DRN-3026033

The complaint

Ms C, on behalf of R, has complained about Allianz Insurance Plc's handling of the claim made on R's retail insurance policy following an interruption to R's business in relation to the COVID-19 pandemic. Ms C is unhappy that the settlement of the claim has been limited and Allianz gave her misleading information during the course of the claim.

What happened

R operates as a hair salon and held a retail insurance policy underwritten by Allianz. In the week prior to 23 March 2020, one of R's employees had been working in the salon but reported symptoms of COVID-19, that she was experiencing, to NHS 111 - who told her to self-isolate on 22 March.

This employee was later hospitalised and diagnosed with COVID-19. It is not disputed that the employee was suffering from this condition nor that she was on R's premises at a point in time when she had sustained this illness.

R did not open its premises on 23 March 2020. Ms C took this decision apparently so that she could self-isolate herself, and so the premises could be cleaned. She informed Allianz of this, commencing a claim for the loss of R's income.

Later on 23 March 2020, the Government announced that restrictions already in place would be extended to all non-essential shops and premises. Businesses, such as hairdressers, were asked not to open from close of trade 23 March 2020. On 26 March, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 were made formalising this guidance as a legal requirement. I shall refer to these requirements, including those following the announcement, as "the Regulations". R remained closed until July 2020.

R's claim was considered under the terms of the policy it held. The most relevant term in this policy, which is Extension 1 to Section 2 (Business Interruption), says:

> "*The liability of the Insurer includes loss as insured by this Section resulting from interruption or interference with the Business in consequence of*
>
> ***1 PREMISES CLOSURE OR RESTRICTIONS***
>
> ***a** closure or restrictions placed on the Premises on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a Notifiable Human Disease occurring at the Premises*
>
> ***b** injury or illness sustained by any person caused by or traceable to foreign or injurious matter in food or drink sold from the Premises by the Insured*
>
> ***c** vermin and pests at the Premises*
>
> ***d** closure of the whole or part of the Premises by order of the Public Authority consequent upon defects in the drains and other sanitation at the Premises*
>
> ***e** murder or suicide occurring at the Premises*
>
> *subject to a maximum of £50,000 for any one loss*

The Insurer shall not be liable under this extension for costs incurred in cleaning repair replacement recall or checking of property…"

The capitalised terms "Insurer", "Business", "Premises", and "Notifiable Human Disease" are all defined within this policy. Allianz has not disputed that the term Notifiable Human Disease would include COVID-19. And the interpretation of the rest of these defined terms is not in dispute either.

The terms "Medical Officer of Health for the Public Authority" and "Public Authority" are not defined within the policy though. And Allianz has said that these do not relate to the circumstances of R's claim. I will discuss this in detail below.

I have referred in this decision to the above term as "Extension 1". And subclause "a" of this term as "R's disease clause".

I have referred to terms of this nature, i.e. those that provide cover for business interruption in relation to the occurrence of a disease at or on the premises, as "at the premises clauses".

Similarly, those terms that require the occurrence of the disease within a particular radius of the insured premises have been referred to as "radius clauses". The relevant radius differs between policies. In the FCA test case, the Supreme Court considered terms relating to 1-mile and 25-mile radii. But other policies on the market differ, providing cover in relation to 10-mile, 5-mile, etc. radii. As has been brought to my attention since my provisional decision, some policies include radius clauses that apply to areas as small as a 250-metre radius.

The "test case", "the High Court judgment", and "the Supreme Court judgment" refer, as appropriate, to the case of *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 and the related judgment in the court at first instance.

Having initially indicated to Ms C that it would meet R's claim for the extent of lockdown (up to the policy limits), Allianz then took the decision only to meet R's losses in relation to the first few days it was closed – a period Allianz considered would have been required to appropriately clean the premises.

Allianz accepted that there had been an occurrence of COVID-19 on R's premises, but did not consider the national lockdown to be a consequence of that occurrence.

Ms C was unhappy with this and complained on behalf of R. Remaining unhappy with Allianz's offer of £500 for providing misleading information, Ms C referred R's complaint to this service.

Since bringing the complaint, R took out a £10,000 loan via the "bounce back loan scheme". Ms C has said that the reason this loan was taken was because the claim was declined. For the first 12 months of the loan, no interest has been payable on this borrowing. I understand interest is now payable at a rate of 2.5%. Ms C has also estimated R's losses for the period of March to July 2020 as being around £27,500. But full details of R's losses have not been provided to either Allianz or this service.

Our investigator considered the complaint should be upheld. Allianz did not agree with this, and this complaint was passed to me for a decision. On 16 July 2021, I issued a provisional decision explaining why I felt the complaint should be upheld. Allianz has responded to this, maintaining its position.

I will set out below Allianz's arguments, then the investigator's opinion and my provisional decision.

Allianz's position

I've summarised Allianz's position below. This is an amalgamation of the comments made both prior to and subsequent to the investigator's opinion. Whilst I have listed what I consider to be the key points, I have considered the sum of their submissions.

Prior to my provisional decision, Allianz had said:

- The FCA did not ask the Court to adjudicate upon any at the premises clauses in the test case, and Allianz considers these clauses to provide a very different sort of cover to that provided by radius clauses. It is necessary to ask objectively what is the intended effect of an at the premise clause. It does not follow that an at the premises clause should be interpreted in the same way as a radius clause.
- Extension 1 is only concerned with business interruption brought about by particular insured contingencies occurring *at the premises* (or in the case of food and drink, items sold *from the premises*) and not elsewhere. The covers are all localised and premises-specific.
- Many of the policies considered by the Court which included radius clauses also included at the premises subclauses. The Supreme Court commented that the language of the at the premises clause in the policy it was considering was not reasonably capable of meaning it provided; "*cover for all the business interruption consequences of a Notifiable Disease, wherever in the country or the world it occurs, provided that (and from the time when) there is at least one case of the disease at the premises*". And so, Allianz considers these terms would not cover losses brought about by national lockdowns or the wider pandemic. Allianz argued that there is no logical distinction to be drawn between whether at the premises cover appears in a stand-alone clause or sits next to or within a radius clause.
- R's disease clause is not designed to cover the business interruption consequences of that same disease being present at other persons' premises, or across a region or the whole country. If there is a disease outbreak at a policyholder's premises and the relevant local authority officer closes the premises or places restrictions on them because of it, then the policyholder will be covered for the loss of revenue it suffers as a consequence, irrespective of whether or not others outside the premises are also experiencing cases of the same disease.
- Treating R's disease clause as only covering the business interruption consequences of being closed down by the relevant officer within a local authority because of the occurrence of disease *at the policyholder's premises* (rather than because of a national lockdown affecting the country) does not produce irrational or arbitrary results. It is not correct to determine this by looking at how the pandemic has evolved with hindsight. At the time the policy was taken out, nobody would have contemplated the Government putting the country into national lockdown. But they might have appreciated that an outbreak of certain diseases at the policyholder's premises might well lead to a local authority closing down the premises temporarily or imposing restrictions on the use of those premises. The fact that a notifiable disease might spread over wide areas does not mean that the cover under R's disease clause becomes meaningless.
- Depriving R of cover for national lockdown related losses does not lead to an uncommercial result or to illusory cover. Cover is still available where a case or cases of COVID-19 at the premises causes a competent authority to place restrictions on the Insured's use of its premises regardless of the number of cases of

disease outside the premises. The incidence of COVID-19 at a pub outside of a lockdown period caused the local authority to shut down the pub.

- At the premises clauses are very different to radius clauses. The losses which are suffered by the policyholder as a result of people having a disease at the premises are direct, immediate and identifiable losses (whereas radius clauses cover indirect losses suffered as a result of an authority's response to a wider outbreak of disease which is remote from the Insured's premises). There is a clear distinction between the causative effect of cases of COVID-19 at the premises and cases elsewhere.
- The Supreme Court also indicated that it might be appropriate to conclude that radius clauses only offer cover where the causal potency of all the cases within the radius are of similar causal potency to all those outside the radius. But this could only be the case where it was possible to apportion the financial loss between the two – and this is not possible in relation to radius clauses. However, Allianz considers this is possible in relation to at the premises clauses where there are direct, immediate and identifiable losses – such as closing premises for a quantifiable period in order to clean them. Such losses are unaffected by cases of COVID-19 outside the premises. The losses in relation to at the premises clauses are divisible and the terms are capable of having a weighted approach applied to them. Allianz therefore thinks that a traditional causation analysis should therefore apply.
- Once COVID-19 is no longer at the premises, and any staff who may have caught the disease have ceased having to self-isolate, the Insured's business cannot continue to be affected by the insured peril and the indemnity period comes to an end. The disease will have made a fleeting appearance at the premises and then have disappeared and no longer be affecting the business or influencing the Government's approach to continued lockdown. It cannot be said that the momentary presence of disease at the premises is of roughly equal causative effect in bringing about the national lockdown as each individual with disease permanently residing in the wider area at the time the Government makes its decision to lock down the country.
- The key to interpreting disease at the premises clauses is that it is the "at the premises" aspect of the disease which must be the proximate cause of the Insured's losses. That leads to the conclusion that these clauses provide cover only where the disease is present at the premises and only for such period of time as the Insured's business is affected by the disease being present at its premises and not elsewhere.
- Allianz referred to a case heard in the Irish courts, *Brushfield Ltd (t/a The Clarence Hotel) v Arachas Corporate Brokers and another* [2021] IEHC 263 ("Brushfield"). And said that the comments in this case about how a term relating to cover in the event of a defect in the drains or other sanitary arrangements *at the premises,* show that such wording should be interpreted as providing very narrow, localised cover, and do not respond to restrictions imposed because of wider disease outbreaks beyond the premises.
- Allianz also said that the occurrence of the disease at R's premises could not be said to be an equally effective cause of the national lockdown. They said the Government did not have access to data in relation to specific premises and could only have relied on data from local authorities or similarly wide regions. And that the occurrence on R's premises was only transitory and was not present on the premises at the point the Government made its decision.
- Allianz went onto say that R's premises had already been closed at the point the lockdown measures were introduced. And so these measures cannot be said to have caused R to close its premises.

- Allianz didn't think it had been shown the actions taken were on the advice of the Medical Officer of Health for the Public Authority. Allianz said the Chief Medical Officer is not the Medical Officer of Public Health for the Public Authority. And the use of Public Authority in the policy should be interpreted as referring to a local authority rather than national government.
- Lastly, in terms of the liability for R's losses, Allianz said that even if the policy did provide cover for the circumstances of the lockdown, this could only last until the first point the need for the Regulations was reviewed (16 April 2020). At that point, there was no occurrence of the disease on R's premises and there had not been for some weeks. So, it could not be said that this historic occurrence was an equal cause of the Regulations continuing beyond this point.
- Finally, Allianz said that it was not reasonable for interest to be added to any settlement due to R, as Allianz had relied on FCA guidance in terms of what the FCA test case would consider – and that this did not include at the premises clauses.

Investigator's opinion

In summary, the investigator said:

- COVID-19 was a disease, the consequences of which the policy provided cover for – provided the other elements of the clause above were satisfied.
- There had been an occurrence of COVID-19 on the premises. This is not in dispute and it is not necessary to set out the detail here. But, as above, an employee of R had been on the premises and was then hospitalised with a diagnosis of COVID-19.
- The term Medical Officer of Health for the Public Authority was likely to mean someone with the authority to require businesses to close or restrict their activities for public health or similar reasons. And the Regulations were made following advice or with the approval of such a person.
- The Supreme Court considered radius clauses. The Supreme Court decided that each case of disease was a separate occurrence and radius clauses only covered the effect of cases of COVID-19 within the area specified in the policy.
- The Supreme Court also considered clauses requiring further elements as well as the occurrence of disease, such as requiring closure or restrictions introduced following the occurrence. The investigator felt the cover in R's disease clause was for the closure or restrictions placed on the premises on the advice of or with the approval of the relevant authority as a result of a case of COVID-19 on the premises. It is not cover for COVID-19 as a whole.
- The Supreme Court decided that the insured peril under these clauses is not the notifiable disease itself. Instead, the clauses were providing cover for the consequences of particular events occurring at a particular time and place. The Supreme Court decided that all individual cases of COVID-19 which pre-dated any government measure were equal causes of the imposition of that measure.
- The Supreme Court decided that whether the legal "but for" test applied depended on the interpretation of the policy as applied to the facts. The Supreme Court said no reasonable person would expect an outbreak of a notifiable disease to be confined to a particular radius. It was highly likely cases would be inside and outside the radius. And it would be contrary to the commercial purpose of the policies for cases of disease occurring outside the radius to deprive the policyholder of cover for cases inside the radius. The radius clauses did not say that cover was only for cases inside the radius.

- The Supreme Court also considered the insurers' argument that the number of cases inside and outside the radius should be "weighed up" when deciding whether the cases inside the radius caused the loss. They rejected this argument because, not only would doing this be unworkable, although each case of disease was individual, the effects of the disease – the government measures – were indivisible.
- Instead, the Supreme Court preferred: "…*an interpretation that recognises the causal requirements of the policy wordings as being satisfied in circumstances where each case of disease informs a decision to impose restrictions and treats each such case as a separate and equally effective cause of the restrictions irrespective of its geographical location and the locations of other such cases* [as this] *avoids such irrational effects and the need for arbitrary judgments and is also clear and simple to apply. This accords with the presumed intention of the parties to an insurance product sold principally to SMEs and often with relatively low financial limits.*" (para 206 of the Supreme Court judgment).
- Cases at a particular premises might be present for a shorter period and be less numerous than the cases across the wider country, but are still individual events that happened at a particular time and place. And the investigator considered each one of these events/occurrences to have been an equal cause of the Government's decisions.
- The investigator considered the Supreme Court's analysis on causation applied equally to the clause in R's policy. This was because:
    - The main difference between R's disease clause and the hybrid clauses considered by the Supreme Court is that the clauses in the test case offered cover when the disease was within a particular radius of the premises, rather than requiring the disease to be at the premises. However, the Supreme Court did not think the size of the radius made any difference.
    - All the policies cover infectious diseases which are inherently likely to spread.
    - The Supreme Court said that cover under a radius clause would be triggered if there was one case within the radius, so there was no requirement for a large number of cases.
    - Like the test case policies, R's policy does not say that cover is available "only" for the case of disease at the premises. The cases on and off the premises are concurrent causes of R's loss and the cases off the premises are not an excluded cause. All the cases of disease result from the same cause, the COVID-19 pandemic.
    - The investigator also noted that R's policy doesn't require the disease to have originated at the premises, so any case on the premises is reasonably likely to have arrived from another location and to be part of a wider outbreak.
- Ultimately, the investigator considered the occurrence on R's premises was one of those taken into account by the UK Government when making its decision to introduce the Regulations. As such it was a proximate cause of the restrictions.
- The restrictions had caused an interruption to R's business, which had resulted in insured losses. Allianz was therefore liable for those losses, subject to the remaining terms of R's policy.
- The investigator also felt that interest should be paid on those losses for the period since the claim should reasonably have been paid. And set out details of how this should be calculated in the absence of further evidence.

My provisional decision

Following Allianz' disagreement with the investigator's opinion, I issued my provisional decision.

My provisional decision was that the investigator was correct in her opinion and her explanation of the arguments. But that I felt it necessary to expand on certain points.

Allianz had accepted that COVID-19 is a disease which falls within the relevant definition in the policy, that there was most likely an occurrence of COVID-19 at R's premises, and that this caused an interruption to R's business. So, these points were not considered in detail.

I explained the relevant clause had a number of elements, and these – in their correct causal sequence – were:

1. an occurrence of a Notifiable Human Disease at R's premises, which causes
2. closure or restrictions placed on the premises on the advice or with the approval of the Medical Officer of Health for the Public Authority, which cause
3. an interruption or interference with R's business that is the cause of financial loss.

I said that I considered the main issue was whether the approach taken by the court to radius clauses should also be applied to R's disease clause, given the content of that clause and the context of the rest of the policy and circumstances.

I confirmed that, largely speaking, the question of whether the placing of restrictions on R's premises by the Regulations was as a result of the occurrence of COVID-19 at R's premises, is one of causation. And that I was in agreement with Allianz that the appropriate test of causation here was to consider, objectively and in the context of the policy as a whole, what the intended effect of the policy term was as it applies to the circumstances of the claim.

<u>Do the principles applied by the Supreme Court on radius clauses apply to at the premises clauses?</u>

I felt the first question to be determined was whether the approach taken on causation by the Supreme Court in relation to radius clauses also applies to at the premises clauses.

I noted that, whilst different policies have different wordings, there is no significant difference between the contractual construction of the radius clauses to the at the premises clauses. The only difference between these clauses is the geographical area that they cover.

I referred to Allianz's comments that other types of policy included subclauses, under areas of cover similar to Extension 1, that provide separate cover in relation to both occurrences "in the radius" and "at the premises". And that the FCA's submissions to the courts and the Supreme Court's own comments referred to this.

However, I said that the Supreme Court had not been asked to determine the correct interpretation of at the premises clauses. And its comments, at paragraph 71 of its judgment, were made in relation to a specific policy. I noted, as had the investigator, that the fact the policy being considered by the court included both "in the radius" and "at the premises" subclauses was likely to be context the court bore in mind when considering the potential meaning of the terms.

I also noted that, when making its comments, the Supreme Court was considering how the insured peril should be interpreted in relation to that particular policy – the court was not considering causation when making these comments. Ultimately, the court found that the approach that applied to the interpretation of the insured peril was the same for both radius clauses and at the premises clauses. And that this was that clause only covers the cases of COVID-19 which occur within that radius. The cover is for the cases of disease within the radius (or at the premises, depending on the wording of the policy), not for the disease itself nor for the consequences of diseases outside the radius/premises.

I said the impact on the cover of requiring the disease to occur on the premises is the same as is provided by a policy limiting the relevant radius to one mile, rather than 25 miles. It does not change the form of cover provided, it merely lowers the chance of the policy term being activated. There is less chance of an occurrence at the premises than within one mile of the premises, and there is less chance of an occurrence within one mile of the premises than within 25 miles. Each individual occurrence, regardless of where it occurred, was an equal cause of the restrictions being imposed. But for the impact of that occurrence to be covered, the occurrence must be within the geographical limit set by the policy.

I considered that, taken at face value, radius clauses offer the same type of cover as at the premises clauses – the only difference being a smaller geographical area where the occurrence needs to take place before resulting business interruption is covered.

I did not consider there to be much weight to Allianz's argument that if R had wanted "off-premises" disease cover, to provide for the consequences of closures or restrictions being placed on its premises because of disease beyond its premises, it could've purchased a policy with a radius clause. I did not consider this was what R had wanted, nor what the investigator suggested should be provided by the policy that R did purchase. I also did not consider the different types of business interruption cover available to be reasonable background knowledge for a hair salon business to have.

I confirmed it is the construction and objectively understood intent of R's policy that is relevant to R's claim and complaint. If Allianz had wanted to limit the policy to instances where a disease only occurred on the premises, it could have specifically said so in the term or provided appropriate exclusions. Alternatively, if Allianz wanted to provide cover for disease that would only likely be found on the premises, they could have limited the definition of Notifiable Human Disease to those diseases likely to be limited to the premises. As it is, Allianz has provided a policy that provides cover for the consequences of various diseases, many of which are likely to be widespread.

The diseases covered by the policy

The second issue I focussed my provisional decision on was the types of disease covered by the policy.

I explained that Allianz had placed a great deal of reliance on how the policy would provide cover in relation to a disease which is inherently likely to be more localised – Legionnaire's disease. I said that R's policy, as with many similar policies – both those with radius clauses and at the premises clauses - provides cover for Notifiable Human Diseases. And that this was effectively any of the diseases on the list of notifiable diseases in Schedule 1 of The Health Protection (Notification) Regulations 2010, including any new disease added to this list. The list of diseases was therefore open-ended.

I noted this list includes a range of illnesses, many of which are likely to be far more widespread than Legionnaire's disease. Additionally, many of the diseases are unlikely to have originated at the premises, so an occurrence there is likely to be part of a larger

outbreak. I said that if Allianz had wanted to restrict cover in R's policy to disease originating at the premises, it could have done so. But it did not.

I also said the same risk of a widespread and unpredictable outbreak of disease applies to both the radius clauses and the at the premises clauses. If these wide-spreading diseases are on the policyholder's premises, they are also likely to be found outside of these premises. So, whether or not the disease is on the premises, it seems that the actions of the relevant authority will in fact largely be the same.

I considered it was likely restrictions would be introduced covering a broad geographical area in relation to many of the diseases covered by R's policy. And this would have been something that both Allianz and R might reasonably have been aware of at the time the insurance contract was entered. I quoted the Supreme Court's comments at paragraph 194 of its judgment:

> "…*we consider that the matters of background knowledge to which the court below attached weight in interpreting the policy wordings are important. The parties to the insurance contracts may be presumed to have known that some infectious diseases - including, potentially, a new disease (like SARS) - can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision*".

I considered that this reasoning also applies in relation to a policy which provides cover only where there is an occurrence of such a disease at the premises of the insured. Whilst some of the notifiable diseases covered by the policy, including Legionnaire's disease, would in some cases be limited to a very localised outbreak – potentially contained to the premises – many of the diseases covered by the policy would inherently be those that would be found beyond the premises if they ever occurred on the premises. As with radius clauses, it would be contrary to the commercial purpose of the policies for cases of disease occurring outside the premises to deprive the policyholder of cover for cases at the premises.

<u>Restrictions relating solely to occurrences of a disease at the premises</u>

I then moved on to consider whether R's policy should be interpreted to provide cover only in circumstances where any action or advice from the relevant authority is directed solely (or at least to a significant degree) at the premises.

I acknowledged Allianz's comments that the other subclauses in Extension 1 all relate to events originating from the premises of the insured. But said it isn't disputed that the requirement in terms of R's disease clause also relates to an event at the premises. Nor that the policy only provides cover for the consequences of that event, rather than events outside the premises. The question is whether the event at the premises – the occurrence of COVID-19 – was the cause of the restrictions that were placed on R's premises.

I noted that the relevant legislation, including the Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020, gave local authorities the authority to close

or impose restrictions on individual premises where it is necessary to control the spread of COVID-19 (amongst other reasons). But I did not consider this was necessarily limited to a situation where a single business is told to close its premises because of an occurrence of COVID-19 only on those premises. Given the contagious nature of many of the notifiable diseases, including COVID-19, it's likely that the disease would spread to more than one location and so more widespread action would be required.

I also noted that it was unlikely that such action would be taken in relation to any specific premises after just one occurrence, as these regulations require that the response be proportionate. And that in the case of individual businesses that had been given specific directions under these regulations, this was apparently as a result of behavioural reasons (staff not following guidelines, etc.), rather than due to there being an identifiable occurrence at the premises. The management of behaviour at specific premises will have been intended to control the spread of COVID-19, but the directions not seem to have been the result of any occurrence at those premises specifically.

And that where it is the occurrence(s) of COVID-19 that has led to restrictions being introduced, either by the UK Government or by local authorities, the measures taken have been more widespread and generalised. These have included national lockdowns, the tier system, and more localised lockdowns (for example those relating to Leicester).

I agreed with Allianz that hindsight in terms of the development of the COVID-19 pandemic should not be used when interpreting the terms of the policy, and said what was relevant is the circumstances that would have existed at the point R and Allianz entered this contract. But I referred to the comments of Lord Briggs (and with which Lord Hodge agreed) in his minority judgment at paragraph 316 of the Supreme Court judgment, which said:

> "*This is not to mis-use the dubious benefit of hindsight when applying an insuring clause to events which could not have been contemplated by the parties at the time of their bargain. As the majority show, there were a number of well-known notifiable diseases (such as cholera, plague, typhus, yellow fever and SARS) to which the relevant clauses clearly applied, all of which were capable of spreading rapidly and widely, so as potentially to cause a threat to health on a national scale, and to threaten a national reaction by the responsible authorities, leading to business disruption on a national scale*."

I considered it likely that if there were occurrences of many of the diseases covered by R's policy, the actions taken would likely have been similar. Reference was made to the actions taken by other governments in relation to outbreaks of SARS and Ebola which led to broad geographical areas or multiple types of business having restrictions imposed on them. I said it seems that the more likely the disease is to be wide-spreading, the more wide-spread the restrictions will be that are imposed to control that disease.

By including cover for a number of diseases where the likely actions to be taken would be those that would impact more than a single premises, I considered Allianz has seemingly agreed to provide cover where actions are taken (in relevant situations) that impact more than just the insured's premises.

I referred to Allianz's comments that the losses suffered by a policyholder as a result of cases of disease at the premises are divisible from those suffered as a result of cases of disease across the wider country. But I was not persuaded by these comments. The cases all arise from the same underlying cause – the COVID-19 pandemic. I thought that other cases of the disease are something which would naturally be expected if there is a case on the premises. I considered consequences arising from the same event, which would

naturally be expected to occur at the same time as the insured peril, are not a separate and distinct risk and should not act to restrict the cover provided.

The comparison with “prevention of access” and “sanitary arrangement” terms

The next issue I considered was whether “prevention of access” and “sanitary arrangement” terms in other policies mean “disease at the premises clauses” should be interpreted as being limited to localised events. Ultimately, I did not consider it was reasonable to apply this to a disease at the premises policy term.

I noted that the prevention of access terms considered by the High Court related (generally) to an emergency/danger/incident taking place in the vicinity of the relevant premises, such as a bomb scare, traffic accident or gas leak. Whilst the occurrence of a disease might be considered such an event, that would depend on the policy wording; it was noted that a person sustaining COVID-19 would not likely be an “incident”.

I also noted that the cover provided by those terms was constructed differently than at the premises clauses. The prevention of access terms relate to a single event – an emergency/danger/incident – and these types of event were unlikely to carry an inherent risk of spreading any further. Whereas many of the notifiable diseases Allianz chose to include within the scope of R’s policy are those that do carry such an inherent risk of spreading. I didn’t consider it was reasonable to apply the interpretation of one type of clause to another, where there are such clear differences.

I also made reference to the reasoning of the High Court around the term “vicinity” in relation to the prevention of access clauses. And that a different approach was taken by the Supreme Court when considering radius clauses.

I referred to the comments made by an Irish court in its judgment on *Brushfield*. I acknowledged that the policy in that case covered the closure of the premises as a result of a defect in the drains or other sanitary arrangements at the premises. And that the Irish considered this to be limited to a closure prompted by a premises-specific defect. I said the comments the court made were what the English courts would consider to be non-binding (obiter) as it was not necessary for the Irish court to determine the matter.

And I went on to say that the events being covered by the policy in that case were inherently different to the relevant term in R’s policy. The term in question in *Brushfield* related to the “drains or other sanitary arrangements at the premises”. These are things that are inherently premises specific. And the defect in the sanitary arrangements that was being considered by the court was the (in)ability to implement effective social distancing arrangements on the premises – something in itself premises-specific, not capable of naturally spreading beyond those premises and over which the insured had some control.

This is in contrast to considerations around diseases, many of which are inherently contagious and wide-spreading, and a policyholder would have little control over such spread. So, I was not persuaded it would be fair to directly apply to R’s policy the comments, made by the Irish court.

I noted that different tests of causation can apply to different policy wordings, depending on what the clause was meant to cover. But it is clear that both the radius clauses and at the premises clauses are intended to cover situations where there is the occurrence of a certain disease and this causes interruption to the business of the insured. Whilst the geographic requirements of the clauses differ, there is no other immediate difference in their intent.

Overall, I considered that it would be fair and reasonable to interpret the term above in R's policy as providing cover for the restrictions imposed as a result of the occurrence(s) of COVID-19 on its premises.

Was the occurrence at R's premises an equal cause of the lockdown?

I then went on to consider whether the occurrence at R's premises was an equal cause of the Regulations.

I agreed with Allianz that the Supreme Court did not specifically find that the occurrence of COVID-19 at any particular premises was influential on the Government's decision making. But felt it was important to stress that this was not something the court was asked to make a finding on. What the Supreme Court did find was that each and every occurrence of COVID-19 was an equal and proximate cause of the Government's decision-making process.

The Supreme Court set out some general principles or standards to be applied when considering the proximate cause of loss. These included determining whether a peril that is covered by the policy had any causal involvement, and if so whether a peril that was excluded from the cover provided by the policy had any such involvement. And then determining whether the occurrence of one of these made the loss inevitable in the ordinary course of events.

The court went onto say that whilst the Government's decisions to introduce the restrictions in March 2020 could not reasonably be attributed to any individual occurrence of COVID-19, this decision was taken in response to all the cases in the country as a whole. And the Supreme Court agreed with the High Court here that, "*all the cases were equal causes of the imposition of national measures*". The Supreme Court decided that here was no reason why one insured event, acting in combination within a number of uninsured events, should not be regarded as a proximate cause of loss even if that insured event was not necessary or sufficient to bring about the loss on its own. And that; "*Whether that causal connection is sufficient to trigger the insurer's obligation to indemnify the policyholder depends on what has been agreed between them*."

As such, I felt the key issue was what risks Allianz agreed to cover; which is a question of contractual interpretation of R's policy, answered by applying the intended effect of the policy to the circumstances of R's claim.

I noted that in making its findings in the test case, the Supreme Court relied on the presumption that an infectious and contagious disease – like many of those Allianz chose to cover in R's policy – can spread rapidly, widely and unpredictably, so that an outbreak which is sufficiently serious to lead to a policyholder suffering an interruption to their business was highly likely to include cases inside and outside the radius relevant to the policy. The court found it would not be feasible, and would be contrary to the commercial intent of the policy, for cases outside of the radius to deprive the policyholder of cover in relation to cases within the radius. I quoted paragraph 206 of the Supreme Court judgment to support this.

I said radius clauses did not limit cover to situations where the interruption of the business was caused only by cases of disease occurring within the area, as distinct from other cases outside the area. And, in such circumstances, other concurrent effects on an insured business of the underlying cause of the business interruption, i.e. the pandemic generally, do not reduce the indemnity under the relevant clause.

I saw no persuasive reason why the considerations that the Supreme Court applied generally to radius clauses do not equally apply to at the premises clauses. And felt the

same applied here. As the Supreme Court said, all that is necessary for a radius clause which also requires the closure to be as a result of, for example, government action, is for the closure or restrictions to be in response to cases of COVID-19 which included at least one case existing within the geographical area set out in the relevant clause. In R's case, this geographical area is its premises and there was at least one occurrence within this area. And I considered the Government's actions and advice were in response to cases of COVID-19, which included the case(s) that occurred at R's premises.

I noted Allianz's argument that there is no evidence that the Government had access to data on or acted in response to specific cases of COVID-19 at particular premises. But felt the same could be argued in relation to the 1-mile radius clauses. And I didn't find this argument generally compelling. Allianz has suggested that the lowest level of data used was that at a local authority level. Many local authorities will be larger than a 1-mile radius. To take Allianz's argument to its conclusion would be to remove cover for policies which are based on a 1-mile radius; and I didn't think this was the intent of the Supreme Court.

I referred to the available date from the FCA "calculator" and set out that this showed that by 23 March 2020 there were 6 reported cases within 1 mile of R's premises and 604 estimated cases within this area. Expanding this radius to 25 miles gave 633 reported and 59,378 estimated cases. I said the difference between these numbers provides a clear indication that it was the size of the estimated cases rather than reported cases which directed the Government's decision.

I explained that as well as data for the reported cases that the Government had access to, the decision it took was also made due to the estimated number of unreported cases. It was the number of these unreported cases, as well as the reported ones, that would have led to the Government making its decision. Each one of these reported and unreported cases will have arguably been a proximate cause of the Government's decision-making process. But it would not be possible for an "estimated occurrence" to lead to an insurance claim where an actual occurrence was required by the policy.

I pointed out that the data being considered by the Government when making its decision would also have been historic. That the Government's advisory groups drew on information from a number of sources. That decisions on the lockdown were prompted largely by a desire to ensure the NHS was not overwhelmed. That the models being considered were predictions of future hospitalisations taking into account, amongst other things, the reproduction ratio of the infection (the R-number), which is affected by numerous factors that govern pathogen transmission and is, as I understood it, therefore usually estimated using different complex mathematical models. And that the data referenced in the government briefings was based on the events that took place over the preceding weeks.

I said that by the time the decision to introduce the Regulations was taken, a number of individuals who had sustained COVID-19 would already have recovered. But I considered these cases would still be those that, together with the other cases around that time, were the concurrent causes of the Government's decision. The Government and its advisors were not looking at individual cases in isolation, they were considering the accumulation of these which would have formed the framework of the rate of infection and allowed for a prediction as to the future R-number and resultant hospitalisations.

I acknowledged that the courts indicated that a person passing through an area, involving no contact with anyone and therefore no risk of transmitting the disease, might not be enough to trigger the insured peril under a radius clause. However, I considered this is entirely different from someone who remained in the area for some time and had numerous interactions with various people. Whilst that person may then have left the area in question, their presence created a risk of the disease having been transmitted. And it is this risk, and the potential of

this leading to hospitalisation and the overwhelming of the NHS, that led to the Government's decisions at this time.

I noted that although each case of disease was individual, the effects of the disease – the government measures – were indivisible.

R had already closed its premises

I further noted that, by the time the Government made its decision, R's premises had already been closed and so there was no longer any occurrence on those premises. But there had been an occurrence on the premises. And for the reasons above, I thought it was more likely than not that this occurrence would have been one of those the Government took into account when forming its decision.

I also noted that at the point R closed there weren't any restrictions that had been placed on the premises. The decision to initially close was largely one that Ms C took, so that she could self-isolate. The advice of the Government at this time would not have required her to actually self-isolate unless she was displaying symptoms of COVID-19, which Ms C hasn't said she was. Or required R to close its premises – other than if this was necessary to clean and disinfect all surfaces that the symptomatic person had come into contact with.

I referred to Allianz's argument that the lockdown measures did not act to close R's premises and therefore did not cause the interruption to its business – such interruption had already occurred as a result of Ms C's decision to close the premises. I said that, but for the Regulations, it seems probable Ms C would've reopened the premises soon after. So, the Regulations could be seen as being the cause of the closure beyond a date a few days after the initial closure.

I also found Allianz's argument somewhat contrived. I explained that had the circumstances been different and the cause of continued closure been, for example, a fire, I would not expect Allianz to argue that there was no cover for the closure as a result of a fire because the premises had already been closed temporarily to allow for cleaning.

And whilst I appreciated that part of the cause of R's continued closure in the present case is the same as its initial closure (i.e. the occurrence of COVID-19 on the premises), the term in the policy is a composite one. The term requires both the occurrence and the action of the relevant authority. It is the action of this authority that is also an integral element of the continued closure and this action had not taken place at the time of the initial closure. Prior to the Prime Minister's announcement, there were no restrictions that had been placed on the premises that caused any interruption to its business. So, overall, I was not persuaded by Allianz's points here.

The Medical Officer of Health for the Public Authority

I then went on to consider Allianz's final points, in terms of denying liability. These were in relation to whether the actions taken by the Government were based on "*the advice of or with the approval of the Medical Officer of Health for the Public Authority*".

Allianz has said that Professor Chris Whitty is the Chief Medical Officer and that he is not the Medical Officer of Health for the Public Authority. Allianz has also argued that, in the context of this clause, "Public Authority" is the local authority only, rather than the national government.

I noted that neither of these terms are defined within the policy. As such, they need to be interpreted as they would be understood by a reasonable person at the time of entering the contract.

I explained that “Medical officer of health” is largely a historical term. It was used in the Public Health Act 1961, but it is not in more recent public health legislation. Section 37 of this Act relates to the sale of verminous articles and appears to be the only legislative term relating to the medical officer of health. The role itself is also historic and no longer exists. I noted that when the role was in existence, it did have a focus on local authority matters rather than anything national. But considered this to be a reflection of the make-up of healthcare services generally at the time medical officers of health were introduced, rather than the current situation which is more of a mix between national and localised healthcare.

I considered the current set-up of the healthcare system was also significant when considering the potential actions taken in the face of the occurrence of many of the diseases covered by R’s policy. As set out above, the responses to many of these diseases would be wide-spread and would require more nationally-orientated action. To say that the policy provides cover for a disease that would likely only be acted upon by national government, but then to limit cover to the actions of a local authority would, to my mind, provide an irrational result.

Ultimately, I said the clause refers to a term that is dated and it would not be reasonable to expect a customer taking out an insurance policy of this nature to understand the historical positioning of a redundant role, and then apply that to how the clause in question should be interpreted in relation to cover for a wide-spreading disease. An alternative question is whether a reasonable customer would consider that a clause referring to the advice of the Medical Officer of Health would include the advice of the Chief Medical Officer for England. I considered that this is how a reasonable person would have interpreted this clause at the time the policy was taken out.

And even if this was not the case, as Allianz has pointed out, the Government made its decision relying on information provided, in part, by local authorities. Neither of the terms “advice” or “approval” are defined with R’s policy either. But it is possible the Government made its decision *on the advice of or with the approval of* health care professionals working at a local level. Because I do not consider the term “Medical Officer of Health” to be limited in the way Allianz suggests, I did not feel it necessary to explore this further.

I recognised that R’s disease clause also refers to the “Public Authority” and that Allianz had said that this is distinguished from other clauses within the policy that refer to only “government” or “government or any public authority”, such as those relating respectively to terrorism and riot. Allianz had therefore said that, in R’s disease clause, Public Authority should be read as referring to a non-government, local authority.

Allianz had further said that the other subclause in Extension 1 that refers to Public Authority is concerned with the drains and sanitary conditions of the premises, and that it is only a local authority that would have any interest in these matters.

I noted that different parts of the policy use different terminology. However, I also noted that they do so in different ways. The term Public Authority in Extension 1 is capitalised, indicating it has a specific meaning. This meaning is not specified within the policy, but this is distinguishable from its use in the “riot clause” where the term is not capitalised. I didn’t think it was clear therefore that these two terms have the same meaning.

I didn’t consider it would be fair to assume that a reasonable person, on entering into this policy, would compare the use of this wording in different parts of the policy, and to conclude

that its use in different parts should be interpreted in a particular way, especially where that wording isn't given a specific definition. The reasonable reader would naturally assume that, if the intention had been to give a term a special meaning, this would have been done transparently by providing a definition.

And I didn't consider the fact that these words are also used in relation to the drainage subclause to be determinative. Reading the policy as a whole, I didn't think the term used in Extension 1 should be read to be restricted to local authorities.

I referred to the consideration by the High Court in the FCA test case of the "EIO policy". The High Court found the wording "competent local authority" to mean, in relation to that policy, the authority competent to impose the relevant restrictions. I also noted that this wording in the EIO policy contrasted with the use of "Government Police or Local Authority" elsewhere within the clause, but did not lead the court to consider "competent local authority" did not include the Government.

The court did refer to the legislative background, and I noted Allianz's comments about the historical role of the Medical Officer of Health and how this should act to imply a localisation of the term Public Authority. But, as above, I didn't consider it was rational that only the result of the actions of a local authority be covered where the policy provides cover for diseases that would in many cases be acted on by non-localised authorities.

I considered the words "Public Authority", in the absence of any further definition, could only be fairly interpreted in a broad sense. And so would include the actions of the Government.

Whilst I took Allianz's points into account, I was not persuaded that a reasonable person reading R's policy would interpret the wording used in Extension 1 as relating only to advice or approval of a locally based medical officer, and excluding any action by Government. I didn't believe such a restrictive interpretation to be reasonable. To paraphrase the Supreme Court, I didn't think this would be the understanding held by the ordinary policyholder who, on entering into the contract, has read through R's policy conscientiously in order to understand what cover they were getting.

Limitation of the indemnity period

I then considered Allianz's comments about whether, if R's claim meets all the elements of R's disease clause, this means that Allianz is liable for the full extent of the period R was closed (up to the maximum £50,000 loss set out in the clause). Allianz had said that the policy defines the indemnity period as the period; "*during which the results of the Business shall be affected in consequence of the Damage*". And Allianz considered this means, at best, the period until R was no longer being affected by the restrictions imposed on the premises as a result of the occurrence of COVID-19 at the premises.

I noted Allianz had referred to regulation 3(2) of the Regulations. Allianz had said that, even if the occurrence of COVID-19 at R's premises prior to 21 March 2020 could be regarded as having caused the Government to implement the Regulations, the Government would have reviewed the need to continue the closure of hairdressing salons on 16 April 2020. And as there was no occurrence on the premises at that point, that occurrence could not have been the cause of the continued restrictions.

However, I felt it necessary to refer to regulation 3(1) of these regulations. For clarity, I have set out the whole of regulation 3 below in my findings.

I explained that the “emergency period” (which was the period during which relevant businesses, including hair salons, were required to close) was introduced by one direction – that which made the Regulations. And then was ended by a second direction – that which made the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020.

And that, whilst the need for the restrictions had to be reviewed every 21 days, I did not consider this resulted in any new restrictions being imposed on R’s premises that caused an interruption to its business. So, I was not persuaded that Allianz’s liability runs only until the first, or any other, review point – other than that which resulted in the second direction.

Interest payable

I then moved on to consider what interest should be payable on any award that I directed Allianz should make in my final decision.

I explained it is not the role of this service to penalise financial businesses. Where we uphold a complaint, our role is to put complainants back in the position they would have been in, had the issue they have complained about not happened. I noted that, in this case, the complaint is about the outcome of the claim.

As above, based on the information I had at the time of my provisional decision, I considered Allianz came to the wrong decision when considering R’s disease clause. So, I thought it was just and appropriate that Allianz reconsider R’s claim, taking into account the remaining terms of the policy. And, if it was then determined that Allianz should have met R’s claim, this is the outcome that it should have come to in 2020 when the claim was made.

I explained that such a decision in 2020 was not something the FCA issued any guidance on and was a decision that Allianz made itself. So, I didn’t think it was reasonable to say that it followed FCA guidance here.

I noted that Allianz may argue that it is only the court’s interpretation, and judgment, from January 2021 that has led to the outcome in my provisional decision. And so interest should only be payable from the date of the judgment. However, I disagreed with this interpretation. I felt the decision that was made incorrectly, based on my provisional decision, was the one made in 2020 and it is the consequences of this that have had any negative impact on R that has been incurred. So I considered, it is from that point onward that R was denied money it might otherwise have had, and it is this loss that Allianz needs to account for.

I did however note that on 15 June 2020, R took out a £10,000 bounce back loan. And that interest was not payable on this for the first 12 months. I said my understanding was that interest has since been charged at a rate of 2.5%. I explained that as Ms C has said that the reason this loan was taken was due to the claim being declined, this will alter the interest payable on any settlement due to R.

Misleading information

Finally, I considered whether the compensation offered to R, in relation to errors made by Allianz when communicating with Ms C during the claim process, was fair and reasonable. I explained that I had considered the impact of the incorrect information provided to R. I noted that this is a limited company, and as such it cannot suffer distress. So, whilst I recognised Ms C herself may have been greatly upset, she is not the policyholder or complainant. As such, I was unable to take into account the personal impact on her.

I confirmed I had considered the inconvenience caused to R, including the need for it to seek alternative funding elsewhere – i.e. the bounce back loan. And taking all of this into account, I considered Allianz's offer of compensation for this aspect to be fair and reasonable. I invited Ms C to submit any further comments or evidence as to the impact on R.

The summary in my provisional decision

In summary, I was satisfied that R's policy with Allianz is a contract with its own terms. I had considered how these terms would likely have been interpreted by a reasonable person at the point the contract was entered into, bearing in mind that it is a policy sold to SMEs.

I didn't think a reasonable person would interpret a clause that provides cover in relation to various diseases, including those most likely to be wide-spread and hence requiring far-reaching measures to tackle them, to be limited to consequences directed solely at the insured's premises.

I thought it was reasonable to read R's disease cause, in the context of the rest of the policy and the circumstances of the claim, as providing cover for losses resulting from the occurrence(s) of COVID-19 at its premises. Although I couldn't be sure, I also thought it was more likely than not that this is how a court would interpret this term.

Given the findings of the Supreme Court, I also thought the occurrence(s) on R's premises was an equally effective concurrent cause, of the decision to introduce the Regulations, as the occurrences beyond the limits of R's premises. And the cases off the premises are not an excluded cause.

Referring back to the elements of the insured peril I had set out earlier in my provisional decision, in their correct causal sequence, and taking the points above into account, I said I was satisfied that:

- An illness caused by COVID-19 was sustained by a person at R's premises.
- This occurrence was a proximate and concurrent cause of the Government's decision to introduce the Regulations.
- These Regulations were introduced on the advice or with the approval of a person or persons who would be considered the Medical Officer of Health for the Public Authority.
- These Regulations placed restrictions on R's premises. And,
- These restrictions caused an interruption or interference with R's business that likely caused a loss.

As the elements of R's disease clause have been met in the circumstances, I considered Allianz decision to decline R's claim was not made correctly. And I so didn't consider Allianz dealt with R's complaint fairly or reasonably.

How I thought things should be put right

I then set out how Allianz should put this right. Briefly, this involved reconsidering R's claim on the basis that there was an occurrence on its premises that caused an interruption to its business from 23 March 2020 to 4 July 2020. And that if, taking into account the remaining terms of the policy, any settlement is due to R, Allianz should pay this along with paying interest on this settlement generally at a rate of 8% simple per annum – though adjustments for the bounce back loan would need to be taken into account. And I confirmed that Allianz should pay R the £500 compensation offered, if it had not already done so.

I invited both parties to provide any further evidence or comment. Ms C had no further information to add. Allianz responded in detail, and I have summarised their response in terms of their arguments below.

Included in its response, Allianz also had some questions around the proposed settlement and periods for which the relevant interest was payable. I asked the investigator to expand upon the basis of this calculation, which she has done. A copy of this was provided to Ms C. I do not consider it necessary to go into the details of this, at this point however.

Allianz's response to my provisional decision

I have not repeated the full content of the response Allianz made to my provisional decision. But I have summarised the points it made below:

- Allianz emphasised that it was the circumstances that existed at the time the policy was taken out – i.e. before the pandemic – and the intended effect of R's disease clause at that time, which was key.
- Allianz referred to a consensus of opinion between the FCA, this service, and insurers, that it considered existed before the Supreme Court judgment and hence at the time R's policy was taken out. Allianz said this consensus was that the intended effect of at the premises clauses was to cover the consequences of a disease occurring at the insured's premises and not the consequences of the disease being in the wider area. Allianz referred to the FCA's submissions to the Supreme Court, that court's comments at para 71 of its judgment, and a previous decision made by this service - "T v Liberty Mutual" (decision reference DRN-2259763).
- Allianz said that this consensus that it considers existed was also the reason why at the premises clauses were not included in the FCA test case, and why the FCA told insurers that they should let policyholders with such clauses know that the cover afforded by such clauses would not be affected by the test case.
- Allianz did not consider there to have been any significant change since the Supreme Court judgment, and that the correct test of causation remained a question of contractual interpretation, which is answered by identifying objectively, at the time the policy was taken out, the intended effect of the relevant clause.
- Allianz felt the view taken before the Supreme Court judgment was the one that the parties would have had at the time the policy was taken out.
- Allianz considered it was inconsistent of me to suggest in my provisional decision that an at the premises clause is materially the same as a radius clause, whilst dismissing the Supreme Court's views on an at the premises subclause on the basis that such should be viewed in the context of this appearing within a clause that included separate at the premises and radius subclauses. Allianz felt it was illogical to imply that if a policy included a disease radius subclause, the at the premises element of the clause might have been interpreted more narrowly. Allianz said the fact that R had only been given at the premises cover, and not cover for restrictions due to disease in a wider radius, strengthens the case for saying that the clause contemplates and is limited to the "*at the premises*" aspect of the disease, not a wider outbreak.
- Allianz considered my interpretation of the clause effectively means that the policyholder ends up with cover for all the business interruption consequences of a notifiable disease, wherever in the country it occurs, provided that (and from the time

when) there is at least one case of the disease at the premises. And that the Supreme Court had said this was not the cover provided by such a clause.

- Allianz felt that I had interpreted the policy with the benefit of hindsight, rather than by assessing the objective intent of the policy at the time it was taken out.
- Allianz also, effectively, said that even if there was cover in the circumstances of R's claim for the start of the period it was closed as a result of the Regulations, this period of indemnity could not last the entire period R was closed between March and July 2020. Allianz said that my finding was that once there is a single case of disease at the premises, that person is an effective cause of everything that follows in the lockdown, even though (a) there was nobody at the premises with the disease when the Government subsequently reviewed the need for continuing lockdown and (b) the person who had been at the premises with the disease had long since recovered as the lockdown continued. And Allianz did not consider this was correct.
- In support of this, Allianz referred to paragraph 572 of the High Court judgment, which set out some detail over which cases could be considered as persuasive evidence of there having been an occurrence on a given day, within a particular radius. Allianz felt this meant the court clearly envisaged that once a person had recovered from Covid-19, they were not to be taken into account as being an ongoing, effective cause of a lockdown. And that once a person with disease is no longer at the premises, they cannot be an effective cause of an ongoing national lockdown.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I consider this complaint should be upheld largely for the reasons set out in my provisional decision. I am not persuaded to change my provisional decision based on the comments of Allianz in response to it, nor for any other reason.

I will explain why below.

Is R's claim covered by R's disease clause?

As I set out in my provisional decision, I consider that there was most likely an occurrence of COVID-19 on R's premises, that R's disease clause provides cover for losses resulting from the occurrence(s) of COVID-19 at its premises, and that the occurrence on R's premises was as equally effective a concurrent cause of the decision to introduce the Regulations as the occurrences beyond the limits of R's premises (which were not an excluded cause). As such, I consider R's claim is covered by R's disease clause.

Allianz has said that such an interpretation is not what would be understood by the parties at the point in time R's policy was taken out. In doing so, it has referred to there being a consensus of opinion between the FCA, this service, and insurers. However, I disagree that this consensus existed.

Whilst the FCA test case did not seek to directly resolve claims relating to at the premises clauses, this does not mean that there was any agreement or consensus by the FCA that they would not respond. The FCA test case could not cover all issues and the FCA was not seeking to shut out policyholders from arguing there was cover under any clause which was not being considered as part of the test case – including at the premises clauses. As the FCA explained when it began the test case, the policy wordings selected for inclusion in the

test case were those which were representative of the “key arguable issues” so that the test case process was as swift as possible, while providing as much clarity as possible to resolve the majority of key issues.

The limitation of the test case to looking only at the key issues was well publicised. And I do not consider it is reasonable for Allianz to suggest that the non-inclusion of a particular issue or type of clause can be read as an acceptance by all parties that those issues/clauses did not offer cover.

Additionally, the comments made by the FCA in its submissions to the Supreme Court need to be understood in their proper context. These comments were made in response to insurer’s arguments and in the context of defending the High Court’s conclusion that the insured peril under a radius clause was the disease everywhere (provided there was a case within the radius). I acknowledge that if the High Court’s conclusions on this point had been supported by the Supreme Court, the arguments that at the premises clauses provide cover in such circumstances would be less persuasive. However, the Supreme Court rejected this interpretation, instead deciding that the insured peril was each local case of COVID-19. I do not find the FCA’s submissions, in relation to contesting a conclusion that the Supreme Court did not agree with, to be overly persuasive when considering the current issue.

Allianz has also referred to the findings of an ombudsman in an earlier case. However, I feel I should point out that each case determined by this service is done so on the basis of the circumstances of that case. And, whilst we will endeavour to apply our reasoning consistently, it is necessary to consider the circumstances of the case referred to – T v Liberty Mutual. That decision was reached prior to the Supreme Court judgment, so could not take into account the findings and reasoning set out in that judgment. The terms of that policy were also different to R’s policy. And that case related to a situation where it had not been established that there had been any case of COVID-19 on the policyholder’s premises, so the requirements of the relevant cover provided by the complainant’s policy had not been met. This meant it was not necessary to give full consideration to whether the clause would have provided cover had there been a relevant case of COVID-19 on the premises. The ombudsman’s comments were not relevant to the outcome of the complaint.

I do not consider that a consensus existed between the FCA, this service and insurers. But, even if one did, for the reasons set out in my provisional decision, I don’t think this would have been the understanding held by a reasonable reader of R’s policy at the time the policy was taken out.

Ultimately, the determination of whether these clauses offer cover is based on the application of the law to the circumstances of a relevant claim. As such, regardless of the FCA’s submissions, it is the conclusions of the Supreme Court having considered the relevant issue of causation that is determinative here.

And that needs to be applied to the circumstances, taking into account the what can be considered to be the understanding of a reasonable person entering the contract in question.

A reasonable person’s understanding of the contract formed by R’s policy would be that if there was an occurrence of a relevant disease on R’s premises, which caused a relevant authority to take action that led to the interruption of R’s business, the requirements of the clause would be met. And their background knowledge that wide-spreading diseases might lead to a wide-spread response from the Government.

I note Allianz's reliance on the Supreme Court's comments at para. 71 of its judgment. For the sake of clarity, these comments were:

> "*Once it is recognised that the words "occurrence of a Notifiable Disease" refer to an occurrence of illness sustained by a particular person at a particular time and place, it is apparent that the argument that the disease clause in RSA 3 applies to cases of illness resulting from COVID-19 that occur more than 25 miles away from the premises should be rejected. As a matter of plain language, the clause covers only cases of illness resulting from COVID-19 that occur within the 25-mile radius specified in the clause. That is consistent with the other sub-clauses of the extension. In each case they cover events (or the discovery of events) that occur "at the premises", that is to say at a particular time and place. They include in (a)(i) any "occurrence of a Notifiable Disease (as defined below) at the Premises". The FCA has not sought to suggest that this sub-clause provides cover for all the business interruption consequences of a Notifiable Disease, wherever in the country or the world it occurs, provided that (and from the time when) there is at least one case of the disease at the premises. The language of the policy is not reasonably capable of bearing that meaning. By the same token and for similar reasons, the interpretation which the FCA has sought to place on sub-clause (a)(iii) is not in our view a tenable reading of the policy wording*."

However, again, these comments need to be considered in the context with which they were made. The Supreme Court was considering the scope of the insured peril, rather than matters of causation. And, whilst the Supreme Court said that the scope of the insured peril for an at the premises clause was not the entire outbreak even if there was an occurrence on the premises, this was also the conclusion it reached in relation to the radius clauses. The Supreme Court found that the insured peril for radius clauses was also not the entire outbreak provided it came within the radius. There was no distinction between radius and premises clauses drawn by the Supreme Court here. And I consider both types of clause provide cover for cases within their geographical limits and not cover for cases elsewhere.

The Supreme Court's reasoning – that the insured peril is each case of COVID-19 that falls within the geographical limit of the clause – applies equally to at the premises clauses as it does to radius clauses.

Additionally, the Supreme Court did not make any distinction between radius clauses and premises clauses when these were combined in the same policy. A single case – even at the premises – was considered sufficient for the cover to respond and to cover the losses sustained by the insured party as a result of that occurrence. The Supreme Court confirmed that a single case can be enough for causation to be established under a radius clause, and there would be cover under a clause containing both a premises and radius subclauses if the only case of COVID-19, within the geographical limits of the clause, was at the premises.

As has been said, the only significant difference in the construction of the at the premises clauses with the radius clauses is the geographical area they specify. This can be undefined, the whole country, a 25-mile radius, a 250-metre radius, or the policyholder's premises. A clause that sets out a smaller area only acts to limit the possibility of a case occurring, and so limit the chances of a claim being made. This is a reasonable and understandable commercial intent by an underwriter.

I should also point out here that the premises of some policyholder's will be greater than a 250-metre radius. And it would be illogical to consider that a policy requiring a case of COVID-19 within a radius smaller than a policyholder's premises would provide cover for the consequences of the Regulations, but that this would not be the case if the policy specified a larger area – that of the entire premises.

As such, I am satisfied that the reasoning of the Supreme Court on causation in relation to radius clauses applies equally to at the premises clauses.

I will note here that I have also carefully considered my provisional decision as it relates to the interpretation of the meaning of "Medical Officer of Health for the Public Authority". In doing so, I have taken into account the comments Allianz has made in the course of this case. I have also taken into account the decision of Lord Mance in a recent arbitration relating to the interpretation of another insurer's policy wording. Details of this arbitration can be found at https://uk.cntaiping.com/tplresource/cms/www/taiping/file/Award_ANNEXA.zip.

In that arbitration, Lord Mance said that references in that policy to instructions issued by or actions or advice of "the Police or other competent local authority" did not include measures taken or advice given by central government, but only covered action, etc. of the police and other local, as opposed to central or national, authorities. However, there are significant differences between the construction of the policy Lord Mance considered and R's policy, both in terms of the wording used and the interplay of the relevant parts of the policies. So, whilst I have noted the reasoning of Lord Mance, I am satisfied that the interpretation reached in my provisional decision on the meaning of "Medical Officer of Health for the Public Authority" in R's policy is correct for the reasons outlined in my provisional decision.

I have also noted the comments Lord Mance made in relation to the High Court judgment around the term "vicinity" in relation to the prevention of access clauses. However, not only do I not consider it appropriate to compare such prevention of access clauses directly with radius or at the premises clauses, the comments made by Lord Mance do not support Allianz's argument. So, I do not feel it necessary to expand upon this issue here.

I have also thought about whether or not the occurrence of COVID-19 on R's premises was something the Government would have taken into account when deciding whether to introduce the Regulations. It should be noted here that the Government's decision was based on both reported and unreported occurrences. But in this case, the person who had been on R's premises having sustained COVID-19 had reported her symptoms to NHS 111 prior to the Government making its decision. So, whilst I am unable to confirm this, the actual occurrence on R's premises may have been taken into account by the Government when it reached its decision.

And as the Supreme Court said at paragraph 212 of its judgment:

> "…*each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action*…"

In summary, R's disease clause is a composite one and I remain satisfied that:

- An illness caused by COVID-19 was sustained by a person at R's premises.
- This occurrence was a proximate and concurrent cause of the Government's decision to introduce the Regulations.
- These Regulations were introduced on the advice or with the approval of a person or persons who would be considered the Medical Officer of Health for the Public Authority.
- These Regulations placed restrictions on R's premises. And,
- These restrictions caused an interruption or interference with R's business that likely caused a loss.

As the elements of R's disease clause have been met in the circumstances, I consider Allianz decision to decline R's claim was not made correctly. And so I consider Allianz did not deal with R's complaint fairly or reasonably.

Is the claim covered until R reopened?

Allianz's response to my provisional decision set out that, even if it could be established R's disease clause responded to the circumstance of the claim, cover would be limited to the point when the Government reviewed the need to continue with the measures imposed by the Regulations. Allianz felt that the person who had sustained COVID-19 was no longer on the premises, and that no other person with COVID-19 had been on the premises, after the Regulations were introduced. And that this person may even have recovered by the time the Government reviewed the need to continue with the measures.

At this point it is helpful to refer, as I did in my provisional decision, to regulation 3 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, which says:

> "*(1) For the purposes of these Regulations, the "emergency period"—*
>
> > *(a)starts when these Regulations come into force, and*
> >
> > *(b)ends in relation to a restriction or requirement imposed by these Regulations on the day and at the time specified in a direction published by the Secretary of State terminating the requirement or restriction.*
>
> *(2) The Secretary of State must review the need for restrictions and requirements imposed by these Regulations at least once every 21 days, with the first review being carried out by 16th April 2020.*
>
> *(3) As soon as the Secretary of State considers that any restrictions or requirements set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State must publish a direction terminating that restriction or requirement.*
>
> *(4) A direction published under this regulation may—*
>
> > *(a)terminate any one or more requirement or restriction;*
> >
> > *(b)terminate a requirement or restriction in relation to a specified business or service or a specified description of business or service.*
>
> *(5) In this regulation, "specified" means specified in a direction published under this regulation*."

As I have explained in my provisional decision, the introduction of the "emergency period" was the result of one direction. The next direction introduced by the Government which altered this emergency period was that which ended the period. This direction was made on 4 July 2020. No relevant direction was made on 16 April 2020, nor at any other point of review prior to 4 July 2020.

As such, I don't consider it can be said that any new or modified restrictions were imposed on R's premises after March 2020 (insofar as relates to the current claim).

I also do not agree with Allianz that the comments of the High Court, that it has referred to, show that it is only those cases that fall a few days either side of a particular date that would be included in a review of the need to introduce or continue with restrictions. These comments by the High Court do not concern the question of causation itself. They were made in relation to how a policyholder might demonstrate there having been a case within a relevant radius on such a given date, and indicated that reported figures either side of that date might be taken into account in proving this. The court was not addressing the data that the Government would take into account when deciding whether to introduce, or remove, the Regulations and related measures.

At each point of review, the Government would have been taking into account all the historic data, including as to changes in the R-number, and not simply the cases in the week leading up to any decision.

So, I don't consider it is correct for Allianz to say that the occurrence on R's premises would not have been included in such a review, even though that occurrence on R's premises was not continuing and had not occurred within a few days of the review point.

Taking all of this into account, I am not persuaded that the liability related to R's claim is limited to the period up until the first, or any, review point prior to 4 July 2020.

Putting things right

I consider R's complaint should be upheld. In order to put things right, Allianz should:

- Reconsider R's claim on the basis that there was an occurrence on its premises that caused an interruption to its business from 23 March 2020 to 4 July 2020.
- If, taking into account the remaining terms of the policy, any settlement is due to R Allianz should pay this. Any excess that is payable should deducted from the total claim amount, before any policy limit is applied.
- Allianz should pay R interest on this settlement.

The interest payable on the settlement should be based on R having been deprived of four monthly interim payments that should have been made during the course of the claim.

The first of these payments should have been paid on 23 May 2020 and should have covered R's indemnified losses for the period 23 March 2020 to 22 April 2020 inclusive. Subsequent monthly payments should have been based on losses for the periods; 23 April 2020 to 22 May 2020, 23 May 2020 to 22 June 2020, and 23 June 2020 to 4 July 2020. These payments should have been made on 23 June 2020, 23 July 2020, and 4 August 2020 respectively.

Allianz should pay R interest on the amount of each of these interim payments, for the period from the date of each of these interim payments should have been made to the date of settlement.

This interest should be paid at a rate of 8% simple per annum.

However, Allianz is entitled to deduct from this interest calculation any interest that would be payable on the sum of R's bounce back loan, for the period R had the benefit of this loan. Allianz should instead pay R the cost of its borrowing under the bounce back loan, including any fees and interest that has accrued at the point of settlement.

Allianz has already offered to pay R £500 compensation. Allianz should do this if it has not done so already.

My final decision

My financial decision is that I uphold this complaint. Allianz Insurance Plc should put things right as I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C, on behalf of R, to accept or reject my decision before 1 December 2021.

Sam Thomas
Ombudsman