruption Policy ("the Policy") underwritten by the Defendants ("the U/Ws") for the period 1st January 2020 to 31st December 2020. The Policy included business interruption ("BI") cover, which had an extension for denial of access (limited to £2.5m any one loss). The Cs alleged that this extended cover was engaged when lockdown and other measures were put in place as a result of COVID-19. Indeed, a claim was apparently notified on 18 March 2020, when instructions were given by the BHA and the GBGB respectively (as described above).

20. The U/Ws accepted at an early stage that there was some coverage for these BI losses, but took various points about the application of the limits and the quantification of loss.

21. The Cs commenced the present proceedings and immediately sought to participate in a trial of preliminary issues which was heard by Jacobs J in October and November 2023. The judgment following that first preliminary issue trial is better known as Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE [2024] EWHC 124 (Comm) and involved overlapping issues in other COVID-19 BI insurance claims.

22. Jacobs J held (among lots of other findings that are less relevant for present purposes) that (i) each of the Cs could claim BI losses under the denial of access extension, with their own £2.5m limit (i.e., for separate limits for each of the Cs) for "*any one loss*"; (ii) further limits applied for claims preparation costs but not additional increased cost of working; and (iii) credit should be given by the Cs for payments they received as a result of the Coronavirus Job Retention Scheme (i.e. "furlough" payments) under the savings clause in the Policy.

23. Jacobs J's decision was appealed by both the U/Ws and the Cs respectively. Those appeals were dismissed by the Court of Appeal: see [2025] EWCA Civ 153. I am told that permission to appeal on the furlough payments issue has been given by the

[3] This was introduced by the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, the Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020, and the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020.

[4] The relevant regulations were the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020.

[5] The fourth tier was added by the Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020.

Supreme Court by order dated 1 June 2025.

24. That left a number of further issues about the operation of the peril and the application of limits, some of which appeared to have factual content. Several of those issues were resolved by agreement. For example, the U/Ws acknowledged that there would have been cases of COVID-19 within a mile of each of the Cs' premises at all material times, for the purposes of triggering limb (b) of the denial of access extension. The parties also agreed that certain quantum aspects (issues 12-14 and 16 on the Agreed List of Issues) needed to be the subject of loss adjustment before they could sensibly be put before the Court.

25. On 4 July 2024, Butcher J made an order by consent that there should be a trial of issues 2, 7-9 and 11 on the Agreed List of Issues. Since that order, some further agreements have been reached between the parties, disposing of issues 7 and 9.

The present issues

26. As a result, at the present trial, I am asked to decide the following:

    26.1. whether measures put in place by the BHA and the GBGB are actions of a "*competent authority*" for the purposes of the denial of access extension (i.e. issue 2 on the Agreed List);

    26.2. how the "*any one loss*" limit applies (issues 8 and 8A); and

    26.3. an issue as to the operation of the arbitration agreement in the Policy (issue 11).

27. I will first say a little about the Policy and the general approach which I will take to construing the same, before taking each of those topics in turn.

The Policy

28. The Policy is a composite policy for "*Material Damage and Business Interruption as defined In the attached Wording*". As I have said, it was for the period 1 January 2020 until 31 December 2020.

29. The "*INSURED*" are the various holding companies in the Arena Group "*&/or subsidiary companies*", which definition embraces all of the Cs.

30. The U/Ws wrote cover on a 40/20/40 basis and are together the "*Insurer*". The total premium payable was £627,035.

31. Section 1 of the Policy covers material damage, and section 2 covers BI.

32. In relation to section 2, the following interests and sums insured are given:

"Item	*Interest*	*Sums Insured/ Estimated/Limits*

B	*Estimated Gross Revenue* *(Declaration Linked Basis)* *Maximum Indemnity Period: 12 months*	*GBP 68,656,147*
	Estimated Gross Revenue *(Declaration Linked Basis)* *Maximum Indemnity Period: 24 months*	*GBP 16,466,592*
	Estimated Gross Revenue *(Declaration Linked Basis)* *Maximum Indemnity Period: 36 months*	*GBP 25,515,911"*

33. The basic insuring clause for section 2 is as follows:

"*If Damage as defined in Section 1 occurs at The Premises to property used by the Insured for the purpose of The Business and causes interruption of or interference with The Business at The Premises the Insurer will indemnify the insured as follows…*".

34. The Cs' "*Business*" is defined as

"*Owners, managers and operators of horseracing courses and dog racing tracks, horse trials, harness racing events and all related activities, including on non-racedays, but not limited to training academy for pupil horse trainers, internal and external catering, creche facilities, property owners and provision of facilities for horse trials and events, conferences, exhibitions, seminars, banquets, provision of wedding venues, sports and leisure activities, trade fayres, campsite markets, golf courses, club house auctions, public house, hotels and the provision of land let for the use by circuses, fayres and concerts, and other similar facilities, and sites of specific scientific interest, car boot sales, restaurants, other outdoor events (cross country races etc), hoteliers and operators of golf clubs and security agents.*"

35. The "*Premises*" are said, at the beginning of the Bluefin/Liberty Combined Wording 2016 which is then amended by various special conditions, to be "*The Premises stated in the Schedule*". However, the "*Schedule*" is the risk details slip, which does not identify any specific addresses.

36. The "*Premises*" are then defined again, in the specific context of the BI cover, as:

> "*…any premises owned occupied or used by the Insured or where goods or records are stored or worked upon or services provided by others on behalf of the Insured anywhere in Great Britain Northern Ireland the Channel Islands or the Isle of Man including whilst in transit in Great Britain Northern Ireland the Channel Islands or the Isle of Man.*"

37. The Indemnity Period is: "*the period from the time the Damage occurs until the results of The Business cease to be affected by the Damage but not exceeding the Maximum Indemnity Period stated in The Specification*". That reference to a "*Maximum Indemnity Period*" means the periods of 12 / 24/ 36 months respectively in the table of interests and sums insured set out above.

38. "*Gross Revenue*" is "*the money paid or payable to the Insured for work done and services provided in the course of The Business at The Premises*" and "*Estimated Gross Revenue*" is "*the amount declared by the Insured to the Insurer representing not less than the Gross Revenue which it is anticipated will be earned by The Business during the financial year most nearly concurrent with the Period of Insurance or a proportionately increased multiple thereof where the Maximum Indemnity Period exceeds twelve months*". Note the reference to that being an amount which has been declared by the Cs to the U/Ws.

39. Since the BI cover in the Policy is written on the basis of reduction in gross revenue, the operative provision requires the U/Ws to pay an indemnity in respect of "*the amount by which the Gross Revenue during the Indemnity Period falls short of the Standard Gross Revenue in consequence of the Damage*". It might be noted that the "*Standard Gross Revenue*" is "*the Gross Revenue during that period in the twelve months immediately before the date of the Damage which corresponds with the Indemnity Period*", but "*to which such adjustments shall be made as may be necessary to provide for the trend of The Business and for variations in or other circumstances affecting The Business either before or after the Damage or which would have affected The Business had the Damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage*".

40. I should also mention the Alternative Trading settlement term as follows:

> "*If during the Indemnity Period goods are sold or services rendered elsewhere than at The Premises for the benefit of The Business either by the Insured or by others on their behalf the money paid or payable in respect of such sales or services shall be taken into account in arriving at the Turnover/Gross Revenue during the Indemnity Period*".

41. The "ordinary" BI cover has a limit of liability and a provision for automatic reinstatement as follows:

> "*The liability of the Insurer shall not exceed in respect of Gross Profit/Gross Revenue 133.33% (one hundred and thirty three and one third per centum) of the Estimated Gross Profit/Estimated Gross Revenue stated in The Specification nor in the whole 133.33% (one hundred and thirty three and one third per cent) of the Estimated Gross Profit/Estimated Gross Revenue*

In the absence of written notice by the Insured or the Insurer to the contrary the Insurer's liability shall not be reduced by the amount of any loss the Insured undertaking to pay the appropriate additional premium for such automatic reinstatement of cover"

42. The "*Denial of Access*" extension in which I am most directly interested is provided for in the particular settlement terms of section 2. As originally drawn, it provided as follows:

"*This Section extends to include any claim resulting from interruption of or interference with The Business carried on by The Insured at The Premises in consequence of*

(a) Damage to other property within a five mile radius of The Premises which shall prevent or hinder the use of or access to The Premises whether The Premises or property of The Insured are damaged or not

(b) action by the Police Authority and/or the Government or any local Government body or any other competent authority following danger or disturbance within a one mile radius of The Premises which shall prevent or hinder use of The Premises or Access thereto

(c) action by the Police Authority and/or the Government or any local Government body or any other competent authority following the suspected or actual presence of a harmful device on or in the vicinity of The Premises provided that the Police Authority shall be informed as immediately as the Insured become aware of the presence of such device

(d) pollution of any sea beach waterway or river arising from a sudden identifiable unintended and unexpected incident occurring within a five mile radius of The Premises which takes place in its entirety at a specific time and place during the Period of Insurance which shall directly cause a Reduction in Turnover

provided that

1. after the application of all other terms conditions and provisions of this Section the liability of the Insurer shall not exceed

(i) GBP 1,000,000 in respect of (a) above any one loss

(ii) GBP 1,000,000 in respect of (b) above any one loss

(iii) GBP 100,000 in respect of (c) above any one loss

(iv) GBP 100,000 in respect of (d) above any one loss

2. this Extension shall exclude any interruption or interference with The Business the duration of which is less than four hours in respect of (a) and (b) above."

43. In condition 22 in the Schedule, these limits of indemnity were amended as follows:

"*Notwithstanding anything contained herein to the contrary, the limit in respect of Section 2 – Particular Settlement Terms, Denial of Access:-*

- *Proviso (i) is amended in respect of (a) to GBP 1,000,000 and a maximum indemnity period of 3 months*

- *Proviso (ii) and (iii) are amended in respect of (b) and (c) to GBP 2,500,000 and a maximum indemnity period of 3 months.*"

44. It should be noted that this maximum indemnity period of 3 months for the denial of access extension is used for the purposes of calculating the indemnity (i.e. "*the period from the time the Damage occurs until the results of The Business cease to be affected by the Damage but not exceeding the Maximum Indemnity Period stated in The Specification*"). For the denial of access extension limb (b), it was common ground that one must read the term "*Damage*" as referring to the insured peril, i.e. the triggering of the denial of access extension. That is because there will not be any physical damage, but only an action by an authority. See the decision of the Supreme Court in FCA v Arch (supra) at [257].

The Spreadsheet

45. As I will explain, the Cs relied quite heavily (at least for the purposes of one issue) on an Excel spreadsheet ("the Spreadsheet"). I was told that the Spreadsheet related to the previous year of cover (i.e. 2019). The sheet which concerned BI cover contained some notes at the top of the page, including:

"*Cover for Gross Revenue includes a 33.33% uplift, to allow for any unplanned increases…*

It is noted that all tracks are to be insured for 12 month indemnity period as temporary marquees can be erected in the event that buildings are damaged. Alternatively fixtures can be ran at other courses…

The indemnity period should increase to a minimum of 36 months in respect of hotels, and perhaps 24 months for the golf courses…".

46. There was then a series of line items, representing the various premises/facilities operated by the Cs, with (under a heading "*2019 Declared Values*") a figure for "*Estimates Gross Revenue*" for most, and also a "*Maximum Indemnity Period*" (12, 24 or 36) specified for each. For the avoidance of doubt, for those among the Cs who operated multiple facilities, there were multiple line entries. So, for Lingfield, there was an entry for the racecourse (£6,424,164 / 12 months), an entry for the hotel (£4,893,431 / 36 months) and a partial entry for the golf course (blank / 12 months).

47. The part of the sheet which was headed "*2020 Declared Values*" was mostly incomplete, save that much of the "*Maximum Indemnity Period*" column had been completed. That column did not always match with the 2019 values, but did seem to be in line with the note above the table: i.e. 36 months for hotels and 24 months for golf courses.

48. It had been agreed between the parties that there was a spreadsheet for 2020, which they had not been able to find. They confirmed, however, that this missing document had formed part of the presentation of risk, on which each of the Cs (save the 5th and 12th Claimants) presented figures for estimated gross revenue "*for each of their*

respective insured premises". I understand that to mean that, as with the Spreadsheet, in this missing document, if one of the Cs operated both a racecourse and a golf course, the estimated gross revenue for each was given separately. This would then form part of the declaration by the Cs specifically referred to in the definition of "*Estimated Gross Revenue*" (see above). It seems that these values must then determine the sums insured (as set out above) for the different categories with different indemnity periods.

49. I note that the Court of Appeal, in the context of the appeal from the decision of Jacob J on the first preliminary issue trial, stated as follows (at [10]):

"*The Bath Racecourse Bluefin wording under Risk Details Section 2 Business Interruption gave three sums insured for Estimated Gross Revenue with three different Maximum Indemnity Periods: £66,656,147 with a Maximum Indemnity Period of 12 months, £16,466,592 with a Maximum Indemnity Period of 24 months and £25,515,911 with a Maximum Indemnity Period of 36 months. These were different total or aggregate limits for respectively racetracks, golf courses and hotels*".

50. It would appear to follow that, for 2020 as for 2019, the estimated gross revenue for racecourses, golf courses and hotels must each have been declared separately, even if more than one type of facility was owned by a single claimant.

51. Mr Scorey was adamant, however, that I could not assume or infer that the missing spreadsheet from the risk presentation for 2020 was in the form of the Spreadsheet. He said I could assume nothing at all. That seemed a little unrealistic to me; it seems rather likely that the missing spreadsheet was an updated version of the Spreadsheet, with the "*2020 Declared Values*" completed. However, I understand and accept his submission that this is the hearing of preliminary issues and that I have not heard any factual evidence. It is not enough at this stage to say that something is likely, or more likely.

The correct approach to construing the Policy

52. As one might expect, there was limited disagreement between the parties as to the approach to construction generally. I was referred to the helpful summary set out by Jacobs J following the first trial (i.e. Gatwick Investment (supra) at [103]-[105]). This was in entirely orthodox terms, putting at its heart the way the words would be understood by a reasonable policyholder and eschewing an overly textual approach, as had been explained by the Supreme Court in FCA v Arch (supra) at [77]:

"*... the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis ... It is an ordinary policyholder who, on entering the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.*"

53. There was a slight difference between the parties as to what "specialist" knowledge that reasonable policyholder could be assumed to have. This difference was not about knowledge of the idiosyncrasies of English insurance law. Rather, the difference concerned whether the reasonable policyholder meant a buyer of this particular kind of cover, insuring racecourses and greyhound tracks and hence familiar with the operation

of the BHA and the GBGB, or required one to assume a buyer of property and BI insurance more generally.

54. Mr Scorey's submission was that the concept of the reasonable policyholder did not import the specialised knowledge of one of the parties. However, when I raised the question with him, he helpfully showed me the (published) arbitration award in China Taiping Insurance [2022] Lloyd's Rep IR 379 at [16], which in turn quoted the Supreme Court in FCA v Arch at [47]:

"*The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean*".

55. That seems to me to answer the question. The background knowledge reasonably available to the parties includes all of the publicly available information about the BHA and the GBGB, but not anything which would only be available to the Cs.

56. The Cs suggested in their skeleton that, if I found there to be ambiguity, I should construe the relevant provision *contra proferentem* against insurers. They referred me, for example, to the decision of the Divisional Court in FCA v Arch [2020] EWHC 2448 (Comm) at [71]-[74] and [118]. I do not read those sections of the judgment as endorsing a general policy in favour of treating the insurer as the proferens of a policy wording in the event of ambiguity. Instead, the Divisional Court referred to cases such as Impact Funding Solutions Ltd v AIG Europe Insurance Ltd [2017] AC 73, in which the Supreme Court warned against equating exclusion clauses in an insurance policy (which define the extent of the agreed cover) with exemption clauses in a contract (which exclude a remedy which would otherwise exist). The Divisional Court then (at [74]) endorsed the decision of Peter MacDonald Eggers QC in Crowden v QBE Insurance (Europe) Ltd [2018] Lloyd's Rep IR 83 to the effect that:

"…the court should not automatically apply a contra proferentem approach to construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the court would be entitled to opt for the narrower construction."

57. That limited role for a *contra proferentem* approach was what I understand the Divisional Court to have been identifying at [118] when they said that "*this would be one of the few cases in which it would be appropriate to apply a principle of contra proferentem*". That limited role is not available here. It does not seem to me that any of the possible constructions which were under discussion in the present trial could be said to have the effect of excluding "*all or most of the insurance cover which was intended to be provided*".

58. Mr Scorey submitted that it would be wrong to assume that the Policy was drafted by the U/Ws. I agree and, if that was the thrust of the Cs' argument, it lacks the required evidential basis. The *contra proferentem* principle seemed to me to be a red herring in the present case.

Issue 2: actions of a "*competent authority*"

59. Issue 2 asks:

> "*Are the actions of the British Horseracing Authority and/or Greyhound Board of Great Britain actions of competent authorities for the purposes of the Denial of Access Cover?*"

60. The defined term "*Denial of Access Cover*" here is a reference to the extension to the BI insurance for what might generically be called denial of access to the premises. As set out above, limb (b) responds to "*action by the Police Authority and/or the Government or any local Government body or any other competent authority*". The issue between the parties is whether the actions of the BHA and the GBGB qualify as the actions of "*any other competent authority*", such that, if it resulted in prevention or hindering of use, there would be an insured risk, or a "trigger event" (see further below).

61. This is important because it has the potential to feed into the number of losses and the operation of the "per loss" limits.

Agreed facts

62. I will not set out all of the facts which have been agreed in this regard; just those which seem to me most salient.

63. The BHA is a private company limited by guarantee without share capital and is not a public body or established by statute. It is the independent governing body and regulator for horseracing in Great Britain. It is responsible for licensing, permitting and registering those who participate in the sport, including trainers, jockeys, agents, valets and racecourses. Licensed members of the BHA are required to comply with the BHA's Rules of Racing in order to remain licensed, permitted or registered.

64. The objectives of the BHA per its Memorandum of Association include:

> "*(1) To be the governing, administrative and regulatory authority for the sport and industry of horseracing in Great Britain and to govern, regulate, promote, administer and organise horseracing in Great Britain in every way in which the Company shall think necessary and desirable.…*
> *(4) To formulate and approve and administer and co-ordinate the fixture policy for race meetings (including programme content) and the dates upon which individual racecourses may from time to time hold race meetings under the Rules of Racing and to compile and vary in accordance with the Rules of Racing (by suspension, transfer or cancellation) an annual list of such fixtures.*"

65. Chapter A, Functions and Powers of the BHA, Rules 9 and 10 provide:

> "*9 The BHA shall fix the dates on which all Race Meetings are to be held.*
>
> *10 The BHA may:*
>
> *10.1 cancel any meeting, fixture or Race;*
>
> *10.2 alter the date of any meeting, fixture or Race;*
>
> *10.3 supervise or make such alterations to the programme of any meeting or*

conditions of any Race;

10.4 order the transfer of any Race Meeting or Race to another Racecourse with or without existing engagements; or

10.5 elect to divide Races."

66. If necessary, the BHA may order the abandonment of any race or race meeting.

67. The Rules of Racing provide that "*a racecourse cannot stage a Race without having a Licence permitting it do so issued by the BHA*". The BHA may grant, refuse, withdraw and suspend licenses. Rule 26, Chapter L, of the Rules of Racing enables the BHA to impose fixed penalty notices (i.e. fines).

68. Paragraph 16 of the Arena Racing Corporation terms and conditions (which are incorporated into sales of tickets or entry badges for race days) expressly provides:

"*16. **Abandoned or Delayed Racing and Other Events Affecting Racing***

16.1 Race fixtures and races may be abandoned or held behind closed doors at any time by the Operator or in accordance with directions from the British Horseracing Authority and any successor body, the police or other emergency services. Fixtures and races may also be delayed, abandoned, or held behind closed doors in other circumstances beyond our reasonable control…"

69. The GBGB is a private company limited by guarantee without share capital and is not a public body or established by statute.

70. By its incorporation in 2008, the GBGB became the single self-regulator for licensed greyhound racing.

71. The objectives of GBGB per its Memorandum of Association include:

"*3.2.1 to be the governing, administrative and regulatory authority for licensed greyhound racing in Great Britain and to govern, administer, regulate, organise, develop and advance licensed greyhound racing in Great Britain in every way in which the Company shall think necessary or desirable; …*

3.2.3 to make publish, adopt and amend (as is necessary in conjunction with the licensed greyhound racing industry) and provide advice on the Rules of Racing and to do the same for other rules and regulations (whether general or otherwise) and directions for the proper conduct and regulation of the practice and procedure of licensed greyhound racing, races and greyhound training and to take all steps as the directors shall deem reasonable for the communication and enforcement thereof…

3.2.5 to be responsible for the licensing and, for the purposes of ensuring compliance with any and all licences issued by the Company, the inspection, of greyhound racecourses, including, but not limited to, their managing executives, track officials and other personnel, as and where appropriate…

3.2.26 to conduct, organise, promote, regulate and manage any races and other competitions…".

72. The GBGB is the official regulatory body for greyhound racecourses in Great Britain and is responsible for ensuring that its licensed racecourses comply with its Rules of Racing. Where a greyhound racetrack is not regulated by the GBGB, its operator is required to apply for and obtain a welfare licence from the Department for Environment, Food & Rural Affairs via their local authority, as required by the Welfare of Racing Greyhounds Regulations 2010. However, where tracks are regulated by a body that has UKAS accreditation such as the GBGB, they are exempt from that licensing requirement. The Government has expressed the view that there would be no need for regulation if not for the independent tracks "*as a UKAS accredited GBGB would be able to effectively self regulate the industry*".

73. Section 2 (Licensing), Rule 5 of the GBGB Rules of Racing provides that:

"*i The GBGB may grant a licence to a person nominated by the Executive of a Racecourse, who will be known as the Authorised Representative of that Racecourse (subject to paragraph 5(ii)). The sole purpose of granting such a licence is for the conduct of greyhound racing staged through a series of race meetings.*"

74. Rule 4A provides *inter alia*:

"*i) The GBGB, acting as appropriate through the Greyhound Regulatory Board or the Disciplinary Committee shall have power; …*

b) to grant Licences with or without conditions, to make general directions to Licence holders as they may think appropriate, to grant registrations, and to make directions to Local Stewards…".

75. The GBGB Disciplinary Authority has the power to impose fines and/or withdraw a licence.

The Cs' submissions

76. The Cs submit that the phrase "*any other competent authority*" embraces "*any*" "*authority*" – "*other*" than those identified by the preceding words in the phrase (i.e., the Government, local government or the police) – which is "*competent*" to take "*action*".

77. The Cs refer to the Oxford English Dictionary definition of "authority", namely a body with the "*power or right to give orders, make decisions, and enforce obedience*". They suggest that requirement for a power or right to take action is the key. The insurance would not cover actions by rioters or demonstrators, or access problems which happen to be caused by individuals. It required intervention by a body which had the "authority" to impose the restriction in question. The Cs say that is what would be reasonably understood by a policyholder reading this cover and giving the words their natural and ordinary meaning.

78. The Cs point to the fact that it has been agreed between the parties that the BHA exercises an exclusive jurisdiction over the regulation, administration and governance of horseracing in Great Britain, licensing both venues and participants, and to its powers, including the ability to cancel or abandon any horse race or other sporting fixture. Its Memorandum of Association provides that it is "*the governing,*

administrative and regulatory authority for the sport and industry of horseracing in Great Britain and to govern, regulate, promote, administer and organise horseracing in Great Britain".

79. The Cs says that the authority of the BHA can also be seen from the facts that (1) the Government liaised with it as to horseracing during the pandemic; and (2) the BHA gave orders which were followed by racecourses. They point out that it is not argued by the U/Ws that the BHA or the GBGB were not competent to give these orders.

80. The GBGB likewise is the official regulatory body for, and licenses, greyhound racecourses in Great Britain. It uses the same terms ("*governing, administrative and regulatory authority*") in its Memorandum of Association. Legislation states that the GBGB regulates its members and enforces standards in place of the Government, and membership exempts a track from needing a local authority (i.e., governmental) licence.

81. All of that being so, the Cs contend that the role and powers of the BHA and the GBGB would have been in the objective contemplation of a reasonable policyholder in the position of the Cs, namely a policyholder seeking to insure racecourses and greyhound tracks against BI risks. The Cs suggest that those are obvious sources of restrictions which a policyholder would have in mind, just as the Lawn Tennis Association would be contemplated for a policy insuring the All England Club, or the Football Association for a policy insuring Arsenal Football Club, or indeed Railtrack for train operators between 1996 and 2002.

82. The Cs also say that, if it matters, the BHA does have a quasi-public role, with the High Court retaining a supervisory jurisdiction over its decisions. They relied upon Fallon v Horseracing Regulatory Authority [2006] EWHC 2030 (QB) at [12]-[13]. I should observe that Mr Scorey submitted that this general supervisory jurisdiction was derived from the power of the Court to prevent unlawful restraint of trade (see Bradley v Jockey Club [2004] EWHC 2164 (QB), where Richards J referred (at [35]) to a "*settled jurisdiction to grant declarations and injunctions in respect of decisions of domestic tribunals that affect a person's right to work*"). I accept that, although it still must be the role or status of these "*domestic tribunals*" which means that their decisions can have that wide effect.

The U/Ws' submissions

83. The U/Ws say that the reasonable policyholder would not have considered that the phrase "*other competent authority*" was apt to encompass either the BHA and/or the GBGB for three reasons.

84. First, they rely upon the *ejusdem generis* or the *noscitur a sociis* principles and say that the words "*competent authority*" take their colour from the types of authority preceding them, namely: "*the Police Authority*", "*the Government*" and "*any local Government body*". The argument is that a "*Police Authority*", "*the Government*" and "*any local Government body*" are all organs of the state (which the BHA and GBGB are not) with coercive powers which can restrict the use of the insured's property. If any "*authority*" with "*jurisdiction to deal with the specific event*" would qualify as a "*competent authority*", the U/Ws say, that would (for example) encompass a commercial party which held intellectual property rights over a play and could exercise a contractual veto over whether it could be performed.

85. Second, they assert that neither the BHA nor the GBGB would have been contemplated as an "*other competent authority*", because neither would have been expected to have taken "*action*" by reference to a "*danger or disturbance*" up to a mile away. The U/Ws suggest such action would be taken by those with coercive civic powers; an organ of the state (or exercising equivalent powers), not a private company acting *qua* sporting regulator which derives its regulatory powers from private agreements with its members. While sporting regulators might be expected to take an interest in what is going on at the Cs' premises, the reasonable policyholder would not consider them to be responsible for taking "*action*". The U/Ws rely upon the statement that the "*paradigm example of a 'disturbance' in this context would be an affray or brawl*" in the judgment of the Divisional Court in FCA v Arch (at [500]).

86. Third, the U/Ws submit that the above analysis is reinforced by the only other occasion in which the words "*other competent authority*" is used in the Policy, which is in limb (c) of the denial of access extension. That is concerned with a scenario where there has been "*action…following the suspected or actual presence of a harmful device on or in the vicinity of The Premises*". It is said to be improbable that a sporting regulator would be concerned with a "*suspected or actual presence of a harmful device*". That would be a matter for the police or the British Army's Explosive Ordnance Disposal & Search Regiment Royal Logistics Corps.

Relevant authorities

87. In relation to the meaning of "competent authority", the Divisional Court in FCA v Arch held at [375] that the phrase "*competent local authority*" in a wording covering non-damage denial of access meant "*whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government*".

88. I was not convinced that this advanced the argument greatly. It is obvious that central government qualifies as an "*authority*" for the purposes of our clause. But the parties would perhaps disagree as to whether the BHA or the GBGB were "*competent to impose the relevant restrictions in the locality on the use of the premises*". The U/Ws would, I think, say that the BHA could not "*impose*" a restriction.

89. In Midland Mainline v Eagle Star Insurance Co Ltd [2004] EWCA Civ 1042, it was common ground that the actions of Railtrack in imposing emergency speed restrictions after the Hatfield rail disaster in 2000 were the actions of a "*competent authority*" under a denial of access cover: see [15]. The Cs observed that Railtrack was at the relevant time a private company (privatisation was in 1996 and renationalisation was in 2002). The U/Ws argued that the source of Railtrack's powers was statutory. Whether that is right or wrong, I was not greatly assisted by the fact that there had been agreement that Railtrack was a "*competent authority*", since that agreement meant that there was no discussion in the case of the reason(s) why Railtrack qualified.

90. I was also shown some overseas cases. They did not assist me greatly either. For example, "*competent public authority*" was held by the New South Wales Supreme Court in Cat Media Ltd v Allianz Australia Insurance [2006] NSWSC 423 at [41]-[43] to mean the authority "*with jurisdiction to deal with the specific events or occurrences*". But that case was really concerned with what the authority was competent to do. It was held that an authority with the power to suspend a license was not competent to close

or evacuate the premises.

91. In relation to the *ejusdem generis* and *noscitur a sociis* principles, the Divisional Court in FCA v Arch (supra) had some useful general guidance to offer at [68]-[70]:

"*68. For instance, if a clause in an insurance policy covers, or excludes, the risk of damage to a number of items, it is likely that the words used denote things of the same genus (ejusdem generis), and each word can take its meaning from the words with which it is linked or surrounded (noscitur a sociis). In Watchorn v Langford (1813) 170 ER 1432, the insurance policy covered "stock in trade, household furniture, linen, wearing apparel and plate". When the insured's linen drapery goods were destroyed in a fi re, the House of Lords held that the policy did not respond because the reference to "linen" must have been to household linen or linen in clothing, rather than drapery.*

69. A more recent illustration can be seen in Tektrol Ltd v International Insurance Co of Hanover Ltd [2006] Lloyd's Rep IR 38 where an insurance policy excluded liability for "erasure loss distortion or corruption of information on computer systems". Sir Martin Nourse (agreeing with Buxton LJ) noted that "loss" in this context was a reference to loss by electronic means, rather than the burglary of a computer, citing the maxim noscitur a sociis (at para 29). That case also involved consideration of the meaning of "malicious person" within another exclusion containing the phrase "rioters strikers locked-out workers persons taking part in labour disturbances or civil commotion or malicious persons". In that context, given the other categories of persons in the list, malicious person was held not to be a reference to a person who hacked in remotely to the computer systems in question (at paras 11 to 12).

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

92. I was referred to a further recent use of the rule in an insurance context: the decision of the Court of Appeal in Manchikalapati v Zurich Insurance plc [2020] Lloyd's Rep IR 77, [124]-[126]. In that case, it was confirmed that the clause "*Any claim or contribution to a claim where cover is available under another insurance policy, or where some other form of compensation or damages is available to You*" was not engaged just because a claim in damages could in principle have been made against a third party. They noted (at [126]) that "*a single species and general words may constitute a genus*".

93. Of course, in order for the *ejusdem generis* principle to play a role, it is still necessary to identify some common genus or characteristic: see *The Interpretation of Contracts* (8th Ed) at paragraph 7.144.

Discussion

94. I do not agree with the U/Ws that the word "*authority*" is meaningless. In combination with "competent", I would understand that word to refer a body (or person) with power and a role **in the relevant context** which goes beyond that of ordinary citizens; i.e. it means a party possessing the power to make decisions and enforce obedience or compliance. Context is important: at home, one might describe a parent as an authority figure; in the classroom, it might be a teacher.

95. The Cs are right to say that the use of this word in the context of denial of access distinguishes the actions of a protester blocking a road, from those of an "authority" such as the Highways Authority doing the same thing. This also seems to me to deal with the U/Ws' assertion that a commercial party which held intellectual property rights over a play and could exercise a veto over whether it could be performed might qualify (contrast the power of the Lord Chamberlain until 1968 to prevent the staging of plays generally in the UK, which undoubtedly made him an "authority" in that context).

96. Unless the context demands, it does not seem to me that the word "authority" necessarily implies an "organ of the state" or anything of that kind. Some of the U/Ws' submissions in this regard amounted to an attempt to read in the word "public" (or "statutory" – which was the word which was found in one of the other policies considered in the Gatwick Investment decision) to accompany "authority". That being so, it is perhaps noteworthy that the parties have used the words "*any **public** authority*" (emphasis added) elsewhere in the Policy, such as in the cover for extinguishment expenses and fire brigade ("*The insurance by each Item includes the costs charged by any public authority or emergency service …*"). Points like this about consistency across a policy only have limited force in the context of insurance wordings, which are often rather cobbled together. But the observation highlights that the U/Ws do need to point to some reason for reading the word "authority" in that way in this provision, since the word "public" is not actually found there.

97. In the end, it seemed to me that the U/Ws' first set of arguments all amount to different ways of contending for a *noscitur a sociis* or *ejusdem generis* construction. The problem for them is identifying any useful common genus or characteristic in this small sample of 3 examples.

98. The U/Ws focus on the powers of the three "bodies" identified in the list, but it seems to me that the powers available to the police are actually quite different in nature from those available to the Government, or indeed those of the British Army's Logistics Corps (which is an example of a body that the U/Ws say would fall within this wording). For example, the police have powers of arrest, but the Government (i.e. the Prime Minister) does not. The Government has, in one sense, the power to impose fines (e.g. by passing laws or promulgating regulations – even if the actual imposition of those fines might be by the Courts or others). Whether the police can impose a fine might depend on what laws have been broken. Analysing the similarities and differences in this regard could quickly become quite complicated.

99. If one seeks to bridge the gap by saying that these bodies all have coercive powers going beyond those of ordinary citizens, it seems to me that the same could be said about the BHA or the GBGB. Indeed, save that the ultimate source of the ability to impose a fine might be said to be the territorial jurisdiction of a nation state, rather than agreement and membership, the manner in which the Government might take action to prevent access to a property, and the manner in which an authority like BHA might do so, are very similar. Each would probably promulgate a restriction and then impose fines or some equivalent punishment if there was a failure to comply.

100. I struggle to see how the "coercive" powers available to the police or the British Government can be said to be sufficiently different in nature from those available to the BHA or the GBGB as to enable me to place the former in the common genus and the latter outside of it. As I say, I accept that the source of those powers might be said to be

different. But even looked at in that way, the difference between the power of a government to impose rules on those who choose to live within its borders and the power of an organisation to impose rules on those who choose to be members feels more like the subject matter of a political studies essay than a distinction that would be drawn by a reasonable policyholder seeking to understand when they would have cover.

101. As ever, context is all. For the reasons I have explained, I am doubtful as to whether the characteristics of the three entities which are specifically identified in limb (b) tell us what the parties meant by a "competent authority" here. Instead, it seems to me that one needs to look at the sphere in which the "authority" needs to be competent, namely taking action in response to danger or disturbance.

102. I do not accept the U/Ws' contention that a reasonable policyholder would not have expected the BHA or the GBGB to take action by reference to a danger or disturbance up to a mile away from the course or track. Given their industry-wide role and the modern approach to health and safety (in which criticisms might subsequently be levelled at a body which had information about danger to the public, and the powers to avoid it, but had failed to act), it seems to me a reasonable policyholder might very well expect such bodies to react to news of an unexploded bomb, a riot or a wildfire, or other such danger, by cancelling races. It is dangerous to try to identify "paradigm" scenarios in which a particular type of cover might be expected to operate. That risks replacing the parties' actual bargain with what the Court might expect them to have agreed: see Corbin & King Ltd v AXA Insurance UK plc [2022] EWHC 409 (Comm) (especially "*we do not construe contractual provisions by reference to such paradigms*", per Cockerill J at [178]). But, in any event, I do not accept the premise underlying this submission, to the effect that one would not expect an industry body such as the BHA or GBGB (or the FA, or Golf England) to involve itself in safety matters in relation to the public events over which it had a supervisory role. That is exactly what I would expect, even if I would anticipate that the police or others might also become involved if they did not perceive the risk to have been sufficiently addressed. Indeed, the BHA would come to my mind as a relevant authority for the purposes of insurance of a racecourse long before the British Army's Logistics Corps.

103. I should make clear that my expectation – as I seek to put myself in the position of the reasonable policyholder – is not premised upon a detailed understanding of the BHA or GBGB rules. It is only necessary to know (e.g. for the BHA) that (a) the membership of the BHA means signing up to rules which, in general terms, allow the BHA to cancel any race and (b) that the BHA perceives its role to be "*to govern, regulate, promote, administer and organise horseracing in Great Britain in every way in which the Company shall think necessary and desirable*". Anyone who knows that – which must include any racecourse operator and any insurer who underwrites such operators – would anticipate that the BHA might use its powers to cancel races if it identified a threat to public safety if they were allowed to go ahead. In this modern world, it would be surprising if it were not to react in that way.

104. In my judgment, that is really the context in which the words "*competent authority*" fall to be construed. If someone had asked the reasonable policyholder who understood a little about the regulation of horse and greyhound racing, which authorities might issue instructions with which the Cs would have to comply restricting the use of the racecourses in the event of a danger to public safety being identified in the area, I am confident that the BHA and the GBGB would have been on the list. Indeed, I suspect

that they would have been towards the top of that list.

Conclusion

105. I answer issue 2: "Yes".

Issues 8 and 8A: the "any one loss" limit

106. As set out above, it is no longer disputed that the "*any one loss*" limit applies per claimant by reason of the Policy's composite nature: see Gatwick Investment in the Court of Appeal and especially Flaux C's analysis at [165]-[167].

107. The remaining issues concern how that "*any one loss*" limit operates at a more practical level, having regard to the way in which the different Government, BHA and GBGB measures affected the different facilities operated by the Cs. Specifically, issue 8 asks:

> "*Is a separate limit under the Denial of Access Cover available for each Claimant individually:*
>
> *(1) Per relevant measure or action;*
>
> *(2) Per Premises; and/or*
>
> *(3) Per Affected Race."*

108. Issue 8A is:

> *"8A. As to issue 8(1), what were the relevant measures or actions. In particular:*
>
> *(1) Are the relevant measures or actions, as the Claimants say, some or all of the measures or actions identified in sections C2 to C4 and relied on in section C5 and Appendices 2 and 2B of the Amended Particulars of Claim; or*
>
> *(2) Are the relevant measures or actions limited, as the Defendants say, to (a) the 21 March Regulations (alternatively the Prime Minister's announcement of 20 March 2020); (b) the 26 March Regulations (alternatively the Prime Minister's announcement of 23 March 2020); and (c) the 5 November Regulations?*"

109. Although the parties approached the issues in a very different way, it seemed in the end to be agreed that there is an individual "loss" each time the operation of an insured peril caused an insured a "*Reduction in Gross Revenue … during the Indemnity Period*". It will be noted that both parties focussed much of their submissions on when the denial of access extension was triggered (i.e. when there was what might be called a "trigger event" for the purposes of that cover). In my judgment, they were right to do so.

110. Accordingly, the differences between them can be grouped under 3 main heads:

> 110.1. whether, at least for racecourses, there would be a new "loss" each time a race or race event (i.e. a series of races on a single day) was prevented from going ahead – the "per race" argument;
>
> 110.2. whether there would be a separate "loss" for each facility (racecourse / golf

course/ hotel), even if affected by the same order to close – the "per premises" argument; and

110.3. whether an order which **reduced** the extent of the restrictions imposed, or did not increase them significantly, would trigger a new "loss".

The Cs' submissions

111. The Cs make much of the fact that the parties did not impose any aggregation wording for the Denial of Access Cover limit. A limit on an insurance indemnity that applies "*any one loss*" is not aggregation of losses: it is the absence of such aggregation. It is not open to an insurer to say, on this wording, that a series of losses ought to be combined under a single limit because they share an originating cause or because there is a degree of unity as to locality, time and agency of the losses.

112. Each £2.5m "*any one loss*" limit envisages an entitlement to a further limit on each occasion that the denial of access extension was "triggered" and caused loss, meaning each occasion on which there was a fresh insured peril which had a material effect on the relevant insured's financial performance.

113. Where revenue was generated from hosting scheduled horse and greyhound races, the Cs submit that the limit applies separately for each race that was cancelled, or hosted without spectators or with limited spectators. The logic for that submission is that the loss under the Policy is the "*interruption of or interference with The Business carried on by The Insured at The Premises*", as made clear in the insuring clause. The Cs argue that this means that the concern is with identifying 'triggers' for cover and, if so, how many. By a 'trigger', the Cs say that they mean "*the matter or matters which give rise to a right to claim under a policy*".

114. An action by a competent authority is not itself a loss, unless it in fact interrupts or interferes with the Business at the Premises by preventing or hindering the use of the Premises. Accordingly, the Cs say, each scheduled race that was cancelled, or required to be conducted behind closed doors, was its own loss for the purposes of the denial of access extension. By way of corollary, when there were no races, there was no BI loss. The right to claim arose not upon the instruction being given by the authority, but when the first race would have happened, but could not. The Cs say that the U/Ws' approach involves treating the Government or other authority action as itself being the loss, and amalgamating all races and interruptions into one loss (in effect bringing in occurrence-based aggregation by the back door).

115. Alternatively, and, in any case, for the other types of facility (i.e. golf courses, hotels and a pub), the Cs argue that there was a fresh trigger of the cover, and hence a further loss, each time materially different restrictions on premises were imposed; i.e. each materially different restriction amounted to a separate trigger, a new interference, and a new loss. The Cs observe that pubs and restaurants etc. did not depend upon the hosting of scheduled events on fixed days in the year, so they accept that nothing equivalent to the "per affected race" approach should apply to them.

The U/Ws' submissions

116. The U/Ws start from the position that the Policy provides insurance (in relevant part)

against losses of gross revenue to the Business as a whole caused by the operation of the peril in the denial of access extension. They say that a "*loss*" is not identified (still less calculated) at a single point in time. Instead, one looks to the cumulative effect of the relevant restriction or hindrance on the Business as a whole over the relevant period.

117. Reflecting the need to look at the financial consequences upon the Business as a whole, the Policy also provides for "*Standard Gross Revenue*" to arrive at figures which "*represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage*". Account also needs to be taken of savings, again across the indemnity period.

118. The U/Ws make a series of points about what are said to be the consequences of the way a loss falls to be calculated, including that:

    118.1. one cannot assess whether there has been any "*loss*" until the end of the (three-month) indemnity period;

    118.2. the mere cancellation of a race or the fact that it is held subject to certain restrictions does not necessarily mean there has been any "*loss*". It could be, for example, that the cancelled race would have been loss-making. Or it could be that, although a particular race happened to be cancelled, that led to pent-up demand, such that many more people came to the next race later in the three-month indemnity period; and as such

    118.3. the Policy is completely different to a fidelity policy, where one can say the certainty that there has been a "loss" if the insured property is stolen.

119. The U/Ws suggest that the correct approach is:

    119.1. to take as the starting point the relevant interruption or interference with the Business, i.e. the insured peril;

    119.2. for each occasion where the peril operates, to assess whether there has been a reduction in gross revenue attributable to the operation of that peril over the relevant indemnity period. That assessment would take into account savings and any alternative trading; and

    119.3. any such reduction in gross revenue can be characterised as a "*loss*" and it is capped at £2.5m.

120. The U/Ws' position is therefore that there is no justification for applying the limit on a per premises or per affected race basis.

121. In relation to premises, the U/Ws assert that the Cs' argument assumes that one should treat different outlets or locations as independent profit centres which are independently insured. However, the coverage is provided for the "*Business*", which owns and operates **all** of the premises and locations.

122. The U/Ws pointed out that, although some of the Cs operate multiple facilities, most of them do so from a single location. For example, the 11th Claimant is identified as operating a racecourse and a hotel, but these are on the same site, as evidenced by the fact they have the same postcode. The U/Ws say that it would be meaningless to

describe these as separate premises.

123. Building on that, the U/Ws ask how is one to is supposed to identify a separate and distinct "*Premises*". They asked whether a bar located in a physically separate building from the grandstand at a racecourse is to be treated as separate "*Premises*".

124. The U/Ws also say that the alternative trading clause demonstrates that cover is approached by looking at the Business of each insured in the round, including considering whether any other "*Premises*" have been used to mitigate losses.

125. In relation to the "per affected race" argument, the U/Ws describe the Cs' approach as unprincipled and leading to absurd results, in that, if the relevant restriction relied upon resulted in the cancellation of, *e.g.,* a flat race meeting in the morning and a point-to-point in the afternoon, that would result in two losses. The U/Ws asked rhetorically: "why stop there: why not a new loss for every lost ticket sale?".

126. Turning to the individual lockdown measures, the U/Ws suggest that the so-called 'Stay at Home Instructions' given on 16 and 17 March 2020 did not "*prevent or hinder use of The Premises or access thereto*".

127. The U/Ws next argue that changes to the regulations which involved a **reduction** in the severity of the earlier restrictions are not relevant measures or actions because they did not prevent or hinder use of the Cs' premises. Those measures did not impose such restrictions, but rather alleviated them. They say that measures that reduce restrictions are unlikely to have been in the contemplation of the reasonable policyholder when considering denial of access because they would tend to reduce losses, not cause them. They contend for an analogy with the view which Butcher J formed when considering whether similar measures amounted to "occurrences" in Greggs Plc v Zurich Insurance Plc [2022] EWHC 2545 (Comm) (at [86]):

> "*Nor would I consider that an informed observer would have regarded changes which simply reduced restrictions as being separate 'single occurrences' for the purposes of the definition. They were such as would of their nature be expected to reduce losses not to lead to them and thus would not constitute the type of matter which would sensibly be regarded as a factor unifying different losses.*"

128. For some of the changes to the regulations, the U/Ws say that the changes were trivial and, on that basis, could not count as separate measures or actions. The example discussed with Mr Scorey orally was racecourses going from tier 3 to tier 4, resulting in the owners of horses being excluded when races were run behind closed doors.

Relevant authorities

129. Colinvaux's Law of Insurance (13th Ed) at 11-357 opines that "*The word 'loss' does not have a fixed meaning, and much will depend on its context*". The authors of that textbook refer first to Mitsubishi Electric UK Ltd v Royal London Insurance (UK) Ltd [1994] 2 Lloyd's Rep 249, in which the Court of Appeal held that the use of a single defective component (a cementitious board) to make 94 toilet modules constituted a "*single, albeit composite, head of loss*", such that the deductible (which applied to "each and every loss") was only applied once, not 94 times. However, the relevant clause in that case referred to "*each and every loss in respect of any component part which is*

defective in design plan specification materials or workmanship", which wording clearly suggests the possibility that a single defective component part might cause a composite loss.

130. In Pennsylvania Co v Mumford [1920] 2 KB 537, the plaintiff was the custodian of securities. It was insured against theft, with a limit for "*any one loss*". The Court of Appeal confirmed that there had been 41 losses, because the securities had been stolen by one employee on 41 separate occasions from four customers over seven years. It did not matter that they were all discovered on the same day (see, for example, p.547 per Warrington LJ).

131. In Glencore International AG v Alpina Insurance Co Ltd [2003] EWHC 2792 (Comm), one of a huge number of issues arising out of the collapse of Metro Trading concerned the operation of an $80m limit "*any one loss*" in the context of Metro Trading's misappropriation of oil. Moore-Bick J held (at [291]-[304]) that there was a separate loss on each occasion when oil was misappropriated, even though this could be said to be "*a single course of conduct repeated at frequent intervals over a period of time leading to what could be regarded as a single overall loss*" (see [299]).

132. The learned judge explained his approach at [292]:

"*There is no provision for aggregation in this policy other than whatever can be spelled out of the simple word "loss". This is a policy against physical loss and damage to goods, so in the ordinary way a loss within the meaning of the policy occurs whenever the goods insured are damaged, destroyed or lost to the insured. Thus, several unrelated fires affecting goods in storage would give rise to several losses, as would several unrelated thefts. The position may be more complicated if several losses are related — as, for example, where an arsonist sets fire to two adjacent tanks in the course of a single attack — and no doubt a certain amount of common sense has to be applied when deciding how many losses have occurred in any given case. Thus, if thieves enter a warehouse containing bagged goods which they remove using a number of different vehicles, pausing from time to time to bring up a new vehicle, it is difficult to see how that could be regarded as more than one loss.*"

133. He also explained (at [304]) that there might be a difference between the number of claims, or the number of causes of action, against Metro, and the number of losses:

"*The insurance in this case is against physical loss or damage to the goods. The fact that a failure to redeliver the missing quantity may give rise to a single cause of action in conversion (if the claimant chooses to pursue a claim in that way) does not mean that there has been only one loss within the meaning of the policy. In my view each time MTI drew oil from the bulk and disposed of it without authority a loss occurred.*"

134. His decision was followed by David Steel J in Dornoch Ltd v The Mauritian Union Assurance Co Ltd (No 2) [2007] EWHC 155 (Comm) which concerned a fidelity excess reinsurance with an "*any one loss*" deductible. An employee of the insured bank had, over 11 years, fraudulently transferred away client funds. It was held (at [31]-[34]) that each transfer of funds was a separate conscious act and hence "*undoubtedly represented an individual loss which could have been the subject of a separate claim (on a policy providing cover for losses of this nature)*" (see [33(2)]).

135. The result in Mitsubishi was different from that in Glencore or Dornoch, but, in each of the above cases, it might be said that the intellectual exercise is the same. One looks at the nature and terms of the cover to identify how an insured (or reinsured) loss is triggered. In Mitsubishi, it was using the defectively designed cementitious board to make various toilet modules. In Glencore, it was misappropriating the oil that triggered cover. If it had been property insurance, I agree with the Cs that a fire breaking out would have triggered the entitlement, and two fires breaking out in different locations would probably have been two losses, even if they happened on the same day, or were caused by the same arsonist.

136. In relation to the nature of and trigger for BI losses caused by COVID-19, in Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd [2022] EHWC 2548 (Comm), Butcher J dealt first with an issue as to the number of "triggers". He described this concept of a "trigger" (which was not a word used in the policy with which he was concerned) as "*a colloquial shorthand for the matter or matters which give rise to a right to claim under a policy*" and observed that it could "*be used to mean either the occurrence of insured perils, or the sustaining of loss as a result of the occurrence of insured perils*" (see [59]). He equated the former meaning (at [61]) with deciding how many "*Covered Event[s]*" there had been, which was the phrase used in the definition of reduction of turnover: "*the amount by which the Turnover during the Indemnity Period fell short of the Standard Turnover, less any costs normally payable out of the Turnover (excluding depreciation) as might cease or be reduced during the Indemnity Period as a consequence of the Covered Event*" (see [20]). To my eye, "*Covered Event*" in the Amlin policy before Butcher J was being used in a similar way to the word "*Damage*" in the definition of the indemnity period in the Policy. See paragraph 44 above.

137. Using the word "trigger" in that sense, for the first kind of denial of access cover (enforced closure), he held (at [68]) that the "trigger":

> "*…is the actual closure of all or part of an Insured Location under relevant compulsion or instruction. On this basis, the Policy is "triggered" in respect of each such closure, and the number of "triggers" is the number of Insured Locations so closed.*"

138. In relation to the "per premises" argument, the conclusion above is to be contrasted with the view Butcher J took of the number of triggers in a second kind of denial of access cover which was before him, which required the actions or advices of a relevant agency to "*have prevented or hindered the use of or access to Insured Locations*". In that context, he considered that the number of "triggers" was the number of actions or advices, not the number of premises. That was because (see [72]):

> "*The wording of the clause indicates that there will be a Covered Event if there is advice or actions from a relevant authority which prevents or hinders the use of or access to "Insured Locations". While, in accordance with General Condition 7(ii), the plural will include singular, it is nevertheless the case that the clause provides that particular actions or advice by a relevant authority, though affecting more than one Insured Location, will constitute "Prevention of Access". In those circumstances, the number of Covered Events under sub-clause (xii) should be regarded as the number of advices or actions rather than that number multiplied by the number of the Insured Locations to which those advices or actions related.*"

139. That reference to the plural ("*Insured Locations*") suggests to me that his answer might

have been different if the clause had required the actions or advices to "*have prevented or hindered the use of or access to an Insured Location~~s~~*" (my changes underlined).

140. It might be noted that, in the related case of Greggs plc v Zurich Insurance plc [2022] EWHC 2545 (Comm), Butcher J explained (in a slightly different context) why it did not work for Zurich to say that the fact that there was a single "Business" for the purposes of calculating a reduction in turnover must mean that there would be a single loss. He observed (at [40]) that the aggregation provisions envisaged that there could be:

"*…a plurality of losses which fall to be aggregated as one [aggregated loss]. Indeed, the logic of Zurich's argument in this respect would appear to be that there was one loss…even if there were two wholly distinct Covered Events at different shops, because the disruption to each will be reflected in the overall Reduction in Turnover of the Insured's Business. I regard that as clearly incorrect.*"

141. In relation to the arguments about the effect of revised orders or regulations, Butcher J made clear in Stonegate that he did not accept that there were multiple triggers if there was a "*reiteration, continuation or renewal of regulations which were, materially, to the same effect*". For the first type of denial of access "*The "trigger" is the enforced closure, and in my view there will be one such "trigger" unless and until the Location opens and is then closed again*" (see [69]). For the second type: "*Steps taken or advice given by government or a relevant agency which merely repeated or renewed an existing prevention or hindrance of access would, in my view, form part of one set of "actions or advice", and thus constitute one Covered Event*" (see [73]). In Greggs, he made clear that the announcement of a measure and the regulations giving effect to it will usually constitute a single "*Covered Event*", being actions or advice which caused the same prevention or hindrance (see [26]). In the other related case of Various Eateries Trading Ltd v Allianz Insurance plc [2022] EWHC 2549 (Comm), he observed (at [31]) that:

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

142. It should be recognised that this part of Butcher J's analysis of triggers and "Covered Events" preceded, and was not dependent upon, his discussion of the **aggregation** issues for each of these policy wordings (which primarily concerned the number of "occurrences").

143. In that latter context, however, he did comment on the point in time at which the assessment as to whether there was one occurrence was to be treated as having been conducted. He held that it would be "*the earliest time after the commencement of loss at which a reasonable person in the position of the insured would seek to decide whether there was one relevant occurrence*" (see [94]).

144. I am not convinced that this timing issue is of particular importance to my assessment,

since I am not concerned with aggregation in the sense of looking for a common cause, but rather with distinguishing between "one loss" and another loss. But I mention it because Mr Kramer relied upon Butcher J's observation that one of the primary functions of business interruption insurance "*is to provide the insured with funds during the interruption*" (also [94]), and suggested that this meant that it was not necessary to wait until it was possible to determine how much loss, if any, had been suffered, before deciding whether there was one or more losses. That submission about timing seemed to me to miss its target, as I will explain, but I do accept that it would be surprising if it were necessary to be able finally to quantify each claim in order to know how **many** different losses had been suffered.

145. The U/Ws placed reliance upon Butcher J's discussion in Greggs about whether announcements or measures "*which simply continued existing restrictions or made trivial changes*" would operate as separate single occurrences in the context of aggregation. He said (at [86]):

"*I do not believe that it conforms to the parties' intentions to have aggregation by reference to such matters, which effectively continued a status quo rather than marking any significant change to it. Nor would I consider that an informed observer would have regarded changes which simply reduced restrictions as being separate "single occurrences" for the purposes of the definition. They were such as would of their nature be expected to reduce losses not to lead to them and thus would not constitute the type of matter which would sensibly be regarded as a factor unifying different losses.*"

146. That is a different question to asking whether an informed observer would have regarded changes which reduced restrictions as amounting to new trigger events or new "losses". Of course, the answer to it might be the same.

147. In relation to the "per premises" argument, the Cs relied upon the decision of Cockerill J in Corbin & King (supra) where there was a limit expressed as "*any one claim*". Cockerill J noted that the premises were in different locations, such that a danger or disturbance "*would naturally give rise to two claims*" and commented further that "*The word "premises" points to each restaurant/ café and that distinction illuminates how a separation of interests may well operate – and that in turn points to separate limits. That then harmonises with the fact of different named insureds and the separate interests which underpin a composite policy*" (see [239]). The composite policy point does not work in the same way in our case, but the examples which the learned judge considered neatly illustrated how the same danger might result in interruption at two different premises. Her expectation that these "*would naturally give rise to two claims*" chimes with my own view.

148. In International Entertainment Holdings v Allianz Insurance [2024] EWCA Civ 1281, the Court of Appeal confirmed the decision of Jacobs J at first instance, which Males LJ summarised (at [48]) as follows:

"*…. the limit of £500,000 applied separately to each claim and that each closure of premises was a separate claim. To take as an example a policyholder with a theatre in Manchester and another in Oxford, the ability to claim for the closure of the Manchester theatre would depend upon proof of a relevant incident within the one-mile radius of that theatre, while the ability to claim for the closure of the Oxford theatre would likewise depend upon proof of a relevant incident within the one-mile radius of*

that theatre. That would be so regardless of whether the incidents in question were different in character (for example, an outbreak of Legionnaires' disease in Manchester and a student riot in Oxford) or the same (two cases of Covid-19, one in Manchester and one in Oxford, each of which, adopting the analysis of the Supreme Court in FCA v Arch, was a separate incident). There was nothing in the clause to indicate that the limit of £500,000 was intended to operate on a per-insured basis."

149. It might be noted that Males LJ was dismissive of the insurer's argument that the fact that the clause provided cover in respect of "*any claim resulting from interruption of or interference with the Business*" was important because "*each policyholder would have its own business, which might include some centralised costs, and that it did not make sense to speak of the business of the premises as distinct from the business of the policyholder*" (see [49] – [50]). He did not find that argument persuasive.

150. Males LJ did indicate that it was important that the Allianz policy did not draw any distinction "*…between those policyholders in the IEH group who own or operate only one venue and those who own or operate multiple venues. At the time when it was concluded, the policy did not even identify which subsidiary of IEH owned or operated which venue. So far as the policy was concerned, therefore, it was a matter of happenstance whether any particular subsidiary owned or operated more than one venue. To interpret the policy limit as applying separately to each policyholder rather than to each premises, when there is no clear wording to show that this was intended, would therefore be somewhat capricious*" (see [51]).

151. To the extent that there is an overlap between a "claim" and a "loss" in this context, therefore, Corbin & King and International Entertainment Holdings might be said to favour a "per premises" approach, especially since some of the Cs have facilities which are geographically separate.

152. Finally, in Unipolsai Assicurazioni SpA v Covea Insurance [2024] EWCA Civ 1110, the Court of Appeal was concerned with a policy of property catastrophe XL reinsurance, pursuant to which an insurer was seeking to recover in respect of payments made to operators of nurseries for BI suffered as a result of COVID-19. One issue concerned when a BI loss occurred (or first occurred). Flaux C explained (at [146]-[147]) that:

"*An "individual loss" first occurs when a covered peril strikes or affects insured premises or property and, when the covered peril which strikes the premises is the loss of the ability to use them (whether through damage to other property or premises or through a closure order as in the present instance) the individual loss occurs at the same point. It is immaterial for these purposes how the property or premises are affected and by what type of peril. The undisputed expert evidence was that market practice was and is to treat damage BI loss as occurring simultaneously with property damage and, like the judge at para 148(ii) I can see no basis for treating non-damage BI losses differently from damage BI losses…*

147. In other words, in all these cases, an "individual loss" only occurs once for the purposes of the Hours Clause, irrespective of how long the financial loss suffered continues for. It encompasses the entirety of the loss sustained by the original insured as a result of the relevant catastrophe striking or affecting the premises, irrespective of whether the relevant "individual loss" comprises physical damage losses, BI losses or

both."

153. He then explained the practical effect of this approach at [151]:

"*…the interference with the business of each nursery which occurred on closure on 20 March 2020 was functionally equivalent to each nursery suffering physical damage on that day. The relevant "individual loss" occurred on that day and not day by day for every day that the business interruption continued. The answer to the example which Unipol posited of the vacationing business proprietors who did not suffer immediate interference and only suffered an individual loss when they would have reopened but for the closure order, was the one which Covéa gave: the business would still only suffer a single individual loss on that later date rather than on a day-by-day basis.*"

154. This seems pretty clear to me. Whether one is dealing with damage or non-damage BI cover, a single individual loss can be said to have occurred once the business is interfered with by the closure, and that loss continues until the interference with the business comes to an end. The Court of Appeal appear to have considered that result to be consistent with the decisions of the English Courts concerning direct insurance (see [148]). I accept that both the policy wording and the context was different, but that decision does seem to me to offer important guidance as to the "shape" of a loss for the purposes of denial of access-type (or "non-damage") BI cover.

Discussion: stage 1 (the BI cover more generally)

155. It seems to me that one cannot jump straight to consideration of the denial of access extension. It is necessary to start by understanding how a loss would be identified, and a claim calculated, in the context of BI consequent upon property damage, which must represent the "base case" for the BI cover in section 2 of the Policy.

156. As the opening words of section 2 of the Policy make clear, the starting point is that damage occurs at the Premises and causes interruption or interference to the Business at the Premises. Let us assume, then, that there is a fire at one of the Cs' racecourses, which prevents a restaurant at the course being used for a period of time. To simplify matters, I will assume that this insured only has a racecourse, and no hotel or golf course.

157. In order to work out what the U/W will have to pay by way of indemnity, it would be necessary to identify the amount by which the (actual) Gross Revenue during the relevant indemnity period falls short of the Standard Gross Revenue.

158. The indemnity period starts from the date of the fire and continues until the fire stops affecting the results of the Business, which obviously might extend beyond the date of reopening of the restaurant. It is subject to a maximum indemnity period, which is not actually identified (for an individual insured) in the Policy. As I have explained, the parties understood something to have been agreed about this, and to have been contained in a missing spreadsheet. However, it seems clear that the maximum indemnity period was different for different types of facility, and that racecourses would (probably) be subject to a maximum of 12 months.

159. The Standard Gross Revenue would use the relevant insured's income for work done and services provided in the course of the Business at the Premises, during the

equivalent period in the previous calendar year. If we assume that the fire happened on 1 May 2020, the restaurant reopened in June 2020 and everything was back to normal in terms of restaurant receipts by 1 July 2020, the comparison would be between the income received between 1 May 2019 and 1 July 2019 and that for between 1 May 2020 and 1 July 2020. I would assume that this would be a comparison of the income for the whole facility (i.e. the racecourse), not just the individual restaurant.

160. It should not matter, however, because the figures for 1 May 2019 to 1 July 2019 would be adjusted for business trends and other circumstances so as to ensure insofar as possible that the comparison revealed only the impact of the physical damage. If the restaurant, or the racecourse as a whole, was experiencing declining attendances in 2020 unrelated to the fire damage, that ought to be factored out (i.e. the figures adjusted so that falls outside the indemnity).

161. In relation to the limits of cover for damage related BI, the relevant provisions are not easy to follow. Mr Kramer suggested that the only limit was the aggregate limit across all of the facilities with the same maximum indemnity periods. I have to say that this seemed odd to me. For a start, it would make limited sense to have only a per loss limit based upon the declared annual gross revenue for all of the racecourses dotted around the UK. Only an Armageddon scenario would be likely to cause physical damage to all of them. After all, the limit of liability provision contains an automatic right of reinstatement (with an undertaking to pay a reinstatement premium), such that the limit (whatever it is) must only apply to a single loss. I suspect that the intention here was that the limit would be the figure for the particular facility, as declared in the lost Schedule-like document. But I accept that this may be controversial and ultimately it does not affect any of my conclusions.

162. Turning to the points which are more directly relevant to the issues with which I am concerned, it seems to me obvious that one would carry out, in effect, a single calculation covering the period from 1 May 2020 to 1 July 2020. You would not calculate the indemnity race by race or meeting by meeting. That is logical, because the differential has to be calculated across the whole indemnity period.

163. An interesting scenario for our purposes would involve some further insured damage being suffered some time after the fire. Imagine that, in late May 2020, a further (unrelated) fire took out a stand close to where the restaurant was situated. How would that be dealt with under the Policy?

164. The starting point must be that there would be a new insured event: new damage, causing additional interruption to the Business. To my mind, that would require a new loss calculation, with a new indemnity period. Importantly, when it came to identifying the Standard Gross Revenue for the second calculation, it seems to me that it would be necessary to adjust the figures to reflect the fact that damage had previously been suffered to the restaurant. Unless an adjustment was made for that purpose, one would not be arriving at the results which would have been obtained "but for" the second fire, as the clause requires.

165. The corollary is that the calculation in respect of the first fire must continue beyond the occurrence of the second fire, at least unless and until it can properly be said that the first fire is no longer affecting the results of the Business. There might be some quite difficult questions about how this would work if the second fire genuinely rendered the

first fire irrelevant – e.g. by requiring the whole area, including the restaurant, to be closed for a period extending beyond the date in June when the restaurant would have reopened. Of course, if (as in this example) the U/Ws would be providing an indemnity for the consequences of both fires, it might make no practical difference how the calculations are performed.

166. The short point, however, is that one would expect there to be two loss calculations in this scenario, to reflect the two insured events (fire damage leads to interruption to business), and hence the two different indemnity periods.

Discussion: stage 2 (loss = loss calculation)

167. It will be apparent that, at least in the context of damage-related BI, I would find it difficult to avoid treating each new insured event (i.e. physical damage causing interruption to business) as requiring a fresh loss calculation with a new indemnity period. The two aspects go together, because a loss calculation requires the identification of an indemnity period and the indemnity period starts from the date of damage. This leads me down a very similar path to that taken by Butcher J in Stonegate: looking for "triggers" or the occurrence of an insured event.

168. I am conscious that the Supreme Court in FCA v Arch (supra) made clear (at [215]) that the "*the interruption is not part of the description of the insured peril*". Rather, the interruption to the business represents "*the nature of the harm to the policyholder's interest in the subject matter of the insurance for which an indemnity is given if it is proximately caused by an insured peril*". But it does not seem to me to follow that a "loss", in the particular context with which we are concerned, has to be something completely different from a trigger event or the occurrence of an insured peril.

169. Rather, the "loss" is the immediate consequence of that occurrence or trigger event. It is what happens next and what results from that trigger event: the interruption to the business caused by the operation of the insured peril. Where the quantification of that interruption is arrived at by looking at differences in gross revenue over a defined period, all of the consequences of that interruption must form part of a single loss. It would not be meaningful to suggest that each lost sale of a ticket, or meal, or drink was a separate loss. All of those things, if resulting from a single trigger event, will form part of a single loss.

170. As such, I found it helpful to think of a "*one loss*" here as meaning something akin to one "loss calculation", in the sense of the activity that would need to be performed after an insured risk caused an interruption, in order to determine what, if anything, was owed by the U/Ws.

171. In the context of BI consequent upon property damage, as I have described, it is clear that the loss adjuster or assessor compares past and present gross revenues during the relevant indemnity period. If there was a new trigger event, there would need to be a further, and separate, calculation, with its own indemnity period. Each would be a separate "loss" for the purposes of the reinstatement provision in the limit clause. It seems to me that the same would be true if the denial of access extension was triggered, and then triggered again by a new "action" preventing or hindering, in some new way, the use of the premises. There would need to be a further, and separate, loss calculation, involving a new indemnity period and a new limit of indemnity.

172. A "loss", or "loss calculation", as I define it here, is therefore not quite the same as a "trigger event" or a "claim", although it seems to me that there would be a high degree of overlap in a Venn diagram. You could have a trigger event, but no loss. You could have a loss, but no claim. But in the ordinary course, the trigger event, loss and claim will be like 3 dominos in a line, falling one after another, such that it might be difficult in practice to identify much of a gap between them.

173. In the particular context of BI cover, then, it seems to me that the meaning of "one loss" is arrived at by identifying a trigger event and then understanding how the amount of the indemnity payable as a result of the interruption which is caused by that trigger event will be calculated (i.e. by reference to a comparison of past and present revenue over an indemnity period). That is different from how one might understand the same words in a policy covering loss of oil, or thefts by employees. But that results from the different nature of the cover, not from any difference in the approach taken to construing the policies.

174. In terms of timing, I should make clear that identifying a new loss calculation does not require the calculation to have been fully performed. To put it another way, it must be possible to carry out a loss calculation and discover that (because of savings made, or alternative earnings, or whatever) there was in fact no loss for which the Cs would be entitled to an indemnity. That would not affect the fact that, if the calculation **had** shown a loss, that loss would have been subject to its own limit of £2.5m. It is the occurrence of a fresh trigger event and hence the commencement of a new indemnity period, which necessitates a new loss calculation and which seems to me to result in a further "loss" for the purposes of the limit. This is why Mr Kramer's point about timing does not ultimately assist him. The fact that the loss must ultimately be quantified over the whole indemnity period does not affect the parties' ability to identify that there has been a trigger event, and perhaps to assess a sum which might be paid on an interim basis. But it does make it difficult to suggest that each individual lost ticket sale, or day of lost ticket sales, represents a separate and freestanding loss.

Discussion: stage 3 (per affected race)

175. As such, I agree with much of the chain of reasoning put forward by the Cs, but part company with them before we reach the end of that chain. It seems to me that they are right to say that one is concerned to identify a trigger event – the operation of an insured peril – which results in interruption or interference with the business. But once that has been identified, the loss calculation will seek to capture all of the financial consequences of that insured peril, continuing until it ceases to have an effect, or the maximum indemnity period comes to an end.

176. I accept, having regard in particular to Unipolsai, that the interruption or interference, and perhaps also the preventing or hindering of use which causes that interruption, might not commence until the point at which the premises would otherwise have been used. If the action by the authority prevents access to the premises from 1 April 2020, but they would not have been used in any event until 1 May 2020, it is arguable that there is no actual preventing or hindering until 1 May 2020 and hence that the relevant trigger event occurs on, and the loss calculation runs from, that later date. However, it does not seem to me to follow that, if the premises would have been used on 1 May, and then again on 8 May, and access to the premises continues to be prevented by the authority throughout that period, that the initial trigger event ceases to have effect on 2

May and there is a new loss starting on 8 May.

177. At the risk of repeating myself, this seems to me a misunderstanding of how the "*Indemnity Period*", and hence the loss calculation, operates. The "*Indemnity Period*" is "*the period from the time the Damage occurs until the results of The Business cease to be affected by the Damage but not exceeding the Maximum Indemnity Period stated in The Specification*". Ignoring the maximum indemnity period for now, in the context of physical damage, as I have explained, the loss calculation would compare past and present gross revenue until that physical damage ceased to affect the results of the business. In my example above, if a restaurant at a racecourse was damaged by fire, the loss calculation would run from the date of the fire until the damage stopped affecting gross revenue. Nobody would suggest that the fire damage stopped affecting the gross revenue at the end of each race meeting, such that a new indemnity period begins when there is a further race meeting the next day or the next week. On the contrary, the only relevant "*Damage*" would be that fire damage, which would continue to affect the results of the Business at least until it was repaired.

178. It seems to me that the parties would expect the prevention of access extension to operate in much the same way. If the police were to instruct that a particular stand could not be used as a result of some local danger or disturbance, and that instruction were to remain in place for several weeks or months, there would be a single trigger event and a single loss calculation comparing past and present gross revenue over that period of weeks or months, even if the impact on the present gross revenue happened to be felt more keenly[6] on particular days when there would have been races, rather than evenly across that period.

179. To the extent that the Cs' argument to the contrary amounted to a technical point about the triggering of an insured peril in the context of a prevention of access extension, my answer is that reading "*the Damage*" in the definition of the indemnity period as referring to the triggering of an insured peril is intended to make sense of that wording, and to bring it into line with operation of the indemnity period in the context of physical damage. It is not intended to make a nonsense of it, or to cause it to operate in a completely different way.

180. If the Cs were correct that a temporal break in their need for the premises results in the commencement of a new indemnity period and hence a new loss calculation, I struggle to see why they stop at subdividing by reference to individual races or race meets. Why is each new day at the golf course, or each meal service at the restaurant, not a new loss? The answer Mr Kramer gave was that it was a question of degree, which he acknowledged was not attractive. He said that there was a difference between a restaurant operating each day and a racecourse holding a festival one month and then nothing at all until the following month. I struggle with the idea that deciding whether something is a new "*loss*" depends on taking a view of the extent of the temporal break. That would be much more subjective and uncertain than asking whether there had been a new trigger event, such that there was a new indemnity period and a need to start a fresh loss calculation.

181. For completeness, I observe that the case on which Mr Kramer primarily relied for his "no loss until there is interference" analysis, Unipolsai, actually seemed to me to

[6] But probably not exclusively: one might expect there to be advance ticket sales, race entry fees and the like.

confirm that, once you have a trigger event resulting in interference, that loss continues as a "*single individual loss*" until the trigger event stops having any effect, rather than there being further separate losses suffered day by day. That is probably the authority which bears most directly on this issue and it points firmly away from the Cs' "day by day" approach to business interruption losses.

Discussion: stage 4 (per premises)

182. At first sight, one might equally ask where in the Policy the Cs find the idea that a separate loss is felt at each individual facility, assuming that multiple facilities are affected in exactly the same way by a single "action" by an authority. The definition of "*the Business*" would appear to embrace everything which an individual insured (i.e. each of the Cs) might ever do, from running horse races to holding car boot sales. The "*Premises*" are similarly widely defined, as anywhere owned, occupied or used by an insured. As I have indicated, the indemnity appears to be calculated by reference to the (past and present) revenue from the whole of the Business. There was a clause which provided in certain circumstances for the trading results to be ascertained by looking separately at each "*department*", but there is nothing equivalent for different facilities or different premises.

183. Building on this, the U/Ws' best point, I would suggest, was their rhetorical question: "why stop there?". If the impact on the "Business" of an insured can be subdivided into different losses by reference to different parts of a single site, why stop at dividing into three (racecourse/ hotel/ golf club) to arrive at three losses? Why not subdivide further by reference to the various bars at the racecourse, or subdivide the bar from the restaurant at the hotel, or the bar from the pro-shop at the golf club? By way of more specific example, it is agreed that the 4th Claimant's racecourse at Fontwell Park has eight food and drink outlets: why not treat each of these as a separate "Premises" which are to be the subject of a separate loss calculation and hence a separate loss?

184. The Cs' answer was the Spreadsheet. They said that the parties had deliberately chosen to divide up these BI risks by reference to (a) racecourses (b) hotels and (c) golf clubs, and that it is clear from this that they were intended to be treated separately when one performs a loss calculation. As I have explained, Mr Scorey insisted that I could not make any assumptions about the role of the Spreadsheet, or anything like it, in the placement of the Policy.

185. I have accepted that I need to be cautious here, because there has not been a complete investigation of the factual position. Fortunately, it does not seem to me that I need to go further than to say that (as was clearly common ground before the Court of Appeal) the parties can be seen to have divided up their facilities so as to separate racecourses/ tracks from golf courses and from hotels, with different maximum indemnity periods applying to the three different types of facilities, and their estimate gross revenues also being divided up (so that each can be included in a different aggregate amount), rather than treated as part of a single "Business" for each of the Cs.

186. With that in mind, it is helpful to consider how the loss calculations would be performed if (reverting back to the base case of BI consequent upon damage) both a racecourse and a hotel operated by one of the Cs were damaged by the same fire. On the basis that different maximum indemnity periods would apply to different types of facility (see for example paragraph 48 above), it seems to me that it would be necessary to have a

separate loss calculation for each of the facilities, using a maximum indemnity period of 12 months for the racecourse and 36 months for the hotel. As I have said, I suspect that the limit of liability is intended to be arrived at by reference to a declared turnover figure for the particular facility, but, even if I am wrong about that, the aggregate figures are undoubtedly separate for the different indemnity periods. It follows that, as a matter of legal analysis, the applicable limit would be different for the racecourse as compared with the hotel, even if it is hard to imagine the aggregate limit ever being reached as a result of a single example of physical damage.

187. The need to perform separate loss calculations for different facilities in the event of physical damage causing BI makes clear that it is not an answer for the U/Ws to say that each of the Cs only has one "Business", and hence any fall in revenue would have to be captured in a single calculation, even if referable to different facilities with different maximum indemnity periods. As it did in Greggs, that argument based on the wide definition of the "Business" ultimately proves too much. It can be seen to produce the wrong answer in one context, which undermines one's confidence in its usefulness more generally.

188. If a separate loss calculation for each affected facility is going to be necessary when performing loss calculations for "ordinary" BI cover, one might expect the same to be true when the denial of access extension operates. If an action by the police prevents the use of both the racecourse and the hotel, the starting point is that one would expect to see the same number of loss calculations as when the same fire caused physical damage to both. I accept that, in the context of limb (b) of the denial of access extension, the maximum indemnity period is limited to 3 months regardless of the nature of the facility. But that does not affect the fact that, absent some suggestion in the wording to the contrary, one might anticipate that the subdivisions would be the same for damage and non-damage BI. Nor, perhaps more importantly, can it be ignored that the only way to apply the aggregate limits in the event of a number of facilities being affected during the policy year would be to carry out separate calculations for the each of the different facilities. If one simply arrived at a single loss figure for the indemnity payable to Lingfield Park Limited (Claimant 12) in respect of the Business covering the racecourse, the hotel and the golf course, against which of the aggregate limits would that single loss figure be applied?

189. Turning to the authorities, the decision of Butcher J in Stonegate is instructive, even though he was counting "trigger events", rather than "losses". He arrived at different answers to the same question – i.e. whether (at the risk of oversimplifying it) one multiplies the number of Government instructions by the number of premises – for the two different formulations of denial of access cover with which he was concerned. In doing so, he illustrates the importance of the precise wording of the "trigger", such that there is one result if the trigger "*is the actual closure of all or part of an Insured Location*" and another if it is "*advice or actions from a relevant authority which prevents or hinders the use of or access to "Insured Locations'*"". In the first, the emphasis is on the "*Insured Location*" (singular); in the second it is on the "*advice or actions*".

190. Carrying out the same exercise with paragraph (b) of the denial of access extension in the Policy, it seems to me that much depends on how one reads the repeated reference to the defined term "*The Premises*". As well as being defined in very wide terms, that word "premises" has an identical singular and plural form, so we appear to be deprived

of the assistance provided in Stonegate by that distinction between "an insured location" and "insured locations". I accept that one could read those references as always meaning each and every one of the places owned or used by the relevant insured. But my own reading is that each is a reference to the same physical place: i.e. somewhere which qualifies as one of "*the Premises*", without necessarily being all of them.

191. In particular, when the denial of access extension says in its opening words "*…interruption of or interference with The Business carried on by The Insured at The Premises*", I suggest it means the Business as carried on at the particular place the use of which (for the purposes of paragraph (b)) has been prevented or hindered by the action of the relevant authority. After all, if it meant the Business carried on at each and every place occupied or used by the insured, it would be meaningless and circular; amounting to saying "*…interruption of or interference with The Business carried on by The Insured at [wherever the Insured carries on the Business]*". The reference in those opening words to the place at which the Business is carried out does not seem to me to be mere verbiage. The essence of this extended cover is denial of access, not just actions by the police and others which happen to interfere with the insured's business.

192. The wider reading of "the Premises" in paragraph (b) would mean that, if the action affected the use of some other location owned or used by the insured (e.g. because of an impact on the insured's brand), despite there being no actual prevention or hindering of the use of the specific building which happened to be within a one mile radius of the danger or disturbance, there would still be cover. It seems to me obvious that the idea behind the provision was that the danger or disturbance needed to be within one mile of the specific place the use of which was being prevented.

193. In order to make it work as intended, therefore, one needs to read the two references to "the Premises" in paragraph (b) as referring to the same physical address. That being so, I suggest that it is also logical to understand the reference to "the Premises" in the opening words of the denial of access extension as meaning the same address.

194. I do not see any difficulty with reading "the Premises" in this narrower way: i.e. as meaning the specific one of the properties occupied or used by the insured which happens to be relevant in that particular context, rather than meaning all of them. To give another example of this, the words "*elsewhere than at the Premises*" in the Alternative Trading clause must mean elsewhere than the particular premises where the Business has been interrupted. After all, any location where goods were sold or services were rendered by the insured or others on their behalf would qualify as "the Premises". But that wide reading would make it impossible for the Alternative Trading clause to operate; there never could be any alternative trading as described in the clause, because it would be impossible for the insured to sell goods or render services somewhere other than at a place which they are using for that purpose.

195. For these reasons, I would read paragraph (b) as concerned with the prevention or hindering of use by the insured of a particular physical location which is within one mile radius of a danger or disturbance. In other words, it means affecting the use of "an" or "the" insured location (singular), not any and all insured locations (plural). Following Stonegate, that suggests that there will be a separate trigger event when each different physical location is affected in this way, even if they are affected by the same action. For the reasons I have already given, it seems to me that there is a high degree

of overlap between a "trigger event" and a "loss" or "loss calculation" here. The trigger event is the "Damage" which starts the indemnity period and hence necessitates a new loss calculation.

196. I have also suggested that there will be a high degree of overlap between the number of "losses" and the number of "claims". I acknowledge that an insured might choose to bring a "claim" which comprised several losses. But, in Corbin & King and International Entertainment Holdings, the insureds had an incentive to bring as many "claims" as possible, in order to take the benefit of multiple limits. In that scenario, it is difficult to see why the insured would not make a separate "claim" for each separate "loss".

197. I have already explained why those cases strongly suggest that, if there is denial of access to two different geographical locations, there will usually be two separate "claims", even if the originating cause of the denial of access is a single incident or action. See generally paragraphs 147- 151 above. I draw attention in particular to Males LJ's rejection of the argument premised upon a wide definition of the Business in International Entertainment Holdings.

198. The U/Ws would point out that arguments about geographical separation work better for the few among the Cs who own facilities which are in different postcodes, as opposed to (say) a racecourse, hotel and golf course on the same large site. However, once one recognises the need to distinguish between different facilities owned by the same insured if there is a sufficient degree of geographical separation, the U/Ws find themselves on a slippery downhill slope. What degree of separation is required?

199. There is an analogy to be drawn with the observation made by Males LJ in International Entertainment Holdings at [51]: "*So far as the policy was concerned, therefore, it was a matter of happenstance whether any particular subsidiary owned or operated more than one venue. To interpret the policy limit as applying separately to each policyholder rather than to each premises, when there is no clear wording to show that this was intended, would therefore be somewhat capricious*". In our case, the Policy reveals that the parties are dividing up their venues for the purposes of the BI cover into three sets – apparently made up of racecourses, golf courses and hotels respectively – regardless of the extent of geographical separation between them. That being so, it would seem capricious to interpret the policy limits as operating differently depending on geography. There is no sign that that was what was intended.

200. As such, I conclude that the "any one loss" limit is intended to apply per premises or facility; i.e. per racecourse, hotel and golf course, following the way in which the parties have in fact divided up such facilities for the purposes of identifying maximum indemnity periods and aggregate sums insured (as to which I make no finding).

201. It is presently unclear to me how this logic would operate for the two claimants who are said to use, in effect, the facilities of the others (i.e. the 21st and 22nd Claimants). I do not understand enough about how their businesses work, or how losses were suffered, to feel confident about expressing a view as to whether there would be a separate triggering event and a separate loss calculation for every place at which they operate. It is not clear how they are dealt with on the Spreadsheet and, more importantly, I do not know into which aggregate figure(s) their estimated gross revenue is said to fall. If it was not divided across the different categories of facilities, that might suggest

that the parties intended a different approach to loss calculation to apply to those Claimants.

202. Mr Kramer suggested that I put those two insureds to one side for now and accept that more information would be needed before any useful conclusions can be reached about how the "per premises" analysis ought to operate in their cases. I am going to accept (gratefully) that suggestion and make no findings about them, save as flows inevitably from what I have already said.

Discussion: stage 5 (relevant measures or actions)

203. Once this stage was reached, there seemed in the end to be rather less dividing the parties than appeared at first sight. It is useful to recap the key concessions made by each:

    203.1. the U/Ws accepted that any change to the regulations which resulted in a "material" tightening of the restrictions imposed on the use of a particular premises amounted to a new trigger event and a new loss;

    203.2. the Cs' accepted that, where the actual restrictions on the use of the premises remained unchanged, there was no new loss, even if there was a new "action" by an authority (in the sense of a change to the applicable regulations or instructions).

204. I should add that neither party suggested that the details of the regulatory arrangements mattered: e.g. how regulations happened to be imposed, revised or renewed. It was agreed that we are interested in the substance of the restrictions imposed. It was agreed (for example) that the announcement of the first lockdown by the Prime Minister and Welsh First Minister on 23 March 2020 was not a separate measure from the legal enactment of that instruction in the regulations promulgated on 26 March 2020.

205. There were perhaps three remaining areas of disagreement in this context. First, there was an issue as to whether the instruction by the Prime Minister to stay at home on 16 March 2020 was a relevant measure or action. Second, the parties disagreed as to whether a new set of regulations which **reduced** the overall level of restrictions could give rise to a new loss. Third, the U/Ws argue that any change to the level of restrictions must be **material** in order to trigger a loss, and that many of the supposed increases in restrictions did not pass that test.

206. To put some meat on those bones by reference to one example used by the Cs: Newcastle Racecourse (or High Gosforth Park Racecourse) is operated by High Gosforth Park Ltd, one of the Cs. The Cs describe the stages through which the restrictions passed in 2020. I can adopt that description because the factual content is not controversial (even if the analysis is):

    206.1. first, there was the instruction by the Prime Minister to stay at home on 16 March 2020, asking people to stop non-essential contact, stop all unnecessary travel, avoid public venues, and start working from home where possible. As I say, there is a dispute about whether that amounted to what I am calling a "trigger event" – i.e. an action by a relevant authority which prevents or hinders use of, or access to, the Premises;

206.2. then there was the BHA closure instruction on 18 March 2020, followed by the first lockdown starting on 23 March 2020. Apparently, this combination resulted in the cancellation of 8 races in Newcastle on 20, 25, 27 and 30 March, 4, 10 and 16 April, and 1 May 2020. It is accepted that the second was a trigger event and, in the light of my finding above, it would appear to follow that the BHA instruction must qualify too;

206.3. on 1 June 2020, the regulations (in England) were varied to permit the resumption of elite sporting activities. However, the BHA gave instructions requiring that these restarted races take place only behind closed doors with no live spectators. The U/Ws say that, overall, this involved a **reduction** in the extent of restrictions. The Cs appear to accept that that is true, but say that does not matter: it was a new instruction which amounted to a restriction on the use of the racecourse; and

206.4. regional restrictions meant that some English racecourses opened for some spectators from 2 December 2020 (and some moved between tiers of restrictions during December 2020). Newcastle Racecourse was put in Tier 3 restrictions (no spectators save for owners), but on 31 December 2020 it moved to Tier 4 restrictions (no spectators at all, including owners). I understood the U/Ws to argue that this added restriction (i.e. Tier 3 to Tier 4) did not qualify as a trigger event because the change (i.e. no owners allowed to attend) was not material.

207. The U/Ws' basis for rejecting the instruction by the Prime Minister of 16 March 2020 as a trigger event was explained orally by Mr Scorey as follows:

> MR SCOREY: My Lord, no. The issue here is when one moves on to the later restrictions which were capable of hindering or stopping the use, that is one thing. Here, this is akin to the Government saying, "Please don't do it, but of course you can if you really want to" So the analogy is if one has a police cordon that blocks off a road: no debate, that is a restriction on your access. If we have a police car that says: the road is still open, we would rather you go round the block, but if you want to go down here, you can, that is not a restriction on the use of the property.

208. I do not agree. Limb (b) of the denial of access cover requires only an "*action*" by a relevant authority (and there is no dispute that the Prime Minster qualifies as such an authority). The nature of an "*action*" is not described or limited, save only by reference to its effect: it must prevent or hinder use of the Premises. The paragraph does not require an order or a prohibition. It seems to me obvious that the Prime Minister's instruction hindered the use of the Newcastle Racecourse (or at least would have done if there had been any races scheduled). It is likely to have meant that fewer people went there (indeed, that could be described as its purpose), which amounts to hindrance in the use of those premises: see FCA v Arch in the Supreme Court at [153].

209. To engage directly with the example used by Mr Scorey, I take the view that paragraph (b) of the denial of access extension would be engaged if, as a result of some local danger, the police were setting up a cordon and discouraging the public from crossing it on safety grounds, even if they were not formally prohibiting anyone from doing so. Giving advice to the public in that way still amounts to an "*action*" by the police. It may not "*prevent*" use of the Premises, but it would (or at least could) hinder that use.

210. I therefore take the view that the instruction by the Prime Minister of 16 March was a trigger event. If it in fact caused any interruption or interference to the business carried on at (say) Newcastle Racecourse, there would need to be a separate loss calculation in respect thereof.

211. Turning to the second controversial area, I am not persuaded that an instruction or regulatory change which **reduces** the extent of the restriction on the use of the premises would qualify as a trigger event. In my judgment, there needs to be prevention or hindering of use as compared with what was possible immediately before.

212. I accept that it is possible to read it as a requirement only that the "action" prevent or hinder use in an absolute sense; i.e. that it suffices if it hinders any use which hypothetically might have been possible, even if that use had not in practice been available immediately before the "action" is taken. But that does not seem to me the natural reading of a provision of this kind. I would read the words of the denial of access extension as being concerned with **actual** interruption or interference and **actual** prevention or hindering, which can only sensibly be identified by asking "what would have happened, but for this action?".

213. If that were not so, I struggled to follow the logic for the Cs' concession that a new instruction or order which does not alter the extent of the restrictions on use was not a trigger event. If any action which might be said (ignoring the existing regime) to prevent or hinder use of the premises amounted to a trigger event and required a new loss calculation, I could not see why an action would not also have that effect if the regime was unchanged. If you must ignore the existing restrictions, then surely it makes no difference whether the existing restrictions remain unchanged, or whether the effect is that those restrictions are reduced?

214. My conclusion is buttressed by consideration of how I would understand the loss calculation to be carried out in scenarios involving more than one trigger event. I dealt at paragraphs 163 - 166 above with the scenario where the fire affects a restaurant at the racecourse and then another fire damages one of the stands. I have suggested that, in such a case, there would be a fresh loss calculation which takes into account the impact of the first fire and that the loss calculation for the original damage would continue (subject to the maximum indemnity period) until the first fire was no longer affecting the results.

215. My expectation was that the analysis would be broadly similar in the context of non-damage denial of access. For example, if an order by the police prevented access to the restaurant, and then, while that order remained in place, the police also prevented access to the adjacent stand, it seems to me that the loss calculation for the first order would take into account **all** of the consequences of the first order. It would not artificially stop at the point when the second order was given and require the second calculation to be performed as if the first order had never been given. The calculation in respect of the increase to the restrictions (i.e. preventing access to the adjacent stand) would have to adjust the standard gross revenue to reflect the fact that the first order already meant that the restaurant was out of use, else there would be double-recovery.

216. Mr Kramer agreed with that analysis in respect of BI premised upon physical damage, but suggested that it was different for non-damage BI, or at least different when the two orders had a common cause (e.g. COVID-19). He submitted that this was a consequence

of the decision of the Supreme Court in FCA v Arch (e.g. at [284]) that "*the trends or circumstances for which adjustments should be made do not include trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the Covid-19 pandemic*". I do not agree. That aspect of the decision can be seen to be a product of the need to construe clauses forming part of the machinery of quantification consistently with the insuring clause, and hence "*they should be construed so as not to take away the cover provided by the insuring clauses*" (see [262]). That is not a concern in the scenario with which we are presently concerned. There is no doubt that the effect on the turnover caused by the first order will be included in a loss calculation; the only question is whether it is included in the first or the second.

217. Indeed, if one were to take the words of the Supreme Court entirely literally in the context of a series of **increasing** restrictions imposed by the police, all supposedly arising out of the same "originating cause", the result would be double or treble recovery, as multiple loss calculations are performed for these overlapping time periods, with each ignoring all of the restrictions already imposed by the previous orders. Mr Kramer suggested that the answer was that the indemnity period in respect of each order came to an end when the next was put in place, to prevent double-recovery. That seemed to me an unprincipled solution, unless the new order can always be said to end the impact of the first order. If all it did was add some further restrictions, that argument would not work. If necessary, I would suggest that COVID-19 should not be treated simplistically as a single "originating cause" over a prolonged period. Rather, the underlying cause of each relevant instruction was the extent of the danger as at the time of that specific instruction.

218. In the end, I repeat that the issue as to whether there is a new trigger event and the need for a new loss calculation seems to me to depend on whether limb (b) of the denial of access extension tests whether the use of or access to the Premises has been prevented or hindered by comparison with (a) the actual situation immediately before that action is taken, or (b) what might be described as the hypothetical optimal situation for those premises. My reading is that it is generally the former, rather than the latter, for two reasons:

    218.1. first, for the reasons explained, that seems to me to fit better with the manner in which the successive loss calculations should be performed: i.e. adjusting for the existing restrictions which result from prior "actions" which are covered by the clause;

    218.2. second, and perhaps more importantly, that seems to me more consistent with common sense. As I have said, if one must ignore all existing restrictions, such that any new "action" is a fresh trigger event even if it results in reduced restrictions, I cannot follow why Mr Kramer conceded that a "new" action which happens to result in an identical restrictions does not qualify. He said that this was common sense. I agree, but would suggest that the reason it is common sense reveals that the Cs are wrong to argue that an action which amounts to removing partially the existing prevention or hinderance qualifies as a trigger event.

219. I would illustrate this last by reference to the simplest type of denial of access: imagine the police gave an instruction which prevented access to the bar and restaurant at a hotel, and then, a few weeks later, permitted access to the bar (but not the restaurant).

It seems to me that a reasonable observer would say that access to the premises had been hindered by the first instruction, and then the extent of that hindrance was reduced by the second. That reduced (but continuing) hindrance would still fall to be taken into account as part of the loss calculation triggered by the first instruction. But to characterise what is plainly the police allowing access to the bar, as them imposing a (new) restriction on the use of the restaurant, is not consistent with common sense. In much the same way as for "occurrences", as discussed by Butcher J in Greggs, I suggest that the informed policyholder would not approach our denial of access extension in that artificial way. To the extent that Mr Kramer's point was that the way in which regulations etc. in the context of COVID-19 were promulgated was more complicated than the police giving one instruction and then another, that risks disappearing into the legalities of revocations and/or amendments, when we all agree that the reasonable policyholder would only be concerned with the substantive effect.

220. For these reasons, I conclude that that there would only be a new risk trigger, and a fresh loss calculation, if the action of the authority imposed an **increased** restriction.

221. The U/Ws add that the increase must be material. In principle, I agree. If the change was minimal and without substance, there could not really be said to be a change. However, it seemed to me that the examples that the U/Ws gave did not fit with this description. To repeat the one identified above (see paragraph 206.4), it was suggested that racecourses moving from tier 3 to tier 4 "only" resulted in the owners of horses being prevented from attending races. Mr Scorey invited me to find that this was not a material change from the perspective of the owner of a racecourse. That struck me as an optimistic submission. After all, as Mr Kramer pointed out, the change must have been expected to prevent the attendance of sufficient people for it to be considered a worthwhile step for the Government to take. That being so, I would expect it to have a more than negligible impact on the Cs' gross earnings.

222. The short point is that "materiality" is really only featuring here to avoid being excessively technical about whether there has been a new "action". There is nothing in the description of the risk which refers to materiality. As such, I would suggest it need only be a relatively low hurdle. To my mind, if the denial of access extension is triggered as a result of a further restriction which at least has the potential to affect the Cs' gross earnings, the next stage is for a calculation to be carried out, not to prejudge what that loss calculation might reveal.

223. I should add that, in the end, this felt like an empty debate. If U/Ws are right that, for example, the move of some courses from tier 3 to tier 4 in December 2020 made no difference to the Cs' bottom line, then that new loss calculation will yield a figure of zero, and the limits end up being irrelevant.

224. For completeness, Mr Scorey had a specific point about the St Leger "pilot", where it had been agreed that a race did not happen as was intended. He said this was not an increase in the restrictions, because it had only ever been allowed to take place as a "pilot" for reduced restrictions. His submission about this did not seem to me to be covered by the Agreed Facts and hence I do not see how I could make any findings in that regard. On the face of it, a race was cancelled as a result of a tightening of restrictions. That seems to me, all other things being equal, to represent a material increase in the restrictions imposed on the use of Doncaster racecourse. But if that factual proposition is being challenged for some reason which is not covered in the

Agreed Facts, the evidence about it must wait for another day.

Conclusions on issues 8 and 8A

225. I answer issues 8 and 8A as follows:

225.1. a separate loss calculation, each of which will be subject to a limit of £2.5m, should be carried out:

225.1.1. for each relevant measure or action; and

225.1.2. for each facility (i.e. racecourse / golf course / hotel) owned or operated by the Cs, which was affected, as those facilities were divided up for the purposes of the different indemnity periods and different aggregate limits in the Policy; and

225.2. the relevant measures or actions are those from sections C2 to C4 of the Amended Particulars of Claim which imposed, or increased to any material degree, restrictions on use of the Cs' said facilities. Taking the example given in paragraph 206 above, the measures described in subparagraphs 206.1 and 206.2 above would be relevant measures. The reductions in the restrictions in 206.3 would not, but the racecourse moving from tier 3 to tier 4 would qualify.

Issue 11: the arbitration clause

226. This last is a short point about a familiar clause, of a type which is often included in property insurance policies. It provides:

"*If any difference shall arise as to the amount to be paid under this Certificate (liability being otherwise admitted) such difference shall be referred to an arbitrator to be appointed by the parties in accordance with the statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the Insurer.*"

227. I note that "Certificate" is the word used for the Policy.

228. The issue I am asked to resolve is as follows:

"*In the circumstances of this case, does the Arbitration Agreement apply to the determination of the quantum of the Claimants' claims (i.e., the issues in section C6 below) once issues of liability, construction and/or law are resolved?*"

The Cs' submissions

229. The Cs say that the arbitration agreement only applies to a "*difference ... as to the amount to be paid*" under the Policy "*liability being otherwise admitted*". The parties agreed to arbitrate where the dispute is only one of quantum, i.e. if cover is admitted and no issue has been taken as to limits or exclusions or other terms of the Policy. As such, "*liability*" means anything other than a dispute "*as to the amount to be paid*".

230. The Cs point out that, in the present case, there has been (and continues to be) a

substantial dispute as to the breadth of cover that was agreed and as to the application of limits. Liability has not "otherwise" been admitted.

231. The Cs observe that the U/Ws have not taken any jurisdictional objection to (indeed, have actively participated in) the judicial determination of the limits and saving clauses issues.

232. Insofar as the U/Ws' argument is that, once some further issues (including issues 2 and 8) have been decided, the arbitration agreement will be engaged, the Cs' answer is that none of the previous cases contemplate this, and the argument is not sustainable on the wording. They point out that the condition precedent for the arbitration agreement to be engaged is that all other issues are "*admitted*" (not "denied but ultimately determined against the Insurer"). The U/Ws did not (and do not) **admit** the Cs' case. In those circumstances the condition precedent to the arbitration agreement has not been (and will never be) satisfied.

233. In any event, the Cs' argue that the Court's jurisdiction is to be determined as at the date of issue of proceedings. That stage has long passed and there is no scope now for the arbitration agreement to play a role.

The U/Ws' submissions

234. In their skeleton, the U/Ws said that there is nothing objectionable in principle about parties agreeing dispute resolution provisions that divide the process between liability being determined by a court and quantum being determined by an arbitral tribunal. Section 6(1) of the Arbitration Act 1996 defines an arbitration agreement as one where "*the parties agree that a dispute...is to be resolved by arbitration*". It is suggested that this allows for a partial reference.

235. The U/Ws say that the reasons for such clauses in insurance contracts is obvious: namely that resolving "pure" quantum disputes can be a technical and tedious process, which can usually be conducted more efficiently and cost-effectively by an arbitrator with a market, claims adjustment, or accountancy background.

236. The U/Ws confirm that they are not seeking to refer any matters to arbitration until "*liability [is] otherwise admitted*". The question is whether they should be referred to arbitration once all issues of liability, construction and/or law are resolved. By that stage, so the argument goes, liability will have been "*admitted*" because the U/Ws would have accepted the judgment of the Court on any liability issues.

237. The U/Ws linked this to the way in which the Cs had advanced their claims, such that (the U/Ws argued):

    237.1. the Cs have not referred any "pure" quantum issues to the Court;

    237.2. some five years on from the events in question, they have not particularised the quantum of their claim, beyond providing some estimates: e.g. "*in excess of £80 million*" (see paragraph 37 of the Amended Particulars of Claim);

    237.3. there is no proper claim for damages or an indemnity in the Amended Particulars of Claim;

237.4. the Cs have, instead, sought to have various preliminary issues determined, anticipating that, after that, there would be a consensual "*loss adjustment process*" (see the recitals to the order of 4 July 2024).

238. The U/Ws contend that section 9 of the Arbitration Act 1996 is a red herring:

238.1. as no "pure" quantum dispute has yet been referred to the Court by the Cs, any application for a stay would be premature.

238.2. section 9(1) says a party "*may*" apply for a stay but there is nothing to stop the parties instead agreeing a preliminary issue to resolve, in advance, whether or not 'pure' quantum disputes must be arbitrated after all other issues have been resolved;

238.3. to the extent that a stay might be required in the future, the U/Ws have taken no "*step*" to answer the relevant "*substantive claim*" (meaning the claim covered by the arbitration agreement – "pure" quantum issues).

239. Orally, Mr Walsh KC, who had conduct of this issue on behalf of the U/Ws, took a more limited point, as I will explain.

Relevant authorities

240. These arbitration clauses in property insurance policies are familiar territory for the English Court.

241. For example, in New Hampshire Insurance Company v Strabag Bau AG [1990] 2 Lloyd's Rep 61 (Com Ct), Potter J held that the dispute did not fall within the arbitration agreement by reason of the word "*otherwise*" in the arbitration agreement (p.64 lhc):

"*It seems to me that the word 'otherwise' is apt to emphasize the fact that it is 'mere' disputes as to quantum which are to be arbitrated, thus excluding disputes as to amount which, despite prima facie acceptance of liability, depend upon the application of particular provisos or exemptions in the policy which place limitations on categories of loss, or otherwise apply to limit the amount recoverable. Such cases would raise a question of liability in the sense and to the extent that they involve a point of law or construction rather than a mere dispute on quantum.*"

242. More recently (in a COVID-19 BI claim context), in DC Bars Ltd v QIC Europe Ltd [2023] EWHC 245 (Comm), Sir Nigel Teare was asked to stay proceedings in favour of arbitration on the basis of a similar clause. He declined to do so, because the issues in the proceedings included points about limits, such as the proper approach to applying maximum indemnity periods. He said (at [30]):

"*The aim of the clause, as is apparent from its wording, is to refer to arbitration disputes as to quantum or assessment of loss but where there is, or is also, a dispute as to the liability of the insurer based upon the terms of the policy there is no agreement to arbitrate.*"

243. As such, his conclusion (at [32]) was as follows:

"*For the reasons I have endeavoured to express the parties are not obliged by contract*

to refer to arbitration the differences between them".

244. Two points emerge from these two cases. First, a dispute about the application of limits is, for this purpose, a dispute about the liability of the insurer, such that it cannot be said that liability is otherwise admitted. Second, there is no suggestion in any authority that this arbitration clause might suddenly "kick in" at a later stage in the litigation process. Sir Nigel Teare said that "*the parties are not obliged by contract to refer to arbitration the differences between them*". He did not say that the parties were not **currently** obliged to arbitrate, but would become obliged to do so once those liability issues had been resolved.

245. I was also referred to some familiar authorities about interpreting arbitration clauses and the "one stop shop" presumption. In BNP Paribas SA v Trattamento Rifiuti Metropolitani [2019] EWCA Civ 768, the Court of Appeal was faced with apparently competing jurisdiction clauses. Hamblen LJ held that there was a starting presumption that "*competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow*" (see [68(5)]).

246. An interesting recent decision confirming the point in time at which the English Court needs to have (or not have) jurisdiction is Hipgnosis SFH 1 Limited v Manilow [2025] EWCA Civ 486. Flaux C made clear (at [57]) that:

> "*...the concept that the English court had jurisdiction when the proceedings were issued, but that was only "floating" and was lost in favour of California when the option was exercised, is heretical and contrary to authority. As Phillips LJ pointed out several times in argument, the jurisdiction of the English court is determined at the date of issue of proceedings: see Phillips LJ's own judgment in CA Indosuez (Switzerland) SA v Afriquia Gaz SA [2023] EWCA Civ 1072; [2024] KB 243 at [83]-[84] which in turn referred to the decision of the House of Lords in Canada Trust v Stolzenberg (No. 2) [2002] 1 AC 1.*"

Discussion

247. It seems to me clear that the arbitration agreement only operates if, at the point at which the claim would be brought, the precondition to the operation of the arbitration agreement has been fulfilled. If that precondition has been fulfilled, it follows that the parties have agreed that the claim must be brought by way of arbitration. If not, then there is no operative agreement to arbitrate, and it is open to either party to commence proceedings before the English Court.

248. I did not understand any of that to be seriously disputed by the U/Ws. Nor, in the light of the cases described above, did they try to argue that, as of today, the precondition has actually been fulfilled. Accordingly, they accept that the present proceedings were properly commenced.

249. That seems to me to be an end to the point. To my mind, the operation of the arbitration clause is binary. If it bites, it operates as an exclusive jurisdiction clause. It is a one stop shop, but only for claims which are otherwise admitted. For any other type of claim, another venue (here the English Court) must be used.

250. The point at which compliance with that pre-condition falls to be tested is the date at which the particular proceedings are brought. I should add that I agree with Mr Walsh that it would not matter if the insurers had, in the initial **correspondence**, taken "liability" points, if, by the time formal proceedings were being commenced, all of those "liability" points had been conceded. But, as I keep saying, when tested at the point at which proceedings are commenced, the arbitration agreement either bites or it does not. If it does not, the obligation to arbitrate will not spring into life at some later stage just because the insurer makes a further admission, or an issue is resolved by the Court. That would be a recipe for mischief and mayhem. I cannot think of any example of a jurisdiction clause which works in that way. In Hipgnosis, the Court of Appeal described the idea that the English Court might have jurisdiction when a claim is commenced, and then subsequently lose it in favour of another venue, as "*heretical*".

251. Mr Walsh accepted that, as a general proposition, if insureds properly commence court proceedings against their insurers, they are entitled to pursue those proceedings all the way to judgment, even if the policy contains an arbitration clause of this kind. He acknowledged that it would be highly unsatisfactory if it was not possible to hear a claim pursuant to an insurance policy containing such an arbitration clause at a single trial; i.e. if it was always necessary to have a split trial, and to refer all issues of "pure" quantum to an arbitration tribunal. Those seemed to me sensible and realistic concessions for Mr Walsh to make. But it was not easy to see what was left of his argument once he had made them.

252. All that appeared to remain was an interesting question as to whether, if a coverage dispute had been resolved solely on the basis of declarations, and then **fresh proceedings** needed to be commenced in order to determine pure issues of quantum arising out of those declarations, that further "claim" would fall within the arbitration agreement. But I do not need to answer that question, because it is entirely hypothetical. It is not going to happen here.

253. With due respect to Mr Walsh's skilful submissions, he is simply incorrect to suggest that the current proceedings will come to an end when the various issues of construction concerning limits have been resolved, leaving the Cs to commence further proceedings (and hope that there is no problem with *res judicata*) in order to obtain any money. That would be a very peculiar way to litigate a claim under an insurance policy. For all of the U/Ws' complaints about the way in which the action has been pursued, the Cs have sought an order for payment of an agreed sum, alternatively damages, reflecting what is due under the Policy (see the prayer in the Amended Particulars of Claim). Moreover, the parties have agreed that the following quantum issues arise in these proceedings (even if they have also agreed that those quantum issues are not to be determined at the present trial):

"*12. Have the Claimants suffered Reduction in Gross Turnover and, if so, in what amounts?*

PoC paras 36-37; ADef para 25.1

13. Have the Claimants suffered ICW and/or AICW and, if so, in what amounts?

PoC para 8; ADef paras 25.1-25.2

14. Have the Claimants incurred CPC and, if so, in what amounts?

PoC para 39"

254. In those circumstances, it is unrealistic to imagine that the current proceedings will terminate without either a final determination of the Cs' entitlement under the Policy, or an agreement of some kind between the parties. I do not rule out the possibility that the parties will **agree** that issues be resolved by arbitration, or by some other alternative method of dispute resolution. But that is a different matter. If the Cs wish, and are otherwise able, to pursue their claims to a final resolution in the English Court, it does not seem to me that the conditional arbitration clause in the Policy can now prevent them from doing so.

My answer

255. I answer issue 11: no.

Final matters

256. I will hand down this judgment remotely and deal with any consequential matters thereafter.

257. It remains only for me to thank the parties' legal teams for the helpful and sensible way in which this preliminary issue trial was conducted and the skill with which the various points were argued, both on paper and orally.