Neutral Citation Number: [2023] EWHC 1696 (Comm)

Case No: CL-2021-000322

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

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, WC4A 1NL

Date: 07/07/2023

Before :

MRS JUSTICE DIAS

- -

Between :

WORLD CHALLENGE EXPEDITIONS LIMITED	**Claimant**
- and –	
ZURICH INSURANCE COMPANY LTD	**Defendant**

- -

Mr Daniel Shapiro KC, Mr Michael Harper and Ms Alethea Redfern (instructed by **Fenchurch Law Limited**) for the **Claimant**
Mr Jonathan Hough KC and Mr William Harman (instructed by **Clyde & Co. LLP**) for the **Defendant**

Hearing dates: 24-27 April, 2-4, 9-11, 15-18 May 2023

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JUDGMENT

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 10:00 on Friday 7th July 2023.

Mrs Justice Dias:

INTRODUCTION

1. The Claimant, World Challenge Expeditions Ltd ("**WCE**") is a specialised travel company registered in the UK which provides adventurous, "challenging", expeditions worldwide for school students (known as "**Challengers**"). It was formerly a subsidiary of TUI but became part of the Travelopia group of travel companies in 2017 following the acquisition of TUI's Specialist and Activity sector by KKR.

2. From at least 2012 to 31 March 2016, WCE had taken out personal accident and travel insurance, including cancellation cover, with Royal & Sun Alliance Ltd ("**RSA**"). From 1 April 2016, similar cover was provided by Zurich Insurance plc, whose business has since been transferred to the Defendant, Zurich Insurance Company plc ("**Zurich**"). It is unnecessary for the purposes of this judgment to distinguish further between the two Zurich entities. The present claim concerns Zurich's Z-Alert Corporate Personal Accident and Business Travel Policy No. 7108302(19) (the "**Policy**") which was in force from 1 April 2019 to 31 March 2020.

3. As everyone knows, COVID-19 ("**Covid**") emerged in late 2019/early 2020 and rapidly spread worldwide severely restricting overseas travel. As a result, WCE was obliged to cancel nearly all of its booked expeditions for 2020. Under the applicable legislation, WCE had a statutory obligation in the event of cancellation to refund UK Challengers in full for any payments they had made. Similar regulations applied in the case of EU nationals and, although WCE had more flexibility under its own terms and conditions to offer alternative remedies in the case of overseas Challengers (such as deferrals or diversions), it ultimately repaid more than £10 million which it had received from Challengers by way of deposits and advance payments.

4. As will appear below, it was the firm belief of WCE that it was insured under the Policy in respect of any deposits which it was contractually obliged to refund to Challengers, such belief having been (in its view at least) confirmed by the fact that both RSA and Zurich had historically settled WCE's cancellation claims on that basis, albeit that no physical payments were ever made since all such claims fell within the applicable policy deductible. This is denied by Zurich, which contends that on its true construction the Policy only indemnified WCE for irrecoverable costs paid out by WCE to third party suppliers (for example, in respect of flights, accommodation and other trip costs). On that basis, Zurich maintains that WCE is entitled to an indemnity under the Policy of less than £150,000. The difference is stark.

5. The principal issues between the parties fall into two broad categories: (1) the correct construction of the Policy; (2) whether Zurich is precluded by estoppel or collateral contract from denying that the Policy provided the coverage which WCE thought it had. Further issues arise in relation to aggregation and quantum.

THE PARTIES

6. As indicated above, WCE is part of the Travelopia group of companies. Travelopia consists of 123 legal entities registered in 35 different companies grouped into ten divisions. WCE is part of the Education Division and itself has a number of subsidiaries registered in

different countries. At the time relevant to this claim WCE partnered with schools to organise and provide expeditions from some 21 different departure countries or groups of countries to around 36 different destination countries or groups of countries, including a number of undeveloped countries off the beaten track. The most important source markets in terms of numbers were the UK, Australia, the Middle East and the USA.

7. At the time of the claim, the Group Managing Director of WCE was Mr Peter Fletcher, who had joined the company in 2005 as a School Programme Manager. Mr Stuart Morris was the Operations and Products Director responsible for trip planning and logistics, including compliance and health and safety aspects. He also had worked for the company since 2005 in a variety of operational roles. Both men had assumed their current positions in around 2016. Mr James Venn joined the company as a Financial Controller in 2009 and was its Finance and Commercial Director at the relevant time.

8. Zurich is the well-known insurance company. Mr Aaron Stephens was one of its Senior Underwriters in the Accident & Health ("**A&H**") Department, who was responsible for the underwriting of the WCE cover from its inception in 2016. Mr Joe Ratcliffe was the Claims Relationship Manager for WCE from 2016 to 2018 and was succeeded in that role by Ms Lauren Wall. Claims under the cover were handled by the A&H claims handling team, of which Sharna Aylett was the lead manager. Other members of the claims handling team included Mr Daniel Mullan who subsequently left in 2017 to join Zurich's A&H underwriting team, and Ms Danielle Langford (previously Mace). Another key figure in the events giving rise to this claim was Mr Alexander Blake, an Executive Adjuster, who in 2020 was working as a Marine Cargo, Fine Art and Specie Claims Adjuster but who was asked in February 2020 to support the A&H claims team and thus became involved in the WCE account at that stage.

9. The brokers when the cover was first placed with Zurich in 2016 were Aon plc ("**Aon")** who were the brokers for TUI's business generally. In February 2017, following the sale to KKR, Travelopia used their own broker, Willis Towers Watson ("**WTW**"), and WTW placed the renewals for the 2017 policy year onwards. The relevant Account Manager at WTW was Mr Ian Brown, while the Loss Management Executive responsible for managing the relationship with WCE was Mr Thomas Warner.

WCE's BUSINESS

10. WCE's expeditions were focused on personal growth and development. Challengers were generally students aged 13-18 from the UK and Europe, the Middle East, the USA, Australia and New Zealand. Expeditions lasted from 7-27 nights and were led by self-employed leaders with one or two accompanying teachers.

11. Challengers would sign up for a trip following a presentation at their school which generally took place about 18-24 months prior to the anticipated departure date. WCE would then organise a pre-trip programme to prepare the Challengers and their teachers for what lay ahead. This included a launch meeting at which the WCE account manager would talk about the destination and what Challengers wished to achieve from the trips. There would then be an itinerary planning meeting where Challengers could choose their preferred activities, followed by a two-day camping trip to learn basic survival skills. Closer to the departure date, a final meeting would be held to discuss any last-minute issues such as visa applications and vaccinations. Information and tips were also available on a web portal which Challengers could access as they chose.

12. As far as payment was concerned, Challengers would pay an initial deposit of around £100-£250 on signing up, followed by monthly or quarterly instalments depending on the length of time to departure and the trip price. The final balance (known as the "**balloon payment**") would generally be paid around 60 days before the departure date. Although there was no set formula for the calculation of the balloon payment, it averaged around 60% of the total trip price.

13. As will be appreciated, there was a substantial lead time between the booking of a trip by the Challenger and the actual departure, during which a considerable amount of work was undertaken by WCE as described above. However, flights would not usually be booked until about 3-4 months prior to departure and payment would not be made to the airline until even closer to the departure date, around 1-2 months before. Accommodation and trips ("**in-country costs**") were not paid for until later still, frequently when the trip was already under way. Sums payable by WCE to the self-employed expedition leaders would usually be paid on submission of an invoice after the conclusion of the trip.

14. The timing of the balloon payment therefore coincided with the requirement to pay for flights, accommodation and other in-country costs. It was not in dispute that WCE typically received around 40% of the total trip cost before having to make any substantial third party outlay and that the trip cost charged by WCE to Challengers included its internal costs and an element of profit.

15. Although WCE partnered with schools to organise trips, its actual contractual arrangements were for the most part concluded directly with the Challengers and/or their families. Individual contracts were governed by WCE's terms and conditions ("**T&C**"s), of which it had various different sets applying in different markets. These had been produced by the central legal teams at TUI and, later, Travelopia, and covered a number of matters including cancellation. While broadly consistent, each set of T&Cs was drafted so as to conform to any applicable legislation. Thus, the T&Cs applicable to UK Challengers reflected the fact that WCE was subject in this country to the Package Travel and Linked Travel Arrangements Regulations 2018 (the "**PTR**")[1] and that customer money for UK customers was protected through WCE's ATOL licence. This was not the case in other jurisdictions.

16. The T&Cs play a significant part in this claim but it is unnecessary to rehearse them in detail beyond noting that (in very general terms):

    (a) A Challenger could cancel a trip at any time but would forfeit a percentage of the trip price on a sliding scale which increased as the departure date drew closer;

    (b) Where a Challenger had to withdraw for one of several stipulated reasons (essentially injury, illness, bereavement), the trip price would be refunded by WCE in full subject only to deduction of an administration fee;

    (c) If WCE had to cancel a trip, or could not run it to the scheduled destination at the scheduled time, (or, after 2018, if the trip was significantly affected by unavoidable and extraordinary circumstances), customers in the UK and EU (but not elsewhere) would automatically be entitled to a full refund.

[1] Replacing the Package Travel, Package Holidays and Package Tours Regulations 1992.

FACTUAL CHRONOLOGY

17. What follows is a chronology of the key events set out as neutrally as possible mainly by reference to the contemporaneous documentation.[2] As will become apparent, there were stark differences of recollection as to what was or was not said at certain key meetings and the parties were diametrically opposed in their submissions as to how some of the communications were properly to be read or understood. These differences will be explored when I come to consider the issues.

Insurance cover prior to 2016

18. WCE had historically enjoyed the benefit of personal accident and business travel insurance which provided cover for medical expenses as well as cancellation. This cover was placed centrally through TUI's broker, Marsh, and prior to 2016 was written by RSA.

19. I was provided with the schedule and wording for the RSA policy for the 2015/2016 policy year. The "Insured" under the policy was defined as WCE *"and Subsidiary and Associated Companies"*, while Individual Challengers, expedition leaders and school leaders were all designated as "Insured Persons" in addition to WCE's own employees and directors. So far as concerns cancellation, the policy materially provided that:

> *"**Cancellation Curtailment Replacement Rearrangement and Change of Itinerary Insurance Section***
>
> ***The Cover***
>
> *If the Insured or the Insured Person is forced to*
>
> *A Cancel an Insured Journey*
>
> *B Curtail an Insured Journey*
>
> *…*
>
> *as a direct and necessary result of any cause outside the Insured's or the Insured Person's control the Company will indemnify the Insured for*
>
> *A deposits and advance payments (on a proportionate basis in respect of Curtailment)*
>
> *B charges for transport*
>
> *C charges for accommodation and sustenance*
>
> *D any other charges*
>
> *reasonably and necessarily incurred and that are forfeit under contract or are not otherwise recoverable."*

[2] Grammatical and spelling errors as original.

20. Cancellation cover under the 2015 RSA policy was subject to a specific £400,000 annual aggregate deductible. In practice, therefore, it was WCE which bore any cancellation expenses, this being cheaper than paying the additional premium that would have been required for a policy with no deductible. As explained by Mr Fletcher in his witness statement, in a normal year, the level of cancellations would not be expected to exceed the deductible and this was indeed the case until 2020. The real objective in taking out cancellation cover from WCE's perspective was to protect the company against the risk of substantial losses through having to cancel multiple trips simultaneously – a so-called "black swan" year where the level of cancellations was far higher than usual. An example would be the Icelandic ash cloud or a similar catastrophe which unexpectedly prevented all travel to a particular part of the globe.

21. During the currency of the RSA policy, WCE made a number of claims under the cancellation section of the policy seeking indemnity for amounts which corresponded to the amount of the deposits that it had refunded to Challengers following cancellation. WCE's evidence was that these claims were all approved as submitted but that no actual payment was made by RSA since they all fell within the deductible. While this was not admitted by Zurich, it was not positively disputed.

The change to Zurich: 2016-2018 renewals

22. By the end of 2015, WCE had worked hard to reduce the level of cancellations and Aon (which had replaced Marsh as TUI's broker during the course of 2015) was asked to carry out a remarketing exercise for the 2016 renewal. The unchallenged evidence of WCE's witnesses was that Aon was instructed to obtain cover on a like-for-like basis to that provided by RSA. Zurich was one of the markets approached and on 26 January 2016, Gillian Bretherton of Aon provided Mr Stephens and his immediate boss, Mr James Dobson (now unfortunately deceased), with: (a) a final Renewal Submission, (b) passenger data, (c) RSA's Claims Tracker (listing claims from 2009 to 31 December 2015), and (d) RSA's Aggregate Tracker (showing the amounts paid out by WCE from 1 January 2013 to November 2015). By far the greater part of the claims from 2009 related to medical expenses following illness or injury. A far smaller proportion related to cancellation, curtailment and change of itinerary and these had reduced to almost negligible amounts by 2013.

23. The Renewal Submission emphasised the importance to WCE of having comprehensive insurance covering search and rescue, casualty evacuation and medical treatment and expressly requested quotations on three alternative bases:

    (a) Including cancellation/curtailment cover as existing, with an annual aggregate deductible of £400,000 and claims handling by the insurer;

    (b) Including cancellation/curtailment cover from the ground up with no aggregate deductible;

    (c) Excluding cancellation/curtailment cover for Challengers but maintaining it for expedition leaders and school leaders.

24. Following receipt of this information, Mr Stephens and Mr Dobson attended a site meeting at WCE's operations centre attended also by Ms Bretherton and Mr Deeley of Aon. By this stage, RSA and Zurich were the only contenders for the business and representatives

of RSA were also present. At the meeting Mr Morris and Mr Drayton (WCE's Operational Support Manager) gave a presentation about WCE's business and the changes they were introducing. It was not in dispute that RSA was keen to retain the business while Zurich was equally anxious to win it.

25. After the meeting, Mr Stephens produced quotations. However, some of these did not correspond to the options requested and it was not until 26 February 2016 that final quotations were provided on the correct basis. Meanwhile, Mr Morris had specifically queried with Ms Bretherton the operation of a particular exclusion in the RSA cancellation cover for regulations *"made by any Government or public authority"*. Mr Morris' specific concern was whether FCO advice necessitating a change of itinerary would be impacted by the exclusion. Ms Bretherton referred the query to both insurers as Zurich had a similar exclusion and a meeting was held with Mr Stephens and Mr Dobson on 25 February 2016 to discuss it.

26. Following the meeting, Mr Dobson provided further clarification on 26 February 2016, explaining that the intention of the exclusion was to exclude cancellation claims where the relevant advice not to travel was in place prior to the trip being booked (for example a trip to Chechnya). If, on the other hand, the trip was booked before the advice was given/changed, then cover would be provided, for example in the case of the Icelandic ash cloud where airspace was closed after booking.

27. In the event, Zurich provided the most competitive quote which included the added benefits of a reduced £200,000 deductible for cancellation claims, a 3-year Long Term Agreement and a profit share arrangement. The Long Term Agreement required Zurich to renew at the same premium if the exposure remained within specified levels and to offer a 10% reduction in premium if the net loss ratio was 60% or lower. An email from Ms Bretherton to Mr Stephens confirms that there was very little between Zurich and RSA in terms of premium but that the aggregate proposed by Zurich was lower. Instructions to place cover with Zurich were given by WCE on 14 March 2016.

28. It is apparent from the premium calculations that the level of premium was calculated by Mr Stephens solely with reference to the level of non-cancellation claims in previous years adjusted by set percentages for profit, expenses and ISB. The calculations did not take account of cancellation claims, no doubt because they had never hitherto breached the aggregate deductible.

29. The policy was subsequently renewed on the same terms for the 2017 policy year, by which time WTW had replaced Aon as Travelopia's broker. Since the loss ratio for the 2016 policy year was below 60%, the Long Term Agreement required the renewal premium to be based on the 2016 premium less a 10% discount, adjusted for revised passenger numbers. The documents show that the loss ratio for this purpose was calculated on the basis of paid/payable claims and so again did not take into account cancellation claims which were still within the deductible. It was made clear in the exchanges between WTW and Zurich that WCE was concerned to ensure that the Zurich policy coverage matched that which it had enjoyed with RSA.

30. The policy was again renewed in 2018. By this time, the loss ratio (calculated on the same basis) had increased above 60% and Zurich was accordingly entitled to, and did, renegotiate the LTA and increase the premium, although Mr Stephens emphasised during the renewal

negotiations that the relationship with WCE was one which Zurich wanted to continue. There was no change in terms so far as the cancellation cover was concerned.

31. I shall refer to the 2016-2018 policies as the "**Earlier Policies**".

Claims handling under the Earlier Policies

32. The vast majority of claims submitted by WCE under the Earlier Policies, both in number and value, were claims for medical expenses under the Personal Accident section of the cover which are not directly relevant to the present dispute. However, a question which arose immediately upon placement of cover in 2016 was who was to take responsibility for paying cancellation claims and tracking the erosion of the aggregate deductible. For commercial reasons, WCE wished to make refund payments to Challengers itself but it wanted Zurich to handle the claims in the normal way and monitor the erosion of the deductible. Zurich was not overenthusiastic about this but agreed to do so nonetheless.

33. A meeting was accordingly arranged for 25 April 2016 between Zurich and WCE at which this and other claims handling questions were to be discussed. Prior to the meeting, a conference call was held on 13 April 2016 between WCE, Mr Ratcliffe, Ms Aylett, Mr Stephens and others to discuss the process for handling cancellation claims. On 14 April 2016, K'an Thomas of WCE sent Mr Ratcliffe details of how WCE processed cancellation claims, stating:

"Essentially all we will do is email you a claim asking if it is valid or not. The claim will contain the following documents:

1. *Top sheet – detailing the Challenger and the refund amount*
2. *The Challenger's application form*
3. *Medical Withdrawal Certificate*
4. *Any other relevant documents – if any*

…

As mentioned yesterday we don't use an insurance claim form and use the Medical Withdrawal Certificate instead. However, RSA is mentioned throughout, please could you check through it to see if you are happy for us to just change RSA's details to Zurich? Any issues please let me know. Also open to any suggested improvements you may have for the certificate."

34. Examples of the first three documents were attached. The Refund Request Form contained boxes for details of the trip and the individual Challenger and a further three boxes for *"Amount Paid"* (coded *"£ Member_finances_Receipts"*), Total Refund and Reason for Refund.[3] It should be noted that it was an altogether different form from that used for medical expenses and other travel claims.

35. Following receipt of this information, Mr Ratcliffe drew up a draft claims protocol (to be provided eventually to WCE) and also drafted Special Handling Instructions ("**SHI**") for the Zurich claims handlers. On 18 April 2016, he provided updated SHI to Ms Aylett following a call with WCE and asked her to *"just make the point to the team regarding "Cancellation" claims – and emphasising the 'lighter touch' needed, conscious that this will be their money ultimately."* On 20 April 2016, Mr Ratcliffe asked Ms Aylett to review

[3] The format of the Refund Request Form was changed in late 2017 but not in any respect material to this case.

the documents sent by Mr Thomas in order to allow any feedback/changes to be suggested at the forthcoming meeting. He stated that the claim form would also be discussed with a view to this being tailored to meet WCE's needs and expectations.

36. As drafted by Mr Ratcliffe, the SHI contained a separate box dealing with Cancellation Claims. This provided as follows:

"The customer has a £200k annual aggregate deductible for any claims considered under the "Cancellation…." Section of the policy.

The following process should therefore be followed when presented with a claim of this type

1)WCE shall notify Zurich of the claim in the normal fashion (via K'an Thomas @ WCE)

2)Zurich's Claims Team record details of the claim as an ***INCIDENT*** *on IMACS*

3)This should be recorded via ***#315 Cause of Loss Code*** *(Travel Other)*

4)As these claims (within the £200k) will be funded by the customer, Zurich should act simply to validate that this represents a valid claim under the policy and provide confirmation that we are happy for WCE to proceed in issuing payment. Should any further information be needed to satisfy ourselves that cover is in place, this should be requested in the normal fashion.

4)As we are recording details of this claim as ***INCIDENT ONLY*** *on IMACS, details of the reserve and agreed settlement should be added to the broker reference field as follows;*

…

5)Once we have agreed settlement with WCE, the date of our confirmation email being issued should be captured in the below "Claims made" field on the first IMACS screen;
…

6)Upon receipt of our confirmation, WCE shall proceed in issuing payment to the individual in question"

37. The meeting on 25 April 2016 took place as arranged at WCE's offices in High Wycombe. It was attended by Mr Ratcliffe, Ms Aylett and Mr Dobson on behalf of Zurich, by Mr Morris, Mr Thomas and Geeta Patel on behalf of WCE and by Ms Bretherton on behalf of Aon. Minutes of the meeting were drawn up by Mr Ratcliffe. These contain the following relating to cancellation claims specifically:

*"****Summary of meeting/discussion:***

…

- *K'an to share detail of the T&C relating to cancellation, which explains the difference between the 'cost of claim' and the actual 'refund' amount the challenger is entitled to and therefore the amount which we would issue/reserve on the basis of (going forward cancellation no longer be included, WCE to keep us informed in this regard)*

- *Often documents are issued on a group booking basis — individual documents may therefore not always be available*

...

- *Cancellations claims will be notified via a central email (team managed by K'an) handlers should respond to this email directly — K'an direct in the event of query/escalation. To be referenced on SHI.*

…"

The minutes also record the following at items 3 and 4 of a list of Action Points:

"K'an to share detail of the T&C relating to cancellation, which explains the difference between the 'cost of claim' and the actual 'refund' amount the challenger is entitled to

Cancellations claims will be notified via a central email (team managed by K'an) handlers should respond to this email directly — K'an direct in the event of query/escalation. To be referenced on SHI."

38. The day after the meeting, Mr Thomas sent WCE's current T&Cs to both Mr Ratcliffe and Ms Aylett. He also set out the template email that WCE sent to Challengers who withdrew for medical reasons. Mr Ratcliffe acknowledged this email, thanking Mr Thomas for a *"really useful meeting"* and stating that he would leave Ms Aylett to review the detail relating to the T&Cs and advise if any further information was needed in that regard. For her part, Ms Aylett responded saying that *"This is just what we needed and now makes sense as to how the deduction is calculated."*

39. Receipt of the T&Cs was noted against Action Point 3 by Mr Ratcliffe in his minutes, who also recorded that Action Point 4 had been completed on 4 May 2016, presumably meaning that he made the necessary amendment to the draft SHI on that date.

40. In short, it was agreed that WCE would submit claims under the cancellation cover to Zurich which would then validate that each was a valid claim under the policy and agree quantum, collate the figures to track the deductible, and then authorise WCE to make payment.

41. In addition to the SHI (which was a document internal to Zurich), Mr Ratcliffe also drafted a Claims Protocol which was provided to WCE and WTW on around 12 May 2016. Under a General Notice section, the Protocol stated that it did not alter the terms and conditions of the policy. In relation specifically to cancellation claims (and reflecting almost word for word Mr Thomas' email of 14 April 2016) the Claims Handling section provided:

"To be notified to Zurich by K'an Thomas, this notification will typically include the following information;

1. Top Sheet- detailing the Challenger and refund amount
2. The Challengers application form
3. Medical Certificate
4. Any other relevant documents – as/if required"

42. A further section of the Claims Protocol headed *"Coverage Issues/Reservation of Rights/Denials"* provided as follows:

    "If there are potential coverage issues details will be flagged by the Zurich Claims handler for consideration – before engaging direct with the Insured and prior to any formal decision and/or repudiation being communicated to the employee.

    Any issue relating to policy coverage will be reviewed comprehensively and Zurich will bring any resulting comment to both the customer and broker – via the Underwriter and/or the Claims Relationship Executive."[4]

43. On 22 April 2016 (i.e. a few days before the meeting of 25 April 2016 referred to in paragraph 37 above), Mr Mullan wrote to Mr Thomas raising two queries on a cancellation claim that had been received in respect of an Anna Bradley. The first related to verifying disclosure of previous medical conditions. However, Mr Mullan also pointed out that *"there is a difference in the amount paid and the amount refunded according to the refund request form. Please could you explain the reason for this difference and clarify if we should have invoices or receipts to confirm these expenses."* A very similar query was raised in relation to a claim relating to a Susannah Crosby: *"Would you be so kind as to confirm the reason for the difference in the amount paid and the refund amount? If there are any invoices or receipt to support these amounts, please forward them to us."*

44. It seems reasonable to infer, as I was invited to do by WCE, that these queries were raised at the meeting on 25 April 2016 and that they were addressed by WCE's explanation as recorded in the minutes and the provision of the T&Cs.

45. On 9 May 2016, Ms Aylett emailed the claims team (including Ms Langford and Mr Mullan) attaching the T&Cs and explaining that they detailed the *"deductions for cancellations which illustrates why the amount to be refunded may be less than paid."* She then continued: *"Can you please ensure the amount calculated for refund reflects this document, then if ever audited it will be clear how we came to agree the figure".*

46. So far as the disclosure goes, cancellation claims thereafter appear to have been consistently handled in the following manner:

    (a) WCE submitted the documentation outlined in the SHI, essentially a Refund Request Form (recording amongst other things the Challenger's name, the amount paid by the Challenger and the total refund to the Challenger) and any medical certification.

    (b) Zurich would verify that the amount of the refund correctly reflected the amount due in accordance with the T&Cs and then confirm that WCE could proceed to make payment.

    (c) WCE made payment upon receipt of Zurich's confirmation.

    (d) The amount of the refund claimed by WCE and agreed by Zurich was recorded by Zurich against the deductible.

[4] An updated Claims Protocol was provided to WCE by Mr Ratcliffe on 27 October 2017 but this did not materially differ from the original.

47. An email from Mr Mullan to the claims handling team on 5 July 2016 passed on feedback from WCE as to how the new insurance arrangements were working from its perspective. He recorded that:

"In terms of claims there are no problems so we should continue with what we are doing as we're clearly doing a good job. The only thing that we can change going forward is the closing process for the cancellation claims… Stuart is happy for us to send the notification of our agreement to settle, and close the file as long as the refund/settlement matched the sum claimed."

48. Thus, where claims were approved by Zurich, they were routinely approved in the amount of the refund claimed by WCE. The disclosed documentation shows that any queries raised by the Zurich claims handlers tended to be in relation to whether the claim satisfied the requirements of WCE's T&Cs as regards time of cancellation/disclosure of medical conditions etc. Where claims were refused, it was generally because no refund was due under the T&Cs. The following are fairly typical examples of terms in which the Zurich claims handlers approved or rejected a claim although obviously the precise wording differed between individual claims handlers:

"I have reviewed the information provided against your terms and conditions and insurance policy and can confirm that this is a covered claim. Therefore I would suggest the customer receives the refund and I will record this claim as paid against the aggregate."[5]

"Unfortunately, we can't agree to a refund on this matter, as it falls outside of the terms and conditions. The terms and conditions state that 'Conditions preventing travel and diagnosed after the application date will only be considered if the information was provided within 30 days of the condition developing'.
…
I have again reviewed this claim against the World Challenge Terms and Conditions which we must abide by. Please could you advise when the parents notified you that Vanessa had been hospitalised?"[6]

"I have had a look at the medical records and dates the challenger withdrew, versus when her condition was declared and I think that this one should be covered under your T's and C's."[7]

"We are in agreement with the refund of £1500.00 and ask that you proceed to payment."[8]

"Having reviewed this claim, I can confirm that there is cover under the cancellation section of the terms and conditions.
We will record on the claim that the refund was made against the policy aggregate."[9]

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[5] Mr Mullan, approving the claim for Joel Lightbowen on 12 October 2016.
[6] Natasha Brocklesby, initially rejecting and subsequently seeking further information in relation to Vanessa De Pinto on 2 and 7 February 2017 respectively. It appears that a claim was subsequently approved in the amount of £886.81.
[7] Alex Riley, approving the claim for Chloe Greenaway on 6 February 2017.
[8] Laura Mulready, approving the claim for Alexander Eilidh on 9 March 2017.
[9] Lisa Telford, approving the claim for James Moore on 20 April 2017.

"We are happy with the claim presented and confirm that it meets the requirements for refunding and we will record as paid under the aggregate."[10]

"I am pleased to advise that according to your terms and conditions a refund is due under your cancellation aggregate."[11]

49. It is fair to point out that disclosure was only given by the parties in relation to the 43 claims specifically identified in the Particulars of Claim as having been handled under the Earlier Policies. By the time of trial WCE had ascertained from Zurich's claims records that in fact a total of around 195 cancellation claims had been handled, of which 139 had been approved and paid (by being set against the deductible) and 46 rejected or not otherwise paid. It submitted that it was entitled to rely on all these claims in support of its case.

50. Mr Jonathan Hough KC (who appeared on behalf of Zurich with Mr William Harman) protested that Zurich had not had a proper opportunity to investigate these further claims and locate relevant documentation. I accept that Zurich was not in breach of its disclosure obligations in relation to these claims and the contrary was not suggested by Mr Daniel Shapiro KC who appeared on behalf of WCE with Mr Michael Harper and Ms Alethea Redfern.

51. In these circumstances, Mr Hough submitted that it was not open to Mr Shapiro to advance his case save by reference to the 43 expressly pleaded claims. However, he did not suggest that the Zurich claims handlers would have approached the other claims in any different way from that in which they handled the 43. Moreover, it was at all times open to Zurich to investigate its documentation with a view to establishing the contrary if it had so wished but it did not do so, from which I infer that it had no grounds to suppose that this was the case. While, therefore, I bear in mind the fact that full disclosure was not available in relation to these further claims, it seems to me overwhelmingly likely that they were handled in the same way as the 43 for which there is disclosure and were therefore either approved or rejected on the basis of their compliance with WCE's T&Cs. To the extent necessary, I so find and in my view WCE can properly rely on them as part of its case.

52. Both sides referred me to individual claims which, for one reason or another, were said to be of particular relevance to the arguments in this case. Rather than encumber this judgment further with the details of these claims, they are set out in a separate annex.

The 2019 renewal

53. Renewal negotiations for the 2019 policy year commenced in February 2019. The loss ratio for the expiring year was again around 113% and Mr Stephens initially quoted a substantially increased premium to reflect this. He also declined to offer a new LTA. In emails to Mr Brown of WTW dated 25 February, he nonetheless indicated his desire to continue the relationship and following a telephone call, revised the terms he was prepared to offer. As recorded in Mr Brown's email dated 13 March 2019, these included a slight reduction in the premium and a lower cancellation aggregate deductible of £100,000. Mr Stephens again stressed that he did not want to risk losing the account in the following year

[10] Billy Stanton, approving the claim for Amy Steele on 2 June 2017.
[11] Lisa Telford, approving the claim for Nicol Thompson on 3 July 2018.

and indicated that he would be prepared after all to continue the existing LTA at the new premium or start a new one.

54. These terms were passed on to WCE by Mr Brown on the basis that the policy coverage and wording would be as expiring. Mr Brown included in his headline points the reduction in premium compared with Zurich's original offer and the reduction in the aggregate deductible for cancellation. The terms were acceptable to WCE and the policy was renewed on that basis.

55. Five cancellation claims were handled under the Policy prior to February 2020 with at least some documentation available for four of them. All of these four appear to have been approved in the amount of the refund claimed by WCE, albeit in two cases only after querying whether WCE's T&Cs had been complied with.

January/February 2020

56. As is by now all too well known, Covid emerged in Wuhan, the People's Republic of China ("**PRC**") towards the end of December 2019 and spread rapidly across the globe. By the end of January 2020, WCE was starting to receive enquiries from anxious Challengers and their families and on 27 January 2020, it produced an Internal Advisory Document for the benefit of its customer support and sales teams. This noted that: (a) current advice from the FCO and its Australian counterpart, DFAT, was only against travel to Hubei province; (b) WCE had nonetheless decided to postpone or divert one expedition to China by a Canadian school (Toronto French School) which was due to depart on 7 March 2020;[12] (c) the situation would be closely monitored with a view to taking decisions regarding further China bookings at a later date; (d) as far as other affected destinations were concerned, WCE's advice was to communicate with schools and families via an External Advisory Document. Such a document was issued a few days later on 3 February 2020 and likewise recorded that the only formal advice from the FCO, DFAT and US State Department was against travel to China but that WCE was monitoring the situation: *"At this stage we do not anticipate any change to your planned trip, however we will be in touch if this changes."*

57. By 7 February 2020, WCE had diverted further trips and was in discussion about diverting others. Also in February, WCE drew up a Covid-19 Policy and Scenario Planning document. At this stage, its strategy was broadly:

    (a) to minimise cancellations initiated by WCE by cancelling only if the relevant government advice was against travel, and instead trying to avoid high risk areas by changing itineraries without triggering a right to cancel;

    (b) to minimise refunds if there was no alternative to cancellation by seeking to divert or defer trips or to offer a credit for a future year;

    (c) to hold customers to WCE's T&Cs in the event that the customer cancelled.

58. Covid continued to have an increasing impact on expeditions, however, and on 25 February 2020 Mr Morris asked Mr Brown to clarify the following point under the cancellation cover:

[12] This was in fact subsequently cancelled by the school itself.

"With the current Coronavirus issue, we are having to divert some teams who were due to go to China to other destinations (FCO advise against travel to China) and costs associated with these changes are legitimate claims and should be submitted to Zurich to go against the £100k aggregate — please confirm.

Hypothetically if in this situation (or a similar situation in the future) the government advises against travel to a certain country and we need to cancel a trip, we would need to refund customers. If each traveller had paid e.g £3k for a trip to China and we were cancelling and refunding £3k, we would submit a claim for £3k to Zurich to go against the £100k aggregate. If the £100k was exceeded, then Zurich would pay out beyond that — please confirm."

59. He followed this with a further request on 27 February 2020 to clarify that WCE could work to certain levels of advisory notice issued respectively by the FCO for UK schools, DFAT for Australian schools and the US State Department for US schools.

60. Mr Brown raised both points with Mr Stephens in a telephone call on 27 February 2020, the outcome of which he set out in an email sent to Mr Stephens later the same day. This recorded in relation to Mr Morris' second point that, although the policy conditions only referenced the FCO, WCE's practice was understood and accepted by Zurich. As regards the first query, it recorded Mr Stephens' agreement that both paragraphs represented correct policy assumptions. Mr Brown observed that WCE clearly had in mind its forthcoming peak trip period and was monitoring the situation very closely. He asked Mr Stephens for an email response by return so that he could provide some comfort to WCE but meanwhile forwarded the email to Mr Morris summarising the policy position as being that *"where trips are cancelled on advice, costs can contribute towards the annual aggregate, which if/when exceeded will leave Zurich providing cover thereafter."* He also said that he would share any written response as soon as it was received and suggested that it would be prudent to keep Zurich informed of the existing and likely future impact of Covid on WCE.

1-16 March 2020

61. On 2 March 2020, Mr Brown initiated negotiations for renewal of cover for the 2020 year.

62. On the same day a telephone conversation took place between Mr Drayton and Mr Stephens regarding the recent decision of the UAE authorities to ban all school trips both within and outside the UAE. In an email, Mr Stephens confirmed his view that Zurich would regard this as a state-driven decision rather than a disinclination to travel such that trips could be claimable under the policy. He noted, however, a difficulty in that no time period was being suggested for the ban.

63. This point was then discussed internally within WCE. It was recognised that a restriction might be relevant for a trip departing in 2 weeks' time, but not for one which was only due to depart 4-5 months hence. WCE's position at that stage was accordingly to wait to make a decision closer to the time. In an email of 3 March 2020, Phil Durrell, WCE's Regional Middle East Manager, noted that he had five trips due to depart that month, of which three had already been cancelled by the schools. Mr Durrell confirmed that refunds would not be offered until the insurers had paid and that he had reiterated that all June/July trips would still go ahead unless the travel ban remained in place and they were unable to travel.

64. The following day, Mr Fletcher issued a Zoom message internally asking his teams to note that claims would not be insured unless there was government advice not to travel, in which case WCE would look to process a refund although nothing was to be unequivocally promised until the insurance claims had been settled and paid.

65. On 7 March 2020, Vicky Doherty (WCE's Head of Customer and Leader Experience) circulated an email to the communications team, noting that Covid was changing things on a daily basis in terms of how WCE communicated with its customers. She attached a document outlining two scenarios that might result in cancellation and explaining that if governmental travel restrictions were imposed, WCE should wait until four weeks prior to departure before making any decision on what to do. Appropriate holding statements would therefore need to be prepared. At the four-week point, decisions would be taken on a case-by-case basis in order to see whether diversion or delay might be an option. Otherwise trips would be cancelled no less than 2 weeks and no more than 3 weeks before departure.

66. Between 11 and 17 March 2020, many governments issued various restrictions and advice against travel, of which the following were of most relevance to the present proceedings:

    (a) 11 March 2020: the US State Department advised US citizens to reconsider travel abroad;

    (b) 12 March 2020: the UK Prime Minister, the Department of Education and the FCO advised against all overseas school trips (followed almost immediately by similar advice from the Scottish and Welsh governments);

    (c) 13 March 2020: the Australian government raised its alert to level 3 advising all Australians to reconsider their need to travel overseas;

    (d) 17 March:

        (i) the UK FCO advised against all non-essential travel initially for a period of 30 days;

        (ii) the New Zealand government advised against overseas travel.

67. Meanwhile, on 12 March 2020, Zurich indicated that any renewed policy would be subject to an annual cap of £200,000 for cancellation claims.

68. On the same day, Mr Morris sent a Zoom message to Mr Fletcher referring to the UK government's ban on overseas school trips and stating that it would be necessary to discuss whether WCE should continue to wait and see in relation to the summer trips or whether it should put together a proactive cancellation plan. Mr Fletcher's response was that cancellation was more appealing in some respects but that it would be necessary to get insurers' co-operation. In a message to staff on 13 March 2020, he stated that, given the restrictions/advice now in place in most markets, WCE would almost certainly see a number of trips cancelled over the next few months. Meanwhile, the advice for customers remained the same but would be updated as the situation unfolded. He recorded a similar message in a video for staff.

69. Also on 13 March 2020, Mr Brown chased Mr Stephens for a response to his email of 27 February and passed on a further query from WCE as to which policy would respond to

cancellation of a trip where the booking and departure dates fell in different policy years. Given the severe reduction in cover proposed for 2020, this was obviously a matter of the utmost concern.

70. On 14 March 2020, a number of Zoom messages were exchanged between Mr Fletcher and Mr Morris discussing the possibility of a more proactive approach to cancellations, as well as the insurance renewal strategy. The perceived problem was how far in advance Zurich would permit WCE to cancel although Mr Fletcher was also concerned about *"how we cover refunds though and what the exposure is once we offset any recouped costs."* Mr Morris' response was that they needed to understand the insurance policy and ensure that WCE's operations plan was co-ordinated with it so that WCE was not exposed. He expressed the view that WCE should not cancel any trips until it had confirmation that it was covered, and referred to a query raised by Travelopia's M&A Director as to whether WCE was under an obligation to mitigate supplier costs and whether the policy only paid out net of any supplier refunds. Mr Morris told Mr Fletcher about Zurich's proposed £200,000 cap on cancellation claims for the forthcoming year to which Mr Fletcher's response was that they needed legal advice as soon as possible. He referred to the T&Cs and suggested that WCE could just let schools cancel if they chose not to travel. However, he expressed a concern that WCE's existing FAQs might be misleading and that WCE might need to defer more trips in order to appease customers. In response, Mr Morris pointed out that WCE could not operate trips contrary to government advice as this would invalidate the insurance so that if the advice remained in place, it would have no option but to cancel. On the other hand, if it waited, it would incur more flight and in-country costs.

71. On 15 March 2020, Mr Fletcher emailed Ms Northey asking to set up a call with Mr Morris to discuss WCE's proposed plan of action. This was to submit to Zurich that all trips due to depart up to the end of August 2020 should be covered under the 2019 policy on the basis of the government restrictions already in place in the major source markets, combined with expert advice that the peak of the pandemic was expected in the UK around the start of June. In an email on 16 March 2020 to Mr Morris and others he confirmed his view that once WCE knew where it stood on insurance, he would like publicly to cancel all the trips that it thought could and should be cancelled.

72. Also on 16 March 2020, Mr Brown spoke to Mr Stephens by telephone and informed him of WCE's internal decision to cancel all expeditions departing up to the end of August at an estimated cost of £4 million on the basis of the existing FCO advice/restrictions. In an email to Mr Moss (Zurich's Head of Specialty Lines), Mr Stephens stated that he had told Mr Brown that Zurich would be looking to discuss the matter as he felt that the decision to cancel was *"hugely overreacting at this point."* He also informed Mr Moss that in order to limit exposure he had provided renewal terms with an annual cap of £200,000 for cancellation.

73. Mr Moss passed this email on to Ms Hayley Robinson, Zurich's Chief Underwriting Officer, (also copying Mr Stephens) stating that Zurich's current stance was to consider cancellation up to 60 days prior to departure which he understood to be consistent with the approach taken on similar risks written by Zurich Municipal ("**ZM**"), another division of Zurich. He concluded that *"the UW team and Claims will be communicating this tomorrow…"*

74. It seems likely that Mr Brown then spoke to Mr Morris after his conversation with Mr Stephens since Mr Morris records in a Zoom message to WCE's directors, that WTW

agreed that an open discussion was urgently needed with Zurich and that Mr Brown did not think they were expecting July trips to be cancelled at this stage although they had not indicated any timeframe. Mr Brown had advised WCE to be open about the scale of the claim, as to which Mr Morris thought WCE should also be indicating the difference between the current exposure and the potential exposure if cancellations were delayed.

75. Arrangements were made for a call to take place with Zurich on the following day. During the evening of 16 March 2020, Mr Stephens emailed Mark Dowsing, Zurich's Technical Claims Manager, asking whether he would be free to join the call. Mr Dowsing replied saying that he was unavailable but that he had asked Mr Blake to attend in his absence. By way of initial comment, he said that Zurich could not provide a view on cover until they had received notice of claims under the policy year. At a high level, Zurich were currently considering a timescale for cancellation of 30 days before the date of travel. At first blush he thought the proposed cancellations were too far ahead to fall into the current policy. However, he emphasised that this was only an indication of Zurich's likely approach and that coverage could not be addressed in detail until a formal claim was submitted. He thought that WCE was "testing the water" and that Zurich should therefore be mindful as to what it said at this stage.

17-27 March

76. At 1030 on 17 March 2020, a Webex call took place. The participants were Mr Morris on behalf of WCE, Mr Brown and Zara Golder on behalf of WTW and Mr Stephens, Mr Blake and Mr Ankit Saha (an underwriting manager) on behalf of Zurich.

77. Mr Blake was new to WCE's account. Indeed he was new to the entire A&H department having worked in the Marine, Fine Art and Specie team since March 2018 handling mainly marine claims. In February 2020, however, he was asked to support the A&H Claims Team alongside his duties in the Marine Team by replacing Ms Langford as Senior Claims Handler, she having moved to another role within the company. As such, he acted as a senior referral point rather than a dedicated account handler, assisting with all aspects of A&H business and also with the operational management of the team. Prior to February 2020, Mr Blake had no experience of Business Travel Policies and had never handled a cancellation claim under such a policy. By the date of the call, he had been taken through the Z-Alert wording at a high level by Ms Langford and had handled a small medical expenses claim, but had not looked at the WCE policy or schedule or the T&Cs.

78. Exactly what was said at the 17 March meeting is a matter of dispute and will be addressed further below. Mr Blake's manuscript notes contain the following:

"Cancel July + August trips

Alternative Government advise
All overseas school trips cancelled
Level 3 in AUS and USA

3 teams, Peru, Morocco, Ecuador

↓

Canada

10-14 weeks to peak
Feel they need to cancel all summer trips

60 day

Standard Claim Procedure
to be changed

60 days? Why not 30??

Section 8. clarity on what policy year responds

100 trips in next 60 days
20 not departed already"

79. Following the call, Mr Morris sent an email to Mr Stephens timed at 1301, also copied to WTW, Mr Dowsing, Mr Fletcher and Ms Northey (amongst others) summarising the position reached as follows:

"As discussed, there are a couple of outstanding issues to resolve, namely the time period of 60 days, and confirmation that our current policy will respond to current bookings as per the policy wording, with the new policy coming into effect for future bookings.

On the basis that we are working to a minimum of 60 days, we will start to process claims for those trips impacted in that time period. James will provide the information in a spreadsheet as discussed — please let us know who you would like that information sent to. Clearly there is an aggregate amount payable by world challenge on the current policy that will need to be factored into the claims process.

Look forward to hearing from you soon"

80. At 1213, Mr Fletcher emailed Mr Morris and others stating that following the meeting with Zurich, WCE would confirm its decision to cancel all trips up to the end of May. Trips due to depart thereafter would be reviewed in April as there was still a question mark over the insurance for these trips that needed to be resolved over the coming days. He reiterated that in no circumstances should refunds be made to customers until monies had been received from the insurers.

81. At 1307, Mr Stephens sent an internal email to Mr Dowsing and Mr Moss amongst others updating them on the call with WCE in the following terms:

"As you may have been aware, I had the call with World Challenge this morning in regard to the potential claims situation arising due to covid-19.

I explained that the reasonable time period for cancellation is 30 as standard, but we are looking to offer 60 days.

The client would like to know as to where the this duration has come from and I explained via legal assistance.

We then discussed trips booked for July/August time. I explained that these were too far in advance and that at this stage, we would not look to reimburse.

One of the Travelopia/World Challenge team then asked as to why trips booked In this policy period (01/04/19 to 31/03/20) would not be covered under the current wording, rather than the amended/restricted renewal wording. They have asked for clarification of the intention of the cancellation wording —

[cancellation wording quoted]

The view of the client is that the July/August trips are to be covered at the time of booking, so a risk attaching theory.

I have spoken to Ankit and at this stage I am not 100% that they are Incorrect. However, Alex (Blake) did point out that the time operative time for July trips, would technically fall in to the new policy period and therefore would seen as 20/21 trip, not when it was booked necessarily.

…

As it stands, World Challenge are submitting the first claim, for 20 trips that have not gone ahead and 80 more that will be in the next 60 days."

82. At 1315 Mr Stephens replied to Mr Morris saying:

"As you note, I have requested confirmation on the policy period/trip departure conversation from internal stakeholders and will rely this back to all parties once received and reviewed fully.

In regard to the necessary individuals needed for the initial claims, I would look to involve Alex Blake, Gemma Fox and myself from Zurich.

Hope this is satisfactory, but if there are any further queries in the meantime, please do let me know."

83. At 1358, Mr Blake sent an email to Mr Dowsing and Mr Stephens asking the latter to:

"elaborate on the 19/20 agg and what the new 20/21 agg will be and how these cancellations may be adversely affected dependant on which policy year they are notified too.

Mark — Happy to retain claims oversight of this matter and linking to you for support. WC will be sending an spreadsheet within the coming days which outlays the 20 trips already cancelled and the 80 forthcoming ones. We will then have a better indication to what our exposure is.

84. In response, Mr Stephens explained that an aggregate cap had been imposed on renewal in order to mitigate Zurich's risk and suggested that this explained WCE's current stance on cancelling all claims in the current policy period.

85. At 1726, Mr Saha emailed Mr Stephens and Mr Moss noting a couple of points arising out of the call:

"1) Looking at the definition of "Operative Time" (pasted below) that was bespoked for the WC policy; only trips commencing during the period of insurance are attaching to the

policy (i.e. come under the definition of "operative time). So indeed trips commencing after 1st April are not governed by this policy. WC suggested on the call that it is "booked" trips that attach to the policy (even if they happen months down the line) but this cannot be our underwriting intention and indeed our wording appears to limit such protracted exposure.

2) WC were under the impression in the call that we cover the "refund" payments they will owe to schools/pupils. This doesn't follow:

• Our wording affirms we will only pay for unrecoverable hotel/airline prepayments in respect of individual pupils/teachers insured under the policy (i.e. "Challengers). This will only be a portion of WC's total costs and what they charge schools/pupils (which I understand the $4m is based on).

• We should hold that we will only charge unrecoverable pre-payments and it is their duty to seek recovery primarily from the airline/hotel (appreciate they're not staying in hotels in this case). This has to be part of the claims handling process."

86. Mr Stephens acknowledged this email stating: *"As you discussed on the call, there needs to be a consideration on recouping airfares etc. Ironically, this cannot be done for July/August trips, as it is deemed to far outside the reasonable period."*

87. At 2011, Mr Stephens sent another email to Mr Dowsing and Mr Blake adopting Mr Saha's comments verbatim.

88. On 18 March 2020, Mr Morris chased Mr Stephens for an update following the 17 March telephone call. He said that WCE was still finalising the spreadsheet to send to Mr Blake for the first 60 days cancellations and hoped to provide it later that day. He stressed that *"As discussed yesterday, resolving the 2 outstanding issues as soon as possible is paramount to us."* Mr Stephens sent a holding response explaining that all information and internal discussions were being reviewed both internally and externally. It appears that Zurich had instructed Clyde & Co. at around mid-March to advise in relation to *"a number of challenging enquiries we are receiving."*

89. Meanwhile, Mr Fletcher and Mr Venn were discussing by Zoom message the stance to be adopted by WCE vis-à-vis its customers. Mr Fletcher reported that Travelopia were happy with the concept of a credit note as it protected cash flow and could result in a similar outcome to a deferral. The difficulty would be in persuading schools to accept them. He suggested that credit notes should only be offered if (1) there was government advice against travel, (2) insurance was not available and (3) a deferral was impossible. Mr Venn pointed out that if the insurance did not go WCE's way then a decision would have to be taken for each market whether to give a refund, hold the line and annoy the school or try to give a credit. Mr Fletcher responded saying that outside the scope of the PTRs WCE was not obliged to give refunds and he did not want to do so. However, WCE was bound by the T&Cs to run the trip at a later date which was its only option for performing its contract. If this did not work for some schools WCE would be in a difficult position although it might be able to retain some schools by offering a credit note. He agreed that if the insurance did not respond, there would be a huge cash hole which could only be mitigated by cost actions and holding the line on refunds.

90. A further urgent chaser from Mr Morris to Mr Stephens was sent on 19 March 2020 following the announcement that UK schools would be closing the next day. This was again met with a holding response.

91. On 20 March 2020, Mr Sapsford of WCE issued a general email to colleagues confirming that WCE had cancelled all domestic and overseas operations to the end of May, including 37 overseas trips. He noted that *"Our insurer (Zurich) are covering all cancellations for 60 days (minimum - still under negotiation)".*

92. On 24 March 2020, Mr Morris emailed Mr Fletcher reporting on a conversation with Mr Brown in which the latter, having spoken to Mr Stephens, had suggested that WCE should not be overly concerned:

"He did say however that when it comes to claims they will be expecting us to try and mitigate costs through things such as airline refunds etc. I was worried that they would come back to this- I'm not entirely sure of how we approach that and the implications."

93. On 25 March 2020, an internal email conversation involving Hayley Robinson took place within Zurich concerning the cancellation threshold for travel policies. One issue was the cancellation threshold for ZM which was *"currently 60 days but proposed to be increased until the end of the academic year."* Ms Robinson responded that:

"This does not yet include what Stephen Moss needs us to consider from the perspective of World Challenge making a claim i.e. his team were working to the same 60 days as ZM — I think his question is whether it was reasonable to accept cancellation to the end of September for World Challenge and to compare to what ZM are doing.

Can that be added in please."

94. Ms Robinson's response was forwarded to Mr Moss who replied as follows:

"The issue we have relates to a specific insured (World Challenge).

They book travel for students to travel and work overseas during the course of the year, current policy expires 1" April but they have trips booked out to the end of August.

Our initial response to this has been to use the stance agreed with ZM (i.e. stating that cancelling trips within a 60 day window is appropriate)

However, given recent developments they have taken the decision to cancel trips going out to August which raises questions on the coverage in relation to these trips that are outside the 60 day guidance.

As we see it there are two potential interpretations;

1: Accept claims under current policy: Cancellation of trips with confirmed booking dates prior to the COVD 19 being a 'known event' even though some will be outside the 60 (or even 90 days).

2: Policy Interpretation: There is also an Operative Clause in the policy which may imply cancellation is only for trips commencing during the policy period.

These options are further complicated by the fact that the policy also includes an exclusion that prevents the client from cancelling trips in the new policy period as the reason for cancellation would have been deemed to have been know prior to inception.

We have a number of difference views on this;" [remainder of email garbled]

95. At 0925 on 26 March 2020, Mr Stephens emailed Mr Brown stating informally that:

"the policy will be looking to respond for all trips cancelled, including those in July and August.

We however have to be very specific in response as to what is claimable etc. I shall be in touch shortly.

As discussed, it will be the claims team taking this forward once formal instructions are sent out."

It appears that formal sign off of the position was required from Mr Nichols, although this was expected imminently.

96. Later that evening, Ms Northey sent an email to Mr Stephens expressing in no uncertain terms WCE's disappointment and frustration that Zurich had still not provided any substantive response following the call of 17 March and hinting that more formal action might be taken if there were any further delay.

97. This email was then the subject of an internal conversation between Mr Blake and Mr Stephens some parts of which one can only hope that neither of them expected to become public:

"…

Alex Blake 17:23:

Do you foresee them renewing or not?

Aaron Stephens 17:23:

The renewal is almost irrelevant at the moment I guess. No new trips until November the earliest.

Alex Blake 17:25:

True, though surely they'd still want cover from between booking date and OT. If they lapse they don't get that benefit

Aaron Stephens 17:26:

November trips have already taken deposits, so would potentially fall in to this policy period... eekkkk

…"

98. At 1746 on 27 March 2020, Mr Blake sent a formal response to Ms Northey and WCE which included the following:

"I can confirm that any agreed claim for those trips already booked, prior to the announcement of Covid-19 as a pandemic, and due to take place up until the end of August, will be borne by the 2019/20 policy year. This is an approach based on the reasonableness and foreseeability of those trips being unable to commence given the current advice from our Government and Public Authorities.

With regards to the claims themselves, it was of my understanding that yourself and/or World Challenge were to provide us with a spreadsheet you currently hold of the c.60-80 trips you were intending to claim for. I would be grateful if you could look to provide this to me for review. I will then be able to assess the costs you have incurred and provide commentary on what is recoverable under the policy and what costs you will be able to receive in refund from your airline/accommodation provider/activity host."

99. It should be noted that the words *"any agreed claim for"* in the first line of the quoted extract had been added into Mr Blake's original draft at the instigation of David Nichols, Zurich's UK Chief Claims Officer, in order not to create any impression that the claim would be settled in full.

28 March-8 April 2020

100. Following receipt of Mr Blake's email of 27 March 2020, Ms Northey suggested to Mr Morris, Mr Venn and Mr Fletcher that it was worth speaking to WTW about the reference to airline/accommodation costs and whether WCE was under any duty to mitigate. Mr Morris replied on 29 March 2020 that he had arranged a call with WTW for the following day and that there were a couple of points on which he felt WCE needed to get absolute clarity:

"1. It appears that Zurich are confirming that the 19/20 policy will respond to trips booked during the policy period that have to be cancelled by an event that is triggered in the same period. They haven't said as much though. Instead they have said it will respond up until the end of August. I would suggest that trips booked later in the year ought to also be covered although we may not cancel them until much closer to the time — perhaps 60 days prior. E.g if the travel restrictions are still in place in September, we may begin to cancel November trips.

2. What we can claim for — a month or so ago WTW confirmed with Zurich (on the phone) that if we had to refund a customer (e.g) £3k that we could claim for £3k. Now they appear to be focusing on mitigation. If they are suggesting that if we get a £500 refund from an airline, then they would process a claim for £2.5k then I think we're ok with that. It will become an issue though if they look to us to evidence all of the costs incurred vs what the customer has paid us; for example, we may not have incurred any accommodation costs yet, and they may argue that what we would have paid out on in-country costs can be used towards refunding the customer.

James and I (and others if available) will try to take a call with Zurich on Monday to address the above and we can then follow up by email. I imagine it will continue to be hard work getting this clarity though"

101. On 30 March 2020, Mr Fletcher informed his colleagues internally that WCE had received confirmation that trips departing after 31 May would be covered by the current policy. However, he reminded them that refunds would only be approved if they were in line with the insurance coverage and that no refunds should be confirmed until WCE was fully informed of any caveats that Zurich might impose. He also cautioned that not every cancelled trip would be covered in any event and that for those trips, WCE would either apply its T&Cs (allowing deferral rather than a refund) or offer a credit note to the school for the latter to administer with students.

102. Later that day, Mr Warner of WTW emailed Mr Blake in response to his email of 27 March 2020 (also copying in Mr Stephens and WCE). He noted that WCE was currently collating the costs incurred and to be claimed and suggested that all parties work through a small sample of trips to establish a claims management process and information requirements. He also raised the question of trips booked in the current policy year which were due to depart from September onwards (mainly for Australian schools). He stated that WCE wished to discuss with Zurich the appropriate time to take decisions about cancellation for these trips, pointing out that the earlier such decisions were taken, the greater the mitigation of incurred costs since this would stop the receipt of additional trip payments by Challengers.

103. Mr Stephens' initial response on 31 March 2020 was that further deposits or bookings taken since the declaration of the pandemic *"would potentially not be covered due to the situation being known at the time of either booking or accepting further deposits. Therefore, the cancellation for such trips are foreseeable."* However, he promised to revert with a formal response. By this stage, Zurich had withdrawn its renewal terms for the 2020 policy year. In circumstances where clearly no trips would be running in the immediate future, this was not a matter of concern to WCE and the Policy therefore expired on 31 March 2020 without being renewed.

104. On 1 April 2020, further internal discussions took place within WCE as to whether (a) to tell customers there and then that trips to the end of August would be cancelled and that WCE was working with its insurers to establish what costs could be recovered; or (b) to wait until the insurance had become clear and then announce the cancellation and refund of monies paid to date at the same time. Both Ms Doherty and Mr Fletcher preferred the latter but recognised that there was a limit to how long WCE could wait in order to do this.

105. Meanwhile, on the same day, Mr Warner replied to Mr Stephens explaining that no new trips would have been booked by WCE since the relevant government advice was released:

> *"2. Regarding taking further deposits; Challengers booked on to trips that have not been cancelled to date (for example departing in November) are still assumed to be going ahead. WCE therefore need to continue to plan those trips on this premise, this would naturally include continuing to take customer payments as customers are on set payment plans; to be clear, these trips were booked prior to the pandemic.*
>
> *Clearly 2 above is relevant to the discussions proposed on cancellation strategy and how far in advance such decisions to cancel should be taken given the currently evolving situation."*

106. Mr Stephens turned to Mr Blake for his opinion on this point, and Mr Blake replied stating:

"I am inclined to agree with Tom that it would be unreasonable for us to assert that further deposits paid on trips already booked prior to the pandemic declaration would be unrecoverable under the policy. What we will need to do is monitor the travel situation closely but also have an understanding of when these future trips are due to fly and when deposits are expected to be collected. There's no point agreeing to say a 60 day rolling cancellation window, but they collect deposits on the 61st day and double our claim spend."

107. On 3 April 2020, Mr Blake issued an internal Early Warning Email ("**EWE**") in relation to the claim submitted by WCE for the trips which had already been cancelled up to 31 May. An EWE was the means by which senior figures within Zurich were alerted to the possibility of a large claim. The report form compiled by Mr Blake and attached to the EWE contained the following description:

"Following the outbreak of Covid-19 all but essential international travel has been halted. World Challenge (WC) have c.80 trips they wish to cancel. It is understood that deposits paid on these trips so far accumulate to GBP 3-4m. Request's have been made for the accurate figures from the insured."

The potential net loss to Zurich was shown as £4 million.

108. The suggestion of working through a small sample of claims was accepted by Mr Blake and, later the same day, Mr Warner forwarded a spreadsheet compiled by Mr Venn containing details of four example claims showing different permutations according to whether the students had fully paid for the trip or not and whether any refunds had been obtained in respect of flights, accommodation etc.

109. Each example trip was broken down into columns showing, amongst other things:

(a) the total trip cost and the amount that the customer had paid;

(b) (in red) the amount of the customer refund (equating in each case to the amount paid by the customer) and the various third party costs incurred;

(c) the amount of any third party refunds;

(d) the Current Claimed Amount which was the total of all the items in (b) less the amount of any third party refunds in (c).

110. Mr Venn candidly accepted in cross-examination that it did not seem right to be claiming both refunds and third party costs, but explained that he put the spreadsheet forward on the basis that this was the information that Zurich had requested and that it represented the most favourable position for WCE. He fully expected a further discussion before any claim was formally advanced.

111. Having reviewed the spreadsheet, Mr Blake emailed Mr Warner (with a copy to Mr Venn) on 6 April 2020 asking for more detail regarding the "Trip Cost to Challenger" and what it comprised. Mr Warner responded saying that he believed it to be the price charged to Challengers and a telephone discussion then took place on 7 April 2020 between the three of them. It was common ground that Mr Blake suggested during this call that the claim as presented by WCE involved an element of double-counting because it claimed

refunds in addition to irrecoverable costs. He did not confirm expressly that refunds were covered under the Policy but equally did not say that they were not.

112. Meanwhile, an internal discussion was taking place between Mr Stephens, Mr Dowsing and Mr Blake regarding the response that Zurich should give to WCE regarding the cancellation of trips departing after August. In the evening of 7 April 2020, Mr Blake expressed his view as follows:

"As I mentioned on our call, I am of the opinion that the Insured should continue to collect deposits on trips post August and that we will have to consider these additional payments as and when the are within a reasonable window of cancellation. At the moment this window has not been defined entirely, but it is likely to be in the 60 day region.

Whilst I appreciate these deposits/additional payments are paid post the declaration of the pandemic, the actual initial booking of the trip was made prior to this announcement and therefore, in line with the approach we have taken on accepting claims in the 19/20 year, we will have to continue to deal with claims post August in the same manner. The Insured has a duty to act reasonably and mitigate costs, but they also have to continue to be as "business as usual" as possible. We can't tell them that we won't accept further deposits paid due to CV19 being a 'known event', but then tell them that the trip is too far in advance for us to consider a cancellation claim.

The Insured has told me they collect the final balance, which looks to be 30-40% of the total costs, 60 days prior to departure for the trip. With this in mind, this will likely be the window we work to as a way to keep the claims costs down."

113. The following day, Mr Blake received an email from Mr Moss in response to the EWE. Mr Moss queried whether the trips had already been cancelled and stressed that WCE should pursue all possible avenues of recovery before presenting a claim. In response, Mr Blake said that he understood all trips had been cancelled to the end of May and that Zurich would be supporting WCE in obtaining recoveries. He also stated:

"I had a call this morning with the Broker, following the call with him and the Insured yesterday, and I made it very clear that the policy is there to cover irrecoverable expenses and that usually cancellation claims are considered several days before, or, more normally, after the date of travel and this would make it easier for us to reaffirm the Insured having to exhaust refund avenues before the claim is considered. I've told him we can't waive our rights to this usual approach just because we are offering to accept the insured's cancellation claims so far in advance. I've told him we will need to work closely to ensure the costs settled are only that which are owed under the policy. He understands this approach/position and I have told him we will look to support the customer as much as possible in securing recoveries."

114. Later in the afternoon of 8 April 2020, Mr Blake emailed Mr Venn and Mr Warner regarding the spreadsheet of sample claims. He attached a spreadsheet of his own which sought to break down the costs in Mr Venn's first example on the basis of his understanding that the flight, accommodation and trek costs were included within the total Challenger Cost. Mr Blake's spreadsheet accordingly had three columns showing "Flight Cost", "Accommodation/Trips" and "Balance of TBC Costs". He also asked a number of further questions which had occurred to him, including a request for any updated version of WCE's

T&Cs and for a list of all trips to the end of August showing the departure date, the amount collected to date, and the amount and payment date of any remaining balance.

115. An internal chat then took place between Mr Blake and Rebekka Carter and Lisa Telford of the claims handling team in which Mr Blake asked for information about the way in which WCE cancellation claims were handled. This included the following exchanges:

"Lisa Telford 11:38:

Mainly the cancellation claims were pre-trip ones where we just verified cover for them. I have probably seen one or two on trip curtailments but they were always few and far between so cannot recall any specific examples. If any claim came in that fell under the aggregate, I would just respond to that effect to WCE

Alex Blake 11:39:

Okay thank you both. For those pre-trip ones Lisa, do we advice WC to refund the full Challenger cost?

Lisa Telford 11:42:

Yes that's right, The pre-trip claims were cancellations by the parents. We check the reason for the cancellation against WCE terms and conditions and advise them whether there is cover in place to refund the parents less their admin fee. As they have never breached their aggregate there has never been one that we have had to pay

Alex Blake 11:43:

Okay thank you and that's useful to know about the admin fee! That may save us a few pounds!"

116. Meanwhile, Mr Fletcher, Mr Morris and Mr Venn had been discussing Mr Blake's email which, as Mr Morris pointed out and Mr Venn agreed, suggested that Zurich was focusing on costs as against profit (but not acknowledging any costs of the programme other than flights and in-country costs) and looking to deduct any third party recoveries from any deposits refunded. Mr Fletcher's response was that mitigation made sense where the trip had been fully paid:

"because, being honest, getting the COGS back and receiving insurance on customer deposits is a bit like double dipping.

If a trip isn't fully paid there can certainly not be any mitigation. The insurance should pay out all customer deposits and they should do it quickly, before balance payments are made.

This is of course off the record. We still want to go for all customer deposits."

117. Internal Zoom messages between Mr Morris and Mr Venn show that they regarded Mr Blake's email as a source of concern, particularly since, as Mr Morris stated *"Aaron already confirmed to Ian at the start of all this that the customer deposits would be claimable, but Ian won't seem to step up on that point."* Mr Morris suggested to Mr Fletcher that they might need to discuss a "Plan B" in case the insurance unravelled, for

example by pointing schools to their own insurance to which Mr Fletcher replied that they could only do their best to get a good outcome for customers and the organisation.

The 9 April call

118. A telephone call with Zurich was arranged for 2.00 pm on 9 April 2020. In a Zoom message to Mr Fletcher beforehand, Mr Morris expressed his frustration:

"I'm annoyed because I got the point about customer deposits being covered right at the start and the broker discussed and agreed that with Zurich (I emailed the broker and Janet - you were copied last week) about this but they seem hesitant to speak up about it. I'm going to push them on this today. ultimately the question is, regardless of the insurance will we be refunding our customers. In the UK we have to legally. If we are going to, why couldn't we communicate about it anyway and figure out where the money comes from later (insurance or Travelopia or both)?"

Mr Fletcher explained that the position was not that simple and urged patience until they had worked the position through with Zurich.

119. The call took place as arranged between Mr Fletcher, Mr Morris, Mr Venn, Mr Warner, Mr Brown and Mr Blake and again the parties are in dispute as to precisely what was said. Mr Blake made some notes in his diary while Mr Warner compiled notes on his laptop during the meeting. These formed the basis of the following email which he circulated to the participants immediately afterwards at 1533. This was an important document which featured heavily in both parties' submissions although the accuracy of certain passages was strongly contested by Zurich. I set it out in full.

"Thank you for your time earlier, I feel the call was very productive and has now advanced the position positively.

Key notes/actions I captured are as follows:

1. Under the European Tour Ops regulations 2018 WCE are responsible to refund their customers in full following a cancellation.

2. Zurich's current position on cover is that the customer refunds will be claimable in full under the policy subject to any refunds obtainable from WCE's providers e.g. Airlines.

3. It was agreed that claims up to 31st of August should now be cancelled with a view to mitigating claim costs.

- *WCE to work with providers to obtain any beneficial cancelation terms in excess of the standard T&Cs with the provider.*

- *Zurich offered to help with this in any way they can including supporting legal advice/form of words to support the recovery process.*

4. Zurich to draft a letter early next week (target date Wednesday 15th) to confirm policy coverage as above and agreement to trips up to 31/08/20 to be cancelled and covered.

5. WCE to provide a listing of all trips cancelled to date due to COVID -19, to include Amounts paid by challengers, Airline/accommodation costs etc were refunds (part or full) may be possible.

- *Sample of these should contain evidence of loss e.g. receipts from challengers for trip, invoice/report from airline with any corresponding refund.*

6. WCE to supply Zurich with a list of trips not currently cancelled but will be cancelled in line with point 3.

7. Zurich to supply WCE a proforma spreadsheet to be completed for trips being cancelled going forward. This will form the basis of the bordereaux claim and a sample of the claims each month will be selected for the substantiating evidence to be provided.

8. In line with 2, 4 and 5 Zurich to review and propose interim payment to WCE

9. Consideration to be given to trips booked for 01/09/20 and beyond and the appropriate time to cancel these.

- *WCE to share a listing of these with Challenger amounts paid to date, outstanding amounts and the balloon payment (along with dates when balloon payment is due).*

Trust this is a good reflection of our call however if I have missed anything please do raise this."

120. Mr Blake's diary notes contain the following entries:

"EU Regulations – Package Travel 2018
- ATOL
Closer to the time

70 airlines with
60 days – Final amount

…

Don't pay large sums until balance from students received

Payment Plan – Predeparture
- Final balance for COGS
…

- *Note for pre-emptive cancellation*

- *Under pressure from customers*
- *Want a position statement on how we're approaching claims."*

121. At 1633, Mr Blake forwarded Mr Warner's email to Mr Dowsing stating, without further comment, *"Just some outcomes from my call with World Challenge today."* Mr Dowsing acknowledged receipt immediately noting, *"Food for thought and further action next week."*

Post-9 April 2020

122. The Easter weekend then intervened. WCE was plainly desperate by now to obtain clarity so that it could properly formulate a strategy for communicating with its customers. Although the intervention of the Easter holidays had provided some respite, it could foresee that it was fast running out of time. On 13 April 2020, Mr Fletcher recorded another video for staff in which he informed them that, following the call with Zurich, he had *"every reason to believe that we will get to the position we want to get to in terms of confirming our refund position, you know, i.e. being able to give full or certainly majority refunds to customers, touch wood,…"* but it was taking longer than he wanted and staff should not jump the gun. He also confirmed Mr Warner's summary of the 9 April call in an email to all the participants and reminded Mr Blake that WCE would answer any questions or provide any information required.

123. On 14 April 2020, Mr Morris messaged WCE staff informing them that while it was internally acknowledged that trips up to the end of August were likely to be cancelled, this was not to be communicated to clients until clarity had been reached on the insurance. In fact, it transpired that Mr Durrell, the Middle East manager, had already confirmed cancellation to Middle East schools albeit without saying anything about refunds.

124. Mr Venn also replied that day to Mr Warner's email attaching a voluminous spreadsheet containing the details which had been requested at points 5 and 6 of the email regarding all trips cancelled and to be cancelled.

125. 15 April 2020 was a pivotal day on which a number of important communications took place:

(a) 0935: Mr Blake forwarded Mr Venn's email and spreadsheet (including the chain containing Mr Warner's email of 9 April) to Mr Stephens, Mr Dowsing, William Anderson (Head of Specialty Lines Claims) and Gemma Fox (A&H Team Leader). His covering email stated that there were some points on Mr Venn's spreadsheet about which he was not quite clear, which he would be taking up with WCE. He continued:

"As you will see, the numbers are significantly greater than we were first advised. Below is a breakdown, based on my understanding thus far, of the costs being presented:

Cancelled Already

- *52 Trips Cancelled*
- *Incurred(paid by challengers) so far is GBP 1.3m*
- *Refunds received so far is GBP GBP 220k*
- *Present net loss is GBP 1,104,211*
- *This does not take in to account any further airline/accommodation refunds they receive*

June — September Trips

- *350 trips in the pipeline to end of September*
- *Incurred GBP 9.8m to date. Further GBP 4.6m due in balance remaining. Potential total gross loss of GBP 14.4m*

• GBP 4,937 received in refunds so far

…

An update to the EWE will need to be issued and I will look at breaking costs down on a month by month basis to give a better visual for what we may expect as this situation rolls on.

***Will, Mark** — Can we have a call to discuss what figure we look to reserve at?*"

(b) 1243: Mr Blake forwarded his email to Mr Moss with apologies for not including him originally and noting that an update to the EWE would be issued by the end of the week.

(c) Between 1400 and 1442: Mr Venn and Mr Blake spoke on the telephone. Mr Venn recorded in a Zoom message to Mr Morris that Mr Blake *"definitely is back tracking now he's got the spreadsheet".*

(d) 1439: Mr Moss responded to Blake, also copying in Mr Lynch (Senior A&H Underwriter) and Ms Robinson, stating that more work needed to be done in relation to anticipated recoveries before sending out a revised EWE and querying *"How much of this potential quantum is outside the scope of the policy (i.e. profit margin, excursions etc)".*

(e) 1448: Mr Stephens replied to Mr Moss and Mr Blake stating:

"The issue here, I see it is that we are almost acting as the insurance for the package being offered by WCE, rather than what the policy is designed to do. It was never the intention for the policy to reimburse on a like for like basis, in the sense that if the expedition is sold for GBP 1,500 to a challenger, our cancellation cost should not be GBP 1,500. [Redacted text.]

One of my concerns here also is that these lower end of the cost estimate, circa GBP 9.8m include the price of flights. However, the flights have not been booked yet as I understand and therefore a refund on these is not going to be feasible.

At this stage, I see the recoverable costs as minimal unfortunately."

(f) 1507: Ms Robinson forwarded Mr Moss' email to Mr Nichols suggesting that expectations needed to be managed before any increased EWE was issued.

(g) 1639: Mr Nichols expressed concern at the way in which things were developing and stated that they simply could not issue an EWE based on Mr Blake's summary. He asked for someone to help Mr Blake, whose logic he did not presently believe.

(h) 1644: Mr Dowsing stated in response that no addendum to the EWE would be issued without first conducting further due diligence, and that they were finalising their approach to adjusting and would only be covering irrecoverable losses.

(i) 1645: Mr Dowsing emailed Mr Blake to reassure him that, *"All is OK and we'll manage tomorrow in the daily call and ask Charlie (or you can) to communicate the more favourable / palatable position to the Exec."*

(j) 1718: Mr Venn emailed Mr Fletcher, Mr Morris, Mr Brown and Mr Warner with a report of his *"concerning conversation"* with Mr Blake earlier.

"He started back tracking on where the call had got to last week, stating that now he had the figures he hadn't appreciated how little costs have been spent. I was very blunt as Pete had been very specific about this last week.

[Example set out]

My perception after the call last week is we could claim £19k, nothing to deduct as there are no cost refunds. His take on it today (wouldn't commit to it) but no claim could be made as we received all the income, paid no costs and therefore not out of pocket.

I did stress the programme element wasn't accounted for and therefore he's taken us down another path, this was not the expectation set last week and does not agree to claims handled before.

I started asking about others because he then started changing the goal posts:

…

I'm going to have to leave it with him because I can't work out what's the difference if a school has paid 100% or 95% or 50%, how does the claim differ if we paid no costs or paid some and received some back — it seems like endless possibilities to me, but then I don't work in insurance.

…"

126. On 16 April 2020, Mr Fletcher emailed Mr Blake expressing his own frustration at the delay in the provision of Zurich's written confirmation:

"When we spoke last week it appeared that we'd reached a clear understanding on how the policy would respond. Tom provided a very accurate and clear summary of the conversation, in which he clearly articulates World Challenge's responsibility to refund customers in full under the European Package Travel Regulations 2018. He confirmed Zurich's position, that customer refunds will be claimable in full, subject to any refunds from airlines and in-country providers, and our joint agreement that trips up to 31st of August should now be cancelled on this basis.

I explained that a large proportion of the customer payments through the pre-departure go towards covering our pre- departure training / preparation, and that balance payments generally cover the majority of flight and in country costs. Furthermore, we clarified on several occasions that, given the timing of the ticketing process (average 60 days prior to departure), only a small proportion of overall flight costs had already been incurred. We clearly explained that cost mitigation would be limited because of this. I believe you understood our need to be crystal clear on this point, so that we could communicate with our customers and cancel flights with airlines clearly and in good faith.

We have sent the majority of the data you've requested and are happy to work through the scenarios. However, we must now establish what has been agreed as solid ground on which both World Challenge and Zurich can proceed. Please could you provide a note to this effect at your earliest convenience."

127. At this point steps were also taken within WCE to obtain specialist legal advice on the position.

128. On 17 April 2020, Mr Blake replied to Mr Fletcher with what was effectively a holding response. He noted Mr Warner's summary of the 9 April call but stated that *"these calls have continued to be exploratory whilst we try to establish the facts at hand in order that we can then set out in writing, as you have requested, the relevant provisions of the policy and how we expect the claims to be adjusted."* He apologised for the delay and indicated that a position letter should be provided early the following week.

129. By this time, the school Easter holidays were drawing to a close and it is evident from WCE's internal discussions that its customer service teams were coming under unbearable pressure from customers to know whether or not trips would be cancelled. Accordingly, WCE's senior management engaged in urgent discussions throughout the course of 19 and 20 April as to whether WCE should continue to hold the ring by saying that the position could not yet be confirmed pending clarification of the insurance position or whether it should bite the bullet and confirm cancellation of all trips up to the end of August. In a Zoom message on 19 April 2020, Mr Fletcher commented that if trips were cancelled, WCE would need to issue a credit note to UK families within 14 or 28 days redeemable for cash after 31 July and to tell overseas customers that they were still working with Zurich to try to obtain refunds. He stated:

"We're expecting Zurich's position statement this week but it may not be favorable.

On that basis I'm happy to cancel the trips and tell people what they'll receive (either RCN or keep waiting) but it's likely only the cancellation part is one global message, so makes things more difficult to deliver."

130. In an email to a colleague, Mr Fletcher commented that:

"We'd reached verbal agreement on the coverage to essentially be: Customer deposits minus COGS refunded from airlines.

Zurich then did a backflip when they realised how relatively little COGS had been committed (and therefore limited mitigation).

Janet is now getting a quote from a mid-tier, specialist insurance lawyer so we can review the policy if they fail to come through. Any update please Janet?

Currently our assumptions in the forecast are worst case scenario."

He also chased Mr Blake for an update to his email sent the previous Friday.

131. In the afternoon of 20 April 2020, a WCE leadership call took place at which the decision was taken to confirm cancellation of all trips up to the end of August and to send out appropriate customer communications the following day, irrespective of the fact that Zurich had not yet provided its position statement. The minutes of the call recorded that the PTR applied to trips sold in the UK and EU and that these customers would require Refund Credit Notes. Otherwise, customers would be held to WCE's T&Cs with refunds only being offered if a favourable position was reached with Zurich.

132. Following this call, Mr Morris emailed Mr Fletcher regarding the communications to be issued for each market and what they should contain, stating that he could not imagine Zurich coming back with what WCE wanted.

133. On 21 April 2020, Mr Fletcher repeatedly chased Mr Blake to set up a call. Mr Blake eventually replied, informing Mr Fletcher that Zurich was expecting to issue its position paper the following day and that perhaps the call would be better postponed to 23 April allowing the letter to be considered.

134. Later that afternoon, Mr Warner emailed Mr Fletcher to update him on a brief phone call he had had with Mr Blake, confirming that Zurich's position paper would be available the next day and that he had asked Mr Blake to send it first to WTW so that they could review it in the light of the policy wording.

135. Later still that evening, Mr Brown emailed Ms Northey in response to her request for an update on the current status of the claim as she needed to brief Travelopia's CEO the following day. Mr Brown explained that following the provision of costs information by WCE, Zurich wished to carry out a robust review of the costs so that they understood them fully and had advised that there were further elements that needed their attention. He confirmed that the position paper would be provided the next day and would be reviewed first by WTW who would update WCE as soon as possible thereafter. He continued:

"Please be assured that the claim process is following a correct and appropriate path. Zurich are engaged and their position on policy trigger as stated above is clear given the size/nature of WCE's circumstances. Next steps are to agree a quantum calculation process, this is important given the large number of trips in scope; the varying nature of their payment positions and differing business process/planning status.

…

Zurich's awaited position paper may identify areas where interpretation differs. If this is the case, our review will be able to quickly identify these and plan any required response.

The over-arching principal of the cancellation cover of a PA/T policy is to pay unrecoverable trip costs where cancellation is uncontrollable, which, as you would expect, would not include any associated business trading risk costs."

136. On 22 April 2020, WCE formally cancelled the bulk of the trips due to depart to the end of August. Cancellation of the remainder was delayed by one or two days because of delays in the mail merge.

137. In the early afternoon, the long-awaited position paper was sent by Zurich to WTW in the following terms:

"…

We would find it very helpful to have more information concerning the items referred to in the Schedule so that we can better understand it. For example, it appears in many cases that no monies whatsoever have so far been paid in respect of flights/ICB costs for trips which were due to take place in the near future. We are not sure why this should be the

case. It would also be helpful to understand how and when flights/ICB costs are arranged/paid for by World Challenge, and what specific items of cost are included within "ICB" costs.

Subject to that, the Schedule appears to show that, in many cases, significant payments have been received by World Challenge from Challengers but that relatively little expenditure has been incurred on flights and/or ICB costs. We presume that, were the trips to have gone ahead, significantly more expenditure would have been incurred in respect of these items. Please can you confirm the level of expenditure expected to be incurred.

…

The Policy covers, subject to its terms, conditions and exclusions, in respect of pre-booked travel arrangements, deposits, advance payments and other charges which have not been/will not be used but which become forfeit or payable under contract or cannot be recovered elsewhere. Zurich is currently minded, and entirely without prejudice to its rights, and subject always to policy terms, conditions and exclusions, to be flexible with regard to not insisting that World Challenge must first recover such deposits, payments and charges elsewhere. However, this is strictly and solely on the condition that World Challenge provides full assistance in making such recoveries. We refer you to the subrogation clause at General Condition 16 in this regard.

For the avoidance of doubt, the Policy does not provide business interruption cover and it is not there to provide windfall profits to World Challenge, or overheads it might incur, still less does it cover payments which were due to be made to airlines, accommodation providers and other third parties but which have not been made (or which have already been refunded). Rather, it covers, on an indemnity basis, losses which have been incurred as a result of deposits, advance payments and other charges payable or paid to third party service providers which have not been and will not be used, such as flights, and which have become forfeit or payable under contract or cannot be recovered elsewhere.

According to the Schedule that you have provided us with, and subject to your providing us with further information as referred to above, it appears that in many cases no deposits, advance payments or other charges have been made in respect of many of the trips referenced. However, we look forward to discussing these and other matters (such as the provision of receipts and other evidence of payments) with you further, on a without prejudice basis."

138. At 1833, WTW forwarded the position letter to WCE noting that Zurich had highlighted that the policy intention was to cover irrecoverable costs incurred and not trading profit. The call that had been arranged with Zurich for 23 April did not proceed and on 18 May 2020, Mr Fletcher sent a lengthy response asserting that Zurich's current stance was contrary to the way in which cover had been operated hitherto and in apparent disregard of the confirmation given in February and April that customer refunds were covered in full.

139. Thus were the battle lines drawn.

2022 renewal with Axa

140. Given the obvious impracticality of running expeditions with a global pandemic raging, WCE did not run any trips for the remainder of 2020 or 2021. It therefore had no need of

insurance and did not seek to renew for either the 2020 or 2021 policy years. In 2022, however, it instructed WTW to obtain quotes. There was no great appetite for this type of risk, however, with some markets regarding the provision of cover for Challengers as a problem. In the event only RSA and Axa were willing to offer terms, although RSA was not prepared to include cancellation cover on the basis that they did not write traditional cancellation for tour operators and that there were other covers better suited to this exposure. In a report dated 8 December 2021 comparing the Axa cover to the 2019 Zurich Policy, WTW advised that:

"the policy will cover losses where the insured has already paid for services. In the event that deposits have been paid by challengers, but the insured has not yet paid suppliers, then cancellation would not be construed as resulting in a loss as no monies had been paid to suppliers. Having to refund challengers would also not be regarded as a loss for which a claim could be made."

141. Cover was therefore put in place with Axa from 1 March 2022, albeit with a Covid exclusion and an aggregate limit of indemnity of £175,000. In an attempt to avoid the problems that had arisen under the Zurich cover, and notwithstanding the WTW advice, Mr Morris emailed WTW on 9 February 2022 asking specifically how the policy would respond in circumstances where students had paid £25,000 in total, the trip was cancelled due to a terrorist incident, and a full refund was made by WCE which was able to recover £10,000 from suppliers. The response from received from Axa's Senior Underwriter and confirmed by him in writing was that the net amount of £15,000 would be regarded as costs recoverable under forfeit of contract and therefore recoverable by WCE under the policy.

THE ISSUES

142. The parties were agreed that the following headline issues arise for decision in this case:

(a) Construction of section 8 of the Policy;

(b) Estoppel by convention/promissory estoppel based on the handling of cancellation claims under the Earlier Policies;

(c) Estoppel by convention/ promissory estoppel based on the handling of pre-Covid cancellation claims under the Policy;

(d) Promissory estoppel/collateral contract based on an alleged agreement made on 27 February 2020;

(e) Promissory estoppel/collateral contract based on an alleged agreement made on 9 April 2020;

(f) Aggregation;

(g) Miscellaneous:

(i) Cover for related entities other than WCE;

(ii) Claims for non-cash refunds/credits for non-cash recoveries.

143. Happily, the parties were able to agree most of the issues regarding quantum "as figures" before the commencement of the trial. Some other pleaded issues have also fallen away. It was accordingly common ground that this judgment should be limited to determination of the points of principle arising out of the matters set out above, leaving the parties to determine the financial consequences of my decisions.

THE EVIDENCE

144. I heard oral evidence of fact on behalf of WCE from Mr Fletcher, Mr Venn and Mr Morris, Ms Northey of Travelopia and Mr Brown and Mr Warner of WTW.

145. On behalf of Zurich, the following witnesses gave oral evidence: Mr Blake, Mr Stephens, Mr Ratcliffe, Mr Mullan, Ms Langford and Ms Wall. I also heard evidence from Mr Martyn Alcock of Zurich and Mr Paul Garner of RSA concerning an exchange of correspondence regarding coverage under the RSA policy.

146. The inherent unreliability of witness recollection has been highlighted in a number of cases in recent years and the courts are increasingly aware of the problem, which is summarised in the well-known passage from the judgment of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd,* [2013] EWHC 3560 (Comm) at [15]-[22]. The essential point to which Leggatt J drew attention was that all "memory" of distant events in fact depends on a process of reconstruction which is inevitably influenced, whether consciously or not, by a multitude of factors. These include the particular selection of documents from which the witness may be invited to refresh his or her memory in order to provide a witness statement (some of which may not previously have been seen), the fact that, even if their statement has not been drafted by lawyers, the matters which are included or left out will almost certainly have been dictated by legal strategy, and the fact that preparation for trial may well result in the witness becoming increasingly reliant on the reconstruction set out in the witness statement rather than on his or her original experience of events. To this I would add the very natural human instinct, when one's past behaviour is subjected to critical scrutiny, to reconstruct events in such a way as to put oneself in the most favourable light possible. This is particularly likely to be the case when the witness has a stake in the outcome of the proceedings through a tie of loyalty to or dependence on one of the parties, such as an employer.

147. Although I do not set out the relevant passage from *Gestmin* in full, two paragraphs bear citation:

> *"18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*
>
> *20. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to*

gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

148. Bearing all these matters well in mind, I found the WCE witnesses to be uniformly impressive. Mr Fletcher was a transparently candid and honest witness who was co-operative, frank, and straightforward, and answered questions directly and courteously. Mr Venn too was frank, direct and helpful in his answers under cross-examination. While he may have harboured marginally graver doubts in April 2020 about Zurich's ultimate position than his witness statement suggested, his oral evidence was consistent and credible. Mr Morris was another impressive and candid witness, as was Ms Northey, although she was further removed from events than Messrs Fletcher, Venn and Morris, and was only intermittently involved in the dispute as it evolved. In short, I have no hesitation in accepting all of them as witnesses of truth who gave an honest account of events as they saw them – even where their answers were not necessarily helpful to WCE's case. I find that their understanding of the various communications with Zurich was genuinely held and, importantly, their testimony was supported entirely by the documentary record.

149. Mr Brown and Mr Warner were likewise straightforward witnesses although neither of them could recall very much about the critical events save in so far as it was reflected in the documents. I bear in mind, of course, that both WTW and Zurich would have been extremely busy at the relevant time dealing with a multitude of claims and enquiries on many policies and that it is therefore unsurprising that their recollections were not as detailed or extensive as those of the WCE witnesses, for whom this was a potentially existential issue.

150. By contrast (and with the exception of Mr Alcock and Mr Garner who fall into a different category), the Zurich witnesses created a dismal impression.

151. Mr Shapiro submitted that their evidence was nothing more than a reconstruction of events so obviously dictated by Zurich's interests that I should find either that they were not witnesses of truth, or that they had convinced themselves of the truth of their false reconstructions. He accordingly invited me to reject their evidence save where it was consistent with the contemporaneous documents. Mr Hough, on the other hand, invited me to find that they were honest witnesses doing their best to assist the court and were not simply trying to toe a party line.

152. It is true that there was a marked similarity in the evidence given by the Zurich witnesses in their answers regarding their understanding of the coverage being given under the Policy. So far as concerns the standard Z-Alert wording, this is not surprising. The wording was in standard form and it is to be expected that it would be understood and applied consistently across the organisation.

153. What was more contentious, however, was the insistence of all the witnesses that they had not appreciated that the cancellation claims put forward by WCE were for customer refunds as such but believed instead that they related to irrecoverable third party costs. In this respect, each of the main witnesses seemed to have a set form of words repeated time and again during the course of their testimony to the extent that it appeared to have been rehearsed, at least in their own minds. For example, Mr Blake repeatedly stated that he

understood the refunds to represent monies *"paid forward"*, while Mr Stephens referred to *"irrecoverable costs"* and Mr Ratcliffe to *"third party costs minus recoveries"*.

154. As discussed further below, I am satisfied that there was no objective basis for a belief that the refunds represented irrecoverable third party costs beyond a corporate understanding of the Z-Alert wording in general. For one thing, as Mr Hough was at pains to elicit, WCE never said anything one way or the other about how the refunds related to its costs. No doubt it never thought to do so because (as I also find), rightly or wrongly, it was under the impression that the RSA policy covered customer refunds as such, that Zurich were providing cover on the same basis, and that it was as plain as the proverbial pikestaff that the claims were for customer refunds.

155. Indeed, any assumption that WCE's refunds to Challengers represented third party costs (whether net of recoveries or not) involved myriad apparent inconsistencies with the documents which were clinically exposed by Mr Shapiro in cross examination - no doubt very uncomfortably for the witnesses concerned. For example:

(a) What did Ms Aylett's instructions of 9 May 2016 mean, if not that WCE was to be indemnified for its customer refunds?

(b) Why did the claims handlers (with two exceptions) make no attempts after 25 April 2016 to verify WCE's costs outlays/recoveries if that is truly what they thought was covered?

(c) Why (on this hypothesis) did the amount of WCE's outlays always exactly match the amount of the deposit less any administration fee charged under the T&Cs?

(d) Why was it thought appropriate to approve claims for the full amount of the customer refund when the deposits which were being refunded must have included an element of profit and fixed costs?

(e) Why would WCE have incurred any costs at all where a cancellation occurred a long time before departure?

156. None of the witnesses had convincing answers to any of these points beyond reiterating his or her belief. Their various attempts in the witness box to explain why documents did not in fact mean what they appeared to mean were frequently incoherent and illogical, and made them look more than a little foolish. The repetitive manner in which they answered difficult questions likewise did not serve to enhance their general credibility.

157. The choice between being taken for a knave or a fool is unappealing at the best of times. However, I do not for one moment suggest that Zurich either directly or indirectly sought to influence their employees as to the testimony that they should give. Rightly, no such suggestion was made by Mr Shapiro. I also acquit the Zurich witnesses of any conscious dishonesty or attempt to mislead. Nonetheless, in view of its apparent inconsistency with the documents, I treat their evidence with some caution save where it is consistent with the contemporaneous documents or what I find to be the inherent probabilities of the case.

158. Mr Blake was not an impressive witness. He appeared nervous at the start of his cross-examination (not in itself, of course, a matter for criticism) and was very cautious in his answers to the extent that he was reluctant to make concessions even on uncontentious

matters. He looked more and more uncomfortable as cross-examination progressed and while he resolutely maintained that he had only ever understood that cover was being provided under the Policy for irrecoverable expenses, repeating again and again that deposits in his mind meant *"deposits paid forward"* by WCE, some of his testimony was difficult to square with the contemporaneous documents. In particular, as discussed in more detail below, I reject a critical part of his evidence relating to the call of 9 April 2020 and his state of mind in the days following.

159. Mr Stephens likewise did not make a good impression. He seemed determined to say as little as possible and frequently avoided agreeing with any proposition put to him unless he had rephrased it first. Getting him to agree that Zurich needed to offer a lower premium if it was to win the business from RSA in 2016 was an uphill struggle, despite him having said as much in his witness statement, and it required several attempts and the assistance of the court before he could be brought to state whether he would normally challenge an assertion that he had agreed to something when he had not. He had no very good explanation for some of the documents which plausibly suggested an understanding on his part that the Policy was covering customer refunds other than simply disagreeing with the question.[13]

160. Mr Ratcliffe was another highly unsatisfactory witness who also was inclined simply to disagree with questions he could not answer. He too looked uncomfortable in the witness box but stuck doggedly to the line that he only ever thought the Policy covered third party costs minus recoveries. He knew that it was for Zurich to validate the claims made by WCE and accepted that it was his job when drafting the SHI and the Claims Protocol to work out (in the case of the former) what information would be needed by the claims handlers to adjust the claims and (in the case of the latter) to instruct WCE as to what information it should typically provide. However, when challenged as to why, in that case, neither document made any mention of third party costs or recoveries, he said that it was a matter for the claims handlers to decide whether the information provided by WCE as set out in Mr Thomas' email of 14 April 2016 (adopted as the basis for both documents) was sufficient for this purpose. He had no idea himself whether it was or not and was simply setting out a "process" to be followed. His attempts to explain his own notes of the meeting on 25 April 2016 were little short of incredible except on the basis that he was either not telling the truth in the witness box or simply failed to engage his critical faculties at the time. The latter is more likely to be the case.

161. Mr Mullan began his cross-examination by saying that he did not know whether he was aware at the time that the claims being advanced by WCE were for refunds made to Challengers and that he may have thought they referred to amounts paid out by WCE. When it was put to him that it was obvious on the face of documents to which he was privy that the claims which Zurich were being asked to approve and validate were claims for customer refunds and that there was nothing to suggest otherwise, he retreated to the position that he could not recall what he actually thought at the time. He had no satisfactory explanation for Ms Aylett's email of 9 May 2016 if it was not an instruction to indemnify customer refunds in line with the T&Cs and his attempts to suggest that it could be read in

[13] For example, his email of 31 March 2020 set out at paragraph 103 and his failure to query Mr Blake's assumption in the email set out at paragraph 106 above that Zurich's claim spend would be doubled if WCE accepted deposits on day 61 and then cancelled on day 60.

some other way (for example, as referring to a claim settlement *to* WCE) contradicted the clear words of the email and lacked all plausibility.

162. Mr Mullan accepted that the SHI did not require evidence of third party costs or recoveries and that he did not routinely ask for it. However, his supposed justification for this, namely that he gradually came to understand after inception that it would be difficult for WCE to provide this documentation for individual Challengers because bookings were made on a group basis does not withstand serious scrutiny. It is correct that WCE said at the meeting of 25 April 2016 that *"individual documents"* might not always be available because bookings were generally made on a group basis. However, it is entirely possible to work out a per passenger cost from an invoice for a group booking. Moreover, there was no evidence to support Mr Mullan's assertion that he had requested invoices and receipts but been told by WCE that they could not be provided or were difficult to provide, and I dismiss this as an *ex post facto* attempt at justification. On the contrary, in the two documented cases where such information was requested, it was provided promptly and without any apparent difficulty at all.

163. The only case which even remotely suggests that there would have been any difficulty in isolating individual Challenger costs was that relating to Alexander Fritot, but this was a claim in the very different context of curtailment where Mr Fritot returned part-way through a trip. In these circumstances, WCE apparently said that it was quite difficult to work out the unused element of the trip because of the large number of different elements. That is entirely understandable where the various expeditions and costs may not have been incurred evenly over the entire duration of the trip and it would therefore be necessary to work out separately for each element how much had been used. However, WCE never said that it was an impossible task, and once the apportionment had been done on a group basis there would have been no difficulty in then calculating the relevant costs on a per Challenger basis. Nonetheless, given the relatively small amounts involved, it was obviously sensible to work on a proportionate basis for curtailment claims and that is the approach that was adopted. It is therefore hardly surprising that Mr Mullan then took the same approach to the later Mardling curtailment claim, although it is clear from his correspondence that this was based on his own assumption about the difficulty of quantifying the claim rather than because of anything said by WCE.

164. I reject altogether the wholly implausible suggestion by Mr Mullan (echoed rather faintly in Ms Langford's oral evidence) that Zurich's review of WCE's claims for compliance with the T&Cs was an additional service provided as a favour to WCE, presumably gratuitously. This would not only have involved the Zurich claims handlers offering free legal advice but would have been of no obvious benefit to WCE when it had the entire resources of the Travelopia legal department to draw on. This smacked of a somewhat desperate attempt to avoid the obvious forensic point that the T&Cs were *prima facie* irrelevant unless Zurich understood that they were indemnifying WCE's customer refunds.

165. As far as Ms Langford was concerned, I formed the impression that she was honestly trying to assist the court to the best of her ability. She stated repeatedly that Zurich handled cancellation claims as an administrative function to guide WCE as to whether it could proceed with making a refund. Although Mr Shapiro took issue with this description of the claims handling process, what I understood her evidence to mean was that the claims adjustment process was administrative from Zurich's point of view because they were simply tracking the deductible rather than making physical payment. As such, it was unexceptionable.

166. Ms Wall's evidence did not advance matters greatly. She answered the questions put to her straightforwardly but she was a comparative latecomer to the WCE cover, had no experience of handling business travel claims and, as Claims Relationship Manager, had no claims handling authority in any event. She professed a general understanding that WCE's cancellations claims were to cover direct losses that WCE had suffered as a result of cancellation but accepted that this was not based on anything said or done by WCE. I did not find her evidence of material assistance one way or the other.

167. As for Mr Alcock and Mr Garner, their evidence was directed to a brief exchange of correspondence in 2022 in which Mr Alcock asked Mr Garner how RSA would have responded to WCE's current claim if WCE had been insured by RSA for 2019/2020 on the same terms as in 2015/2016. In his letter, Mr Alcock set out in two sentences the rival contentions (namely WCE's case that the policy covered all deposits received by it which were then refunded, and Zurich's case that it only indemnified irrecoverable third party costs) and the financial consequences of each case.

168. Mr Garner had had no involvement whatsoever with the WCE account and had no knowledge of either the specific policy or the way in which RSA handled claims thereunder. Unsurprisingly, therefore, he was unwilling to answer the question posed without considerable further investigation which he was not prepared to undertake. He also stated in correspondence with Mr Alcock that even if he carried out an investigation, he could not be sure that his evidence would remain entirely supportive of Zurich's position. He declined Mr Alcock's offer to provide a copy of the Case Memorandum and List of Issues or the RSA policy and was accordingly not in a position to compare the terms of the RSA policy to the Zurich policy or to comment in any way on the facts of the case. All that he was prepared to say was that he would have considered that a claim for deposits paid to an insured and then refunded to a customer would fall outside the scope of a travel policy in general terms. However, he agreed that he was unable to comment on whether such a claim fell within the scope of either the Zurich policy or the RSA policy written for WCE specifically.

169. In these circumstances, I accepted the evidence of both gentlemen without hesitation or qualification but found that it did not ultimately assist me.

ZURICH'S APPROACH TO CLAIMS HANDLING

170. The course of claims handling by Zurich was the foundation of WCE's case in relation to both the construction of the Policy and estoppel. It is therefore convenient for me to set out my findings in this regard before considering how they impact on the issues for determination.

171. Since the subjective views of the Zurich personnel are of critical importance to the question of estoppel, I start with my conclusions in relation to each of them, having considered their written and oral evidence carefully against the documents and the inherent probabilities.

Mr Blake

172. I accept that Mr Blake understood in general terms that the Z-Alert wording indemnified irrecoverable costs: see, for example, his email to Ms Northey of 27 March 2020.

173. He was new to the WCE account in March 2020. He had no knowledge of WCE's business and no knowledge of how cancellation claims had been handled over the previous three years. While I have some sympathy for him in the sense that he was suddenly propelled into an unfamiliar setting in what was no doubt a very stressful situation for everyone in the insurance industry at the time, the fact remains that he was performing the role of senior claims handler and specific referral point for the WCE account. As such, he should not in my view have left it so late before taking steps to understand WCE's business or to elucidate the relationship between the deposits received by WCE and its cost outlays.

174. Because of this failure, I find that he unthinkingly assumed that the customer refunds must represent irrecoverable costs to WCE and that this explains why some of his communications after 17 March 2020 were couched in terms suggesting that deposits were indeed covered under the insurance (see, for example, paragraphs 106, 107 and 112 above) while others referred to incurred costs (see, for example, paragraph 113 above). This assumption would have been confirmed by his conversation on 8 April 2020 with Lisa Telford.

175. As regards the 9 April 2020 call specifically, I find that:

(a) In the light of Mr Morris' concerns expressed to Ms Northey on 29 March 2020 and his discussions with Mr Fletcher and Mr Venn on 8 April 2020, WCE was anxious to obtain confirmation that customer deposits/refunds would be covered in full or, if not, what mitigating measures it would be required to take;

(b) WCE was given the clear impression by Mr Blake (even if, as the WCE witnesses fairly accepted, he did not say so in terms) that refunds would be covered, albeit subject to recoveries, and that Zurich's position paper would confirm this;

(c) There was agreement that trips departing up to 31 August 2020 could be cancelled;

(d) WCE explained clearly that its business model was such that cost outlays would be minimal;

(e) Mr Warner's follow-up email the same day was an accurate record of the call.

176. The reason Mr Blake gave such a clear impression is because (as I find) he still believed at that stage that the refunds represented costs to WCE. This was notwithstanding:

(a) That he had started to focus on costs following receipt of Mr Venn's sample spreadsheet in early April;

(b) WCE's express confirmation during the 9 April call that its third party costs were minimal in comparison to the deposits; and

(c) Mr Stephens' email of 17 March 2020 (see paragraph 87 above) which should have alerted him to the fact that WCE may have been incorrectly interpreting the cover.

177. Whether Mr Blake never read Mr Stephens' email properly, or was out of his depth, or simply slow in putting two and two together is unclear. However, a continuing belief that customer refunds were indemnifiable costs under the Policy is entirely consistent with Mr Blake forwarding Mr Warner's email without qualification to senior Zurich personnel as setting out *"some outcomes from my call with World Challenge today"*, and also with his

suggestion in the morning of 15 April (having received the full claims spreadsheet from Mr Venn) that the EWE might need to be increased to £14.4 million. I do not accept his evidence that he did not read Mr Warner's email before sending it on. He may well not have spent much time on it given that it was received on the eve of the Easter bank holiday, but I find that he would not have sent it on without checking (at least briefly) that there was nothing in it with which he took issue.

178. As it was, the penny did not finally drop until later in the day on 15 April at around the same time (and whether or not prompted by the fact) that alarm bells were starting to ring higher up in the organisation. When it did, it is hardly surprising that he felt *"a bit foolish"*.

179. Only at this point, however, did Mr Blake belatedly appreciate that the refunds claimed by WCE did not represent third party costs and his subsequent holding responses to WCE referring to previous conversations as purely *"exploratory"* I find to be no more than a fig-leaf to excuse what he now realised was the wholly incorrect impression that he had given during the 9 April call.

180. Thus, while I accept Mr Blake's evidence in cross-examination that he found himself in an embarrassing position on 15 April, I do not accept his explanation that this was simply because he had misstated the figures in his proposed update to the EWE through excessive haste. On the contrary, as just stated, I find that these were precisely the figures he intended and that his "embarrassing" mistake was in having failed to appreciate – despite all the indications staring him in the face – that the refunds being claimed by WCE had nothing to do with its third party costs.

181. As I have already said, I acquit him of any conscious dissembling. However, it does seem to me that the evidence he gave regarding the 9 April call and the appreciation of his error on 15 April 2020 was a classic example of *Gestmin* reconstruction which put his conduct in a less damaging light.

Mr Stephens

182. Mr Stephens was an underwriter. He too understood that the intention of the Z-Alert policy wording in general terms was to indemnify the irrecoverable third party costs of the insured.

183. Once he had underwritten a policy, he was clearly unconcerned with how it was handled thereafter or whether the claims being agreed conformed to the scope of the cover he had written. He regarded responsibility for adjusting claims in accordance with the policy as being that of the claims team alone.

184. For this reason, I accept his evidence that when the Dixon and Fritot claims were referred to him by Mr Mullan, he did not focus specifically on the figures being claimed but looked only at the points of principle involved.

185. In so far as he applied his mind to it at all, he (like Mr Blake) assumed, without any basis other than his own understanding of the Z-Alert wording in general, that the claims being put forward by WCE represented irrecoverable costs within the meaning of that wording.

186. For the same reason, I consider it likely that in his exchanges with Mr Brown at the end of February 2020 he was focusing only on the question of whether Zurich would make

physical payments once the deductible was exhausted and was not considering how or why refunds would be covered under the Policy in the first place, even though it was clear that WCE was asking about coverage for refund payments. He may well, therefore, have said something to the effect that *"costs can contribute towards the annual aggregate"* as recorded in Mr Brown's report of the conversation to Mr Morris (paragraph 60 above).

187. I accept Mr Stephens' evidence that there may have been some discussion during the call of 17 March 2020 about third party recoveries. However, it is clear from his response to Mr Saha's email following the call that (i) WCE was under the impression that refunds were covered; (ii) nothing had been said about the policy only covering irrecoverable third party payments; and (iii) the claims handling process hitherto had not necessarily reflected this.

188. Despite Mr Saha's email, however (the wording of which Mr Stephens adopted in his own email to Mr Dowsing), he seems to have done nothing about Mr Saha's concern beyond telling Mr Brown on 26 March 2020 that the response to WCE needed to be very specific as to what was claimable and that the claims team would be taking this forward. It is completely unclear what, if any, steps he took to investigate how claims had hitherto been adjusted or to ensure that the claims team was appropriately instructed going forward.

189. It was only after speaking to Mr Blake in the early afternoon of 15 April 2020 after concerns had been raised about the size of the potential claim that Mr Stephens finally appreciated that Zurich had in fact been consistently indemnifying WCE for its customer refunds, hence his belated recognition that *"we are almost acting as the insurance for the package being offered by WCE"* contrary to the intention of the policy.

Mr Ratcliffe

190. I accept Mr Ratcliffe's evidence as to his understanding of the general scope of coverage of the Z-Alert wording. I also find that he knew that WCE's cancellation claims were for the amount of the refunds made to Challengers and that Zurich were to assess the validity of those claims under the policy. Nonetheless he seems to have utterly failed, for whatever reason, to consider the implications of these two apparently irreconcilable propositions but simply regarded it as a matter of no concern provided *"the process"* was followed.

Mr Mullan

191. On the evidence I find that Mr Mullan knew that Zurich were approving claims for the amount of WCE's customer refunds. I accept that he may have held a general belief that the Z-Alert wording indemnified irrecoverable third party costs, but I find that he never applied his mind to how the two could be reconciled. As he said in evidence, once he had been supplied with the SHI (which answered his initial query of 22 April 2016), he simply handled claims in accordance with the prescribed process, which he accepted was different from the process followed for other insureds: see, for example, his approval of the Bentley sisters' claim even though the only documented third party costs were substantially less than the amount of the refund. Accordingly, he did not think about why there would be a difference between the amount of the Challenger's deposit and the amount of the refund if it was only concerned with WCE's lost costs.

Ms Langford

192. Ms Langford said that she understood WCE's customer refunds to represent third party costs and that Ms Aylett and Mr Ratcliffe had said nothing to the contrary when they presented the SHI to the claims handling team. This was consistent with her initial approach to the Bentley sisters' claim, where she asked for details of the flight costs which were duly provided by WCE. Ms Langford was unable to say on what basis the claim was approved by Mr Mullan, but it does not appear that she ever asked about third party costs again, and she maintained that she always thought the amount paid by each Challenger was entirely expended on flights and accommodation etc. She frankly admitted that she simply did not think about where (on this basis) WCE was making its profit, or how it was that the amount of the refunds invariably matched the amount of any third party costs less recoveries. She simply complied with the instructions in the SHI to apply the appropriate deduction in accordance with the T&Cs.

193. I accept that this was her genuine belief, even if there was no substantial basis for it. All she could point to in this regard was a medical expenses claim in January 2019 where she was told (incorrectly) that the administration fee represented WCE's internal costs. However, that does not necessarily imply that the remainder of the refund represented third party costs. In any event, this was an isolated incident which was irrelevant to the handling of any claims before that date and there is no evidence that Ms Langford passed this information on to the rest of the claims handling team, whether as a relevant consideration for cancellation claims or at all.

194. I was invited by Mr Shapiro to take account when assessing the evidence of Zurich's failure to call either Ms Aylett (now Hanley) or Ms Telford, whose evidence – at least on the face of the documents – might have been supportive of WCE's case in a significant respect. Both still work for Zurich but the only explanation proffered as to why neither of them had been called was that Zurich considered that it had called a sufficient range of claims personnel to cover the issues raised. In these circumstances, I consider that it would be open to me to draw such inferences from their absence as I thought appropriate in all the circumstances: *Efobi v Royal Mail Group Ltd*, [2021] UKSC 33; [2021] 1 WLR 3863 at [41]. Having considered the matter carefully, however, I am unable to conclude that either witness would have materially changed the view I have formed of the evidence that was put before me, particularly in the light of the point made at paragraphs 224 and 225 below.

195. For his part, Mr Hough suggested that it was equally remarkable that WCE had not called any witnesses who could give relevant evidence of claims handling. It is true that none of WCE's witnesses was involved in the handling of claims under the cover. However, given the way in which claims were submitted, it is not apparent that any of them could have contributed materially to what was evident on the face of the documents. Certainly, there was nothing (unlike in the case of Ms Aylett or Ms Telford) to suggest that any such witness might have been able to give positive evidence in support of Zurich's case.

Conclusions

196. Based on these findings, I conclude as follows:

(a) All of the Zurich employees had a general expectation that the Z-Alert wording covered irrecoverable third party costs. Given my findings as to the natural and ordinary meaning of the Policy below, this is unsurprising.

(b) Over and above that general expectation, they had no basis for supposing that the refunds paid to Challengers represented WCE's irrecoverable third party outlays. It was common ground that WCE never said anything to this effect and indeed it was never asked about this. Nor did any of the individual claims handlers know anything about WCE's business model for taking deposits and paying out costs.

(c) However, cancellation claims for WCE were, as accepted by Mr Mullan, handled differently from those of other insureds and a specific process (reflected in the SHI and Ms Aylett's email of 9 May 2016) was put in place for WCE which was different to that for other insureds. I note that the 25 April 2016 meeting was attended by a senior underwriter, Mr Dobson, who seems to have raised no objection or query regarding anything discussed.

(d) This bespoke WCE process required handlers to check that the refunds were correctly calculated according to WCE's T&Cs and that the reason for cancellation was valid under the Zurich wording.

(e) It was obvious on the face of the documents, and I find as a fact, that Ms Aylett, Mr Ratcliffe and the other claims handlers knew perfectly well that WCE was claiming the amount of the refunds paid to Challengers and that Zurich's task was to validate each cancellation claim before a refund could be authorised.

(f) They also knew and understood that provided the refund was correctly calculated according to WCE's T&Cs and there was a valid cancellation under the Zurich wording, the claim was to be approved and set against the deductible.

(g) The Claims Protocol was a customer-facing document which could reasonably have been expected to set out all the information required in order to validate a claim. However, the only documentation to which Zurich expressly referred, and which was routinely provided, was plainly and obviously inadequate to verify third party costs or recoveries and sufficient only to enable the claims handlers to check the validity of the refunds against the T&Cs.

(h) The SHI likewise could reasonably have been expected to give the claims handlers complete instructions as to how claims should be adjusted in accordance with the policy wording. It is little wonder, therefore, that they evidently did not consider that they needed to go beyond the four corners of that document. Accordingly, beyond checking the claims against the T&Cs and verifying the reason for cancellation, they did not worry about why or on what basis it could be said that the claim represented irrecoverable third party costs within the policy wording but just followed their instructions and the bespoke process set out in the SHI. As Mr Mullan put it: *"I believe that the process was set up by various people internally and at World Challenge and you know we were just carrying out the steps agreed in that process and we were following instructions, effectively."*

(i) Thus it was that WCE was never asked about third party costs or recoveries in relation to cancellations after April 2016 save in the case of the Bentley sisters in August 2016 (as to which see above).[14] On the contrary, cancellation claims were routinely settled

[14] I accept Mr Shapiro's submission that the claim for Tiffin Girls' School which was settled in 2017 by reference to the cost of replacement flights less recoveries on cancelled flights fell into a different category, not

in full by reference to "refunds" and without any mention of "costs" or "recoveries". Where they were rejected, this was for other reasons, for example breach of the T&Cs or an invalid reason for cancellation. It was not suggested that any claim was ever rejected specifically on the grounds that it did not equate to irrecoverable third party costs. Had any such concern been held by Zurich, WCE could reasonably have expected it to be raised in accordance with the assurance in the Claims Protocol: see paragraph 42 above.

(j) In any event, neither the claims handlers nor the underwriters particularly cared what the refunds represented, since the amounts involved were all comparatively low and fell within the deductible so that it made no practical difference to Zurich – at least until such time as the deductible was in danger of being breached. Mr Mullan in particular gave evidence both written and oral that he would have asked for proof of irrecoverable costs if the deductible had been exceeded but that the attitude internally was that this was unlikely. This might be thought a somewhat cavalier attitude when the adjustment and agreement of a claim has just as much contractual significance where it goes to erode a deductible as when a physical payment has to be made, but that is a matter for Zurich.

197. I now turn to the issues for determination.

CONSTRUCTION

The Policy

198. The relevant provisions of the Policy (as also of the Earlier Policies) were as follows:

> *"**Insured:** World Challenge Expeditions Ltd*
>
> *…*
>
> ***Event Aggregate Limit***
>
> *GBP 25,000,000*
>
> *Cancellation and/or Curtailment Limit*
>
> *GBP 100,000*
>
> *…*
>
> ***Business Travel Coverage***
>
> *Category A*
>
> *Insured persons*

being a straightforward cancellation submitted on a Refund Request Form, but rather a rearrangement claim submitted on a different type of form. In any event, this was one isolated claim and is insufficient to disturb what I find was otherwise a settled and consistent course of dealing.

Any challenger whose details are lodged with the Company

Operative time

A *While the Insured Person is participating in an Expedition organised by the Insured which commences during the Period of Insurance and involves travel from the Insured Person's country of residence*

Insurance operates from the departure of the Insured Person from the Insured Person's residence or place of schooling in their country of residence (whichever occurs last) until arrival back at such residence or place of schooling (whichever occurs first) at the end of the journey.

B *While the Insured Person is undergoing training organised by and under the supervision of the Insured in their country of domicile Insurance operates from the time or arrival at the organised training until the time of departure from the organised training*

…

Endorsements and conditions to apply

…

Endorsement 1 – Cancellation Insurance – Aggregate Deductible

It is hereby noted and agreed In respect of the Cancellation Curtailment and Change of Itinerary Insurance Section the Company shall not be liable for the first £100,000 of all losses arising from the same Incident and in any one Period of Insurance.

…

Section 1 – General Definitions

…

Cancellation or Curtailment Limit

The maximum amount for which ***we*** *can be held liable in respect of all claims under Section 8 for loss and expense arising out of any one event.*

…

Event

A sudden, unforeseen and identifiable occurrence.

All occurrences or series of occurrences arising from or attributable to one source or original cause will be regarded as a single occurrence where they occur within a 10 mile radius and within 72 consecutive hours of the one source or original cause.

Event Aggregate Limit

Our maximum liability in respect of all claims for bodily injury arising out of any one event.

…

Insured Person

Any person or category of persons as stated in the schedule.

…

Operative Time

The period of time and/or activities for which you or an insured person are covered under this policy as stated in the schedule.

…

Section 8 – Cancellation, Curtailment, Rearrangement and Replacement Expenses

The Cover

If during the operative time or between the confirmed booking of the journey and the operative time any part of the pre-booked travel arrangements for a journey are cancelled, curtailed or rearranged as a direct result of any cause outside the control of you or the insured person we will pay you or the insured person up to the sum insured in the schedule and subject to the cancellation or curtailment limit for:

a) deposits, advance payments and other charges which have not been and will not be used but which become forfeit or payable under contract or cannot be recovered elsewhere; and

b) reasonable additional travel and accommodation expenses necessarily incurred."

Principles of construction

199. The principles of construction applicable to contracts generally as well as to insurance policies specifically, are sufficiently well-known not to require further extensive citation. Both parties were agreed that the core principle as summarised in *FCA v Arch (UK) Ltd*, [2021] UKSC 1; [2021] AC 649 at [47] was 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. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task."

200. They were also agreed that the process of construction involves both textual and contextual considerations, looking iteratively at the natural and ordinary meaning of the words used against the background of the facts known or reasonably available to both parties at the date of the contract. Where there is more than one possible meaning, resort may be had to business commonsense, albeit with due caution not to rewrite the contract

for the parties or to create an ambiguity where in truth none exists. I remind myself, of course, that principles are not immutable rules and that various factors may pull in different directions.

201. Mr Hough also suggested that in the specific context of insurance contracts, there were two further principles of relevance, namely (1) that an insurance policy is a contract of indemnity and that an insuring clause should as far as possible be construed accordingly; and (2) that the apparent purpose of an insurance policy may be relevant to its proper construction. However, I was not persuaded that either of these propositions in fact added anything of substance to the approach set out above. The first seemed to me to beg the question as to whether the policy in question was in fact a contract of indemnity, while the second seemed rather to state the obvious.

Textualism

202. In the present case, the following were salient features of the Policy:

(a) It was bespoke, to the extent that individual Challengers were expressly identified as insured persons and there was a bespoke definition of *"operative time"*. It also had a large aggregate deductible applicable to cancellation claims. None of these features is commonly found in a standard business travel policy which is more typically used by a corporate entity arranging business travel on behalf of its employees and directors (albeit sometimes including family members and guests). To that extent, WCE's position was more akin to that of a travel agent or tour operator than a typical employer.

(b) In the typical scenario there is only one relevant booking relationship and one movement of money, namely from the insured entity to the third party provider on behalf of its employee.[15] What is unusual about the present case is that there are two potentially relevant sets of bookings to be considered: the booking made by the Challenger involving payments to WCE over a long period of time *and* the bookings made by WCE with third party providers much closer to the departure date.

(c) Furthermore, there was a course of dealing between the parties on materially identical wording going back some three years.

203. That said, the Z-Alert wording was not only a standard form of wording used by Zurich but (as confirmed by Mr Brown and by its similarity to the RSA wording) was reasonably standard industry-wide. Mr Shapiro accepted on behalf of WCE that in the typical scenario such wording covers the insured entity's irrecoverable third party costs. However, he submitted that this was simply a function of factual happenstance, in that it is only the entity which makes any payments in the typical scenario. By contrast, the fact that the Challengers were insured in their own right and that it was they, rather than WCE, who were paying the deposits made all the difference.

204. It was not in dispute that in accordance with the definition in the policy wording, the relevant *"journey"* for the purposes of clause 8 is the expedition undertaken by the individual Challenger. In these circumstances, it seems to me that there is at least a plausible argument that the *"confirmed booking of the journey"* must refer to the confirmed booking by the Challenger and that *"pre-booked travel arrangement"* means travel

[15] Or possibly made by the employee and reimbursed by the entity.

arrangements pre-booked by the person who makes the confirmed booking, i.e., the Challenger.

205. However, if that is right, then notwithstanding that the word *"deposits"* is broad enough on its face to cover deposits paid by a Challenger to WCE, by parity of reasoning, it seems to me that the natural and ordinary meaning of sub-paragraph (a) is that the deposits etc. must be forfeit and irrecoverable *by* the person paying them. In this case, of course, the deposits were not irrecoverable by the Challengers since they were refunded by WCE. From the Challenger's point of view, therefore, the only irrecoverable amount would be any administrative or termination fee deducted by WCE. However, that was not the claim which was ever historically made, nor is it the claim which is being asserted now, it being common ground that cancellation claims were asserted by WCE on its *own* behalf and not on behalf of individual Challengers. Even looking at the matter from WCE's perspective, save in a few instances, there are no amounts which are forfeit or irrecoverable by WCE for bookings that it made itself since most of the cancellations took place before any such bookings were made.

206. What WCE's construction seeks to do is to "mix and match" by construing clause 8(a) as referring to deposits paid by the *Challenger* to WCE but which are then forfeited by *WCE* through having to pay them back again. In my judgment this is not the natural and ordinary meaning of the clause which to my mind requires the wording to be applied wholly from the point of the view of either the Challenger or of WCE, but not partly one and partly the other. This is not (as Mr Shapiro argued) a question of reading in or imposing some additional limitation on the clause so as to introduce a qualification which is not otherwise there; it merely gives effect to what is inherent in the meaning of the words.

207. Precisely the same considerations apply to *"advance payments and other charges"*. However, I would not have accepted Zurich's submission that it could rely on the *eiusdem generis* rule so as to cut down the width of the preceding words by reference to the meaning of *"charges"*. If the *eiusdem generis* rule applies at all, it can only be on the basis that *"charges"* is a general word, in which case it takes its colour from the preceding words, not *vice versa*. I also derive no assistance in this respect from sub-paragraphs (b)-(d) since the situations contemplated by these clauses are not ones where there were ever likely to be parallel booking processes as there were for the expedition generally.

208. WCE submits that this construction would preclude a Challenger from ever making a cancellation claim because Challengers only ever paid WCE and were not permitted to bring claims under the Policy themselves. In my judgment, however, this submission ignores the fact that, so far as cancellation is concerned, the Challengers never suffer a loss (apart from the contractually deducted administrative/termination fee) because of the refund. Moreover, in practical terms, it is always WCE which makes payments on behalf of the individual Challenger. It therefore seems to me that the relevance of naming the Challengers as an insured persons in the context of cancellation is not so much because they might suffer a loss in their own right as in the identification of the relevant *"journey"* and the application, for example, of sub-paragraph 8(c). In any event, it was acknowledged by both parties that cancellation was only a small part of the overall cover provided by the Policy. The PA/medical expenses section of the cover was far more commonly invoked and it was, of course, imperative that the Challengers were identified as insured persons for that purpose since they might very well incur costs and expenses in their own right which would need to be claimed even if the relevant arrangements had to be made through WCE.

209. For these reasons I do not accept that Zurich's construction negates the purpose of identifying the Challengers as insured persons under the policy and I agree with Mr Hough as to the natural and ordinary meaning of the words.

Contextualism

210. It was not in dispute that very clear words are required if a standard form wording is to be construed otherwise than in accordance with its natural and ordinary meaning: *ABN Amro Bank NV v RSA plc*, [2021] EWHC 442 (Comm). Even so, the Policy does not fall to be construed in a vacuum and I have to decide what it means in the context of the particular relationship with WCE. Thus, WCE relied on a number of contextual arguments as a counter to the purely textual arguments. I can dispose of a number of these in fairly short order.

Nature of WCE's business

211. Mr Shapiro relied on the features identified in paragraph 202(a) above. He submitted that Zurich knew from the initial underwriting submission made by Aon in 2016 that trips were booked by Challengers some 18-24 months in advance of departure. It is less clear from the evidence whether Zurich were also told that Challengers paid in instalments over that period whereas WCE only booked flights and accommodation much nearer the time. What can be said, however, is that Zurich had every opportunity to ask questions about WCE's business model both during the initial site visit and in subsequent correspondence.

212. However, I have effectively rejected this argument in arriving at my conclusion on the natural and ordinary meaning of the Policy. While I accept that the schedule and wording have to be read together, this was an industry standard form of wording and I can discern nothing in the schedule to suggest that the cover should nonetheless apply differently to either an individual Challenger or to WCE.

213. Moreover, even assuming that Zurich did know about WCE's business model from the outset, I do not accept that it must have been objectively obvious to it that WCE was seeking insurance to cover its costs and revenues as a quasi-travel business. Nothing explicit was ever said to this effect and a standard business travel wording would have been an unusual wording to choose if this had been the objective intention of the cover. Zurich would have known that WCE had been advised by experienced and competent brokers when it first took out cover with RSA and could justifiably have assumed that it had been properly advised by Aon as to the appropriate cover for its needs. Whether or not that was in fact the case is beyond the scope of this litigation.

Claims handling by RSA

214. It would have been clear to Zurich from the different quotations requested that a quote on the *"existing basis of Cancellation/curtailment aggregate of GBP 400,000 with claims handling by insurer"* was intended to be for cover no less wide than that provided by RSA. Ultimately, that was not challenged by Mr Stephens.

215. I also accept the evidence of WCE's witnesses that claims were presented to and adjusted by RSA in the amount of the Challenger refunds. However, there was no evidence as to the basis on which they did so and this was not something on which Mr Garner could assist. Moreover, Zurich were not told how RSA had handled cancellation claims historically and

the evidence does not come anywhere near showing that they would have known about this from the information provided in 2016.

216. I therefore regard the basis on which RSA handled claims to be irrelevant to the question of construction. I pause to note only that it explains why WCE would not have thought it necessary to explain how the refunds related to its external costs unless anyone had asked.

Calculation of premium/deductible

217. WCE further submitted in opening that Zurich set the premium and deductible both at inception and at each subsequent renewal on the basis that refunds were being indemnified. I reject this submission. As stated above, Zurich would not have known in 2016 on what basis RSA were settling cancellation claims and the documents available make it quite clear that cancellation claims were not taken into account in calculating the premium for subsequent renewals, whatever WCE may subjectively have assumed.

218. The most that can be said is that the level of cancellation claims would have been relevant to the size of the deductible and that WCE's improving cancellation claims history resulted in this being reduced to £100,000 for the 2019 renewal. However, this in itself says nothing about the basis on which the cancellation claims had been adjusted.

Claims handling by Zurich

219. The main thrust of WCE's submissions were based on the way in which claims were handled under both the Earlier Policies and the Policy itself, as to which my findings are set out at paragraphs 170-196 above. Mr Shapiro put his case on the basis that this was part of the factual matrix which informs the question of construction.

220. Two points can be made in relation to this submission at the outset. The first is that the process of construction is concerned with an ascertainment of what the parties objectively agreed. The subjective intentions of the parties are irrelevant. Thus the court is entitled to look at such background facts as were reasonably available to the parties at the date of the contract, i.e., at 1 April 2019. In my judgment, this must mean reasonably available to the parties charged with negotiating the contract, in which respect a distinction is to be drawn between the underwriter whose business it is to write the policy and those who are charged with handling claims under it.

221. Secondly, the Z-Alert wording was to all intents and purposes an industry-wide standard wording where it is clear that there is less scope for its meaning to be affected by factual matrix evidence: *Lewison on The Interpretation of Contracts (7th ed.) §3.171*. Moreover, I accept Mr Hough's submission that the normal expectation of how a standard wording operates is itself part of the factual matrix and that any factual matrix evidence would have to be very clear before it could override what I have held to be the natural and ordinary meaning of the Policy. It is also relevant in this context that WCE had throughout been advised by competent brokers who could objectively have been expected to advise it as to the meaning and effect of its insurance cover.

222. The relevant underwriter on behalf of Zurich was Mr Stephens. On the basis of my findings above, I am not satisfied that he had actual knowledge in April 2019 that claims had been and were being approved by Zurich's claims handlers in the amount of customer

refunds without any steps being taken to verify costs or recoveries. As previously noted, he did not concern himself with claims handling matters.

223. For the same reason, I am not satisfied that he should reasonably have known this. Mr Stephens played no part himself in the production of the SHI or Claims Protocol and I do not see any principled basis on which the subjective assumptions of individual claims handlers can be imputed to him in the discharge of his functions as an underwriter. In any event, objectively speaking, a failure to enquire about costs and recoveries is not the same as a positive indication that such information is not contractually required; it is equally consistent with error, laziness or incompetence. Accordingly, the mere fact that the claims handlers (who themselves had no underwriting authority) may have been settling claims on an incorrect or concessionary basis might be capable of giving rise to an estoppel but does not mean that settlement on that basis has somehow become part of any legitimate factual matrix so as to affect the construction of the Policy.

224. This in itself is fatal to any argument based on factual matrix. But there is a further point. I was initially very attracted by Mr Shapiro's submission that the conduct of the Zurich claims handlers in routinely settling claims in the amount of the refunds without enquiry into costs or recoveries made no objective sense unless they knew and understood that they were covering customer refunds *per se*. They can undoubtedly be criticised for sloppy and uncritical use of language in referring almost invariably to "refunds", no doubt mirroring the language in which the claims were presented. On reflection, however, the submission ignores the critical point that in circumstances where WCE used money received from Challengers in order to purchase flights etc., it would not itself suffer any loss except to the extent that it was required to make a refund since any third party payments it made would have been funded by the Challengers rather than coming out of its own funds.

225. Accordingly, even on Zurich's case that the Policy only indemnified irrecoverable third party costs, it can reasonably and plausibly be said that it was still necessary to check the refunds against the T&Cs in order to verify that WCE had suffered a loss since the amount of the refund would necessarily limit the amount of any valid claim. The mere fact that claims were approved by reference to the T&Cs is accordingly not inconsistent objectively with an assumption that WCE had incurred costs in that amount.

226. In support of his argument Mr Shapiro relied on *Allianz Marine Aviation (France) v GE Frankona Reinsurance Ltd London (The"Treasure Bay")*, [2005] EWHC 1010 (Comm); [2005] LRIR 437 at [50]-[51]. However, this provided only limited support beyond the general proposition that the way in which a policy has been operated between the parties in the past can affect its construction. That case concerned declarations under a facility for a single insured. It did not involve a wording which was in general use across the industry. Moreover, there was a genuine ambiguity in the excess provision at issue which could have borne either of two constructions without doing violence to the natural and ordinary meaning of the words used. 81 declarations had been made under the facility and the insurer accepted that in 80 of those declarations the insured's construction of the excess provision was correct. Unsurprisingly, the insured therefore argued that it should bear a consistent meaning in all cases. By contrast, WCE's argument here is that the course of dealing between the parties entirely changes the basis of cover. That is a bold submission – tantamount to arguing for a variation by conduct – which I am unable to accept.

227. Nor is this a case like *The Karen Oltmann,* [1976] 2 Lloyd's Rep. 708 where there is more than one possible meaning of the words in question and the parties have negotiated

the contract on the basis that they bear one of those meanings. First, there is in my view no relevant ambiguity. Secondly, in the absence of any evidence that Mr Stephens actually knew the basis on which claims were being settled or that WCE ever expressly stated that the refunds did not correspond to its third party outlays, it cannot be said that the Policy was *negotiated* in 2019 on the basis of WCE's construction.

228. I was also referred by Mr Shapiro to *Quantum Processing Services Co. v Axa Insurance UK plc*, [2008] EWCA Civ. 1640 where the insured expressly told AXA's agents that he would be going scuba diving. The Court of Appeal held that AXA's lack of objection or qualification meant that scuba diving had to be carved out of what would otherwise have been a general exclusion for hazardous activities. But since WCE never expressly said that it was seeking cover for refunds where it had not necessarily made any payments to third parties, I do not see how this case assists it.

229. In summary, I do not accept that there is anything in the factual matrix known or reasonably known to both parties at the date of the contract which affects what I have found to be the natural and ordinary meaning of the words.

230. In these circumstances, it is unnecessary to say very much about Zurich's appeal to business commonsense. Mr Hough argued that the claim was massively in excess of any loss suffered by WCE and that if WCE's construction were correct it would turn the insurance into a novel and very unusual form of business interruption insurance for which a higher premium would have been appropriate.

231. Had I otherwise been in WCE's favour as a matter of construction, I would have rejected this argument. As Mr Hough accepted, it is not conceptually impossible for WCE to have obtained the insurance which it thought it had, namely to cover the risk of having to make customer refunds. It might be unusual to find such cover in a business travel policy but the scope of cover under any policy depends ultimately on what it says, and if that is what I had found was objectively agreed, then that is what the parties agreed and the consequences cannot be said to be anomalous. Nor would there be any question of an unjust windfall in those circumstances. If Zurich failed to charge the correct premium, they only have themselves to blame. WCE was entirely open and transparent at all times. It never sought to hide anything. I accept that it never said in terms that the customer refunds were greater than its irrecoverable third party costs, but (as already noted above) there was no reason why it would have thought to do so when it had been indemnified by RSA on the same basis for years and understood that it was getting the same breadth of cover from Zurich.

232. In further support of its argument, Zurich submitted a Note on the Financial Effects of the Claim. This sought to apply a liberal dose of hindsight by looking at the financial consequences of the rival cases on the 2020 year (which was of course completely skewed by the pandemic). However, it is trite law that business commonsense cannot be applied retrospectively but must be assessed as at the date of the contract. If the parties had looked in April 2019 at the effects of the competing constructions on a typical year, then it cannot possibly be said that the consequences of WCE's construction were absurd or uncommercial when the aggregate deductible had never been exceeded in seven years. And of course the whole purpose of the cover from WCE's point of view was to indemnify it for refunds which became repayable in the event of mass cancellations due to a catastrophe – the so-called "black swan" year.

233. As it is, however, I hold that on its true construction, the Policy only indemnified WCE's irrecoverable third party costs up to the amount of the refunds it was obliged to make to Challengers. It follows that the only way in which the claim can succeed is by virtue of the alternative case based on estoppel and/or collateral contract, to which I now turn.

ESTOPPEL/COLLATERAL CONTRACT

234. WCE advanced its case on estoppel on a number of different bases as follows:

(a) Estoppel by convention and/or promissory estoppel based on the handling of claims under the Earlier Policies;

(b) Estoppel by convention and/or promissory estoppel based on the handling of claims under the Policy;

(c) Promissory estoppel/collateral contract arising from an agreement made on 27 February 2020;

(d) Promissory estoppel/collateral contract arising from an agreement made on 9 April 2020.

235. Although WCE's written submissions referred consistently in this regard to estoppel by representation, its pleaded case relied on promissory estoppel and it seems to me that this was indeed the substance of what it was asserting. I therefore deal with the argument on that that basis. In any event, it does not seem to me that estoppel by representation, properly so-called, has any part to play in this dispute, given that it requires a representation of existing fact, whereas any representation in this case was at best a representation of law as to the effect of the Policy.

236. There was no substantial dispute between the parties as to the principles of law applicable to estoppel by convention and promissory estoppel. They are set out at length in the authorities to which I was referred and to which I have had regard. I therefore only summarise them shortly as follows.

237. Estoppel by convention requires:

(a) A common but mistaken assumption of law or fact which is expressly shared between the parties (or made by C and acquiesced in by D) by means of conduct crossing the line between them. It does not matter that C's mistake has not been induced by D;

(b) An assumption by D of some element of responsibility in the sense that D conveyed an understanding that it expected C to rely on the common assumption;

(c) Reliance by C in its subsequent mutual dealings with D on the common assumption, rather than on its own independent view of the matter. However, it is not necessary that C should rely *solely* on D's affirmation of or subscription to the common assumption as opposed to its own mistaken belief;

(d) Some detriment to C or benefit to D sufficient to make it unjust or unconscionable for D to assert the true legal position.

238. As further elaborated by the Supreme Court, the underlying rationale of these requirements is that C must know that D shares the common assumption and be strengthened or influenced in its own reliance on the assumption by that knowledge: see *Tinkler v HMRC,* [2021] UKSC 39; [2023] AC 886 at [45]-[51], approving and explaining the statement of principle expounded by Briggs J in *HMRC v Benchdollar Ltd,* [2009] EWHC 1310 (Ch.); [2010] 1 All ER 174 at [52].

239. Promissory estoppel requires:

(a) A clear and unequivocal promise or assurance by D that it will not enforce or will suspend its strict legal rights. For this purpose, it is not necessary that D should actually be aware of the rights it is foregoing; it is sufficient that it demonstrates apparent awareness. Conversely, however, where C is unaware that D has a particular right, it will be difficult in practice for C to show that it understood D's representation as a promise not to insist on that right unless D expressly so states: *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions,* [2002] EWCA Civ. 1253; [2003] LRIR 1 at [22];

(b) An intention on the part of D that the promise/assurance should affect the legal relations between the parties;

(c) Detrimental reliance by C on the representation such that it would be inequitable to permit D to withdraw the promise or act inconsistently with it.

240. Under both forms of estoppel, the question of detrimental reliance is closely related to the question of unconscionability. As I understand the effect of the authorities, unconscionability is not so much a separate requirement as the prism through which detrimental reliance is to be assessed. Thus C must show that it changed its position in reliance on the representation or assurance in such a way and to such an extent that it would be unjust in all the circumstances to allow D to resile.

241. It is also right to note that neither estoppel by convention nor promissory estoppel is absolute and indefinite in its effect. The former ceases to be effective after the relevant assumption has been shown to be incorrect, while the latter is suspensory only and can be resiled from upon reasonable notice.

Estoppel by convention/promissory estoppel based on the handling of cancellation claims under the Earlier Policies

242. Some 139 claims were agreed by Zurich under the Earlier Policies in the amount of WCE's customer refunds and set against the deductible. WCE submitted that this demonstrated an assumption by Zurich (shared by WCE) that the insurance cover indemnified WCE for the amount of its refunds. Alternatively, there was a clear and unequivocal representation or assurance by Zurich that the wording operated in this way.

243. WCE alleged that it relied on this assumption/representation in each of the following ways:

(a) By entering into the Policy and paying premium based on a claims history which was predicated on indemnifying the amount of the refunds;

(b) By not making alternative insurance arrangements, for example, by reverting to RSA for cover in 2019;

(c) Delaying cancellations from mid-March onwards at the request of Zurich and/or committing to paying refunds when it would otherwise have sought to persuade Challengers to accept deferrals or credit notes.

244. In response, Zurich argues that:

(a) There was no common assumption that Zurich would always pay for customer refunds in full even if they exceeded WCE's irrecoverable outlays;

(b) Nothing "crossed the line" and Zurich did not assume responsibility for any such assumption;

(c) WCE did not rely to its detriment on any such assumption or representation.

Estoppel by convention

Common assumption

245. I accept that an estoppel by convention requires the assumption or convention relied upon to be both clear in meaning and scope, and clearly established, especially where its effect is to change or contradict the meaning of a contract between the parties. However, it is not necessary to show a concluded contract: *Republic of India v Republic of India Steamship Co. Ltd (No.2),* [1998] 2 AC 878 at 913G.

246. One critical difference which emerged between the parties at the outset concerned the formulation of the relevant assumption. The assumption pleaded and asserted by WCE was simply that it would be indemnified for the amount of its customer refunds. Zurich, on the other hand, submitted that there needed to be an assumption that Zurich would cover customer refunds in full *even if they exceeded irrecoverable outlays*. On the latter basis, of course, it would need to be shown that the Zurich claims handlers uniformly understood that the refunds exceeded WCE's irrecoverable costs - an altogether more difficult, if not impossible, hurdle for WCE to clear.

247. On this point, I agree with Mr Shapiro. I see no reason of either logic or principle why an effective estoppel requires more than a common assumption that the amount of the refunds would be covered irrespective of the reasons why. If there was such an assumption, then in my judgment, the subjective understanding of the Zurich claims handlers as to what those refunds did or did not represent is irrelevant.

248. That is not to say that it would not be open to Zurich to plead and prove that its conduct was only consistent with an assumption on its part that refunds were only indemnifiable to the extent that they corresponded to WCE's irrecoverable costs. However, it did not seek to do so and in any event I would have rejected any such submission on the basis of my findings as to the course of claims handling set out at paragraphs 170-196 above.

249. As it is, the position in my judgment is as follows:

(a) Both WCE and the Zurich claims handlers subjectively believed and understood that WCE was covered for the amount of its customer refunds.

(b) There was therefore a common assumption to that effect which is sufficiently clear in its scope for the purposes of an estoppel by convention.

(c) There was ample conduct crossing the line by which this common assumption was shared between the parties. It was obvious from the face of the claims documentation routinely submitted by WCE that it was claiming the amount of its customer refunds. For its part, Zurich never suggested prior to 22 April 2020 that the cover was only in respect of WCE's irrecoverable third party costs and that claims had hitherto only been agreed in error or as a concession. On the contrary, the assumption that the insurance indemnified the amount of WCE's customer refunds was demonstrated each time that Zurich agreed a claim and set it against the aggregate deductible. True it is that the Claims Protocol purported to preserve the effect of the policy wording, but it also contained an explicit assurance by Zurich that they would "flag" any coverage issues and review them comprehensively with WCE. WCE could therefore reasonably have expected that any issue as to the scope of cover would be raised by Zurich. Zurich's failure to do so at any stage prior to April 2020 could only have indicated to WCE that there was no such issue and that the basis of cover was as it understood it to be.

(d) The erosion of the deductible had contractual consequences for both parties. Zurich undertook to monitor the erosion of the deduction for the purposes of the policy and it is unrealistic to contend that they did not intend WCE to rely on their calculations in that respect. Accordingly, by agreeing claims in the amount of the refunds and setting them against the deductible, Zurich clearly conveyed to WCE that they shared WCE's assumption as to the scope of cover and WCE was strengthened and confirmed in its own reliance on that assumption. This is sufficient to demonstrate that Zurich assumed some element of responsibility for the common assumption.

250. Mr Hough submitted that the subjective understanding of the claims handlers was insufficient to establish any assumption on the part of the company. I reject this submission. Whilst their understanding was not to be attributed to Mr Stephens as an underwriter, the claims handlers were the people charged by Zurich with handling claims under the insurance and agreeing the amounts to be set against the deductible on the company's behalf. Mr Stephens' express evidence was that these were matters with which he as an underwriter did not concern himself. Indeed, he necessarily adopted and relied on their handling of claims when considering the extent to which the deductible had been eroded at each renewal. In these circumstances, the relevant assumption can in my view properly be established by reference to the understanding and conduct of the claims handlers.

251. I am therefore satisfied that WCE has established a common assumption arising from the course of claims handling under the Earlier Policies which is sufficient in principle to found an estoppel by convention.

Reliance (1): concluding the Policy

252. The first way in which WCE puts its case is that it relied on the common assumption by entering into the Policy and paying premium based on the claims history.

253. In my view, this submission is factually flawed and must be rejected. I accept Mr Stephens' evidence that premium for the various renewals was set without reference to cancellation claims. No doubt the cancellation claims history fed into Zurich's decision to

reduce the aggregate deductible for the 2019 renewal, but only in the general sense that it had never previously been exceeded. In truth, the reduction was offered as a sweetener for the increased premium being proposed on the basis that it would look good to WCE while costing Zurich nothing.

Reliance (2): failing to make alternative arrangements

254. The second way of putting the case is to say that WCE relied on the assumption by failing to make alternative insurance arrangements. In closing, Mr Shapiro suggested that reliance could be established on the basis WCE had lost the opportunity of investigating the market had it so wished. However, an immediate difficulty in this way of putting the case is that (as recorded in the Order of Foxton J dated 4 February 2022) WCE expressly restricted itself at an earlier stage of proceedings to arguing that it would have reverted to place cover in 2019 with RSA and would have obtained from RSA the cover previously provided in the 2015/16 policy year. I do not therefore consider that it is any longer open to WCE to argue that it might have canvassed the market more widely.

255. In any event, there was no satisfactory evidence that WCE could in fact have obtained the cover that it sought either with RSA or elsewhere in 2019. The mere fact that RSA were keen to retain the account in 2016 and that WCE obtained insurance with AXA in the very different conditions of 2022 provides no indication at all that it could have got cover from RSA in 2019 on the 2015/16 terms. RSA might have changed their risk appetite between 2016 and 2019 (as they clearly had by 2022) and even if cover could have been obtained, there was no evidence that RSA (or indeed any other insurer) would have operated it on the basis that WCE wanted.

256. Moreover, even if remaining with Zurich in 2019 and not making alternative arrangements were enough to constitute reliance in principle, it can hardly be inequitable for Zurich to resile from the common assumption when there is no evidence showing a real prospect that WCE would in fact have been in a better position by obtaining more beneficial cover elsewhere. For all these reasons, I am not persuaded that there was any detrimental reliance in this respect.

Reliance (3): WCE's approach to cancellation

257. This leaves WCE's third way of putting the case on reliance, based on its approach to cancellations.

258. It was common ground between the parties that where there was applicable government advice or regulation preventing travel to a particular destination, then cancellation was inevitable for trips to those destinations which were due to depart imminently. However, it was uncertain how long the pandemic would last and how long any specific advisories would remain in place. At least initially, therefore, there was a prospect that it might be possible to resume running expeditions to some places later in the year, hence Zurich's hesitancy about cancelling trips too far in advance.

259. I accept that in this respect, WCE was on the horns of a dilemma. It wanted to do its best by its customers but cancelling trips and offering refunds on the massive scale that might be required would require an enormous cash outlay that might sink the business altogether. That, after all, was why it had wanted cancellation cover in the first place.

260. Like everyone else, WCE had no idea how long the pandemic would last. Most government advisories were open-ended in terms of timescale and remained in place until superseded by something else. Separately, however, there were practical considerations that might make it problematic to run trips, for example: difficulties in obtaining vaccinations or visas, the remoteness of the destination if a Challenger or a leader contracted Covid, the fact that some destinations were inherently unlikely to have adequate controls in place. Considerations such as these might dictate cancellation even before any relevant restriction was imposed by governmental authorities, simply because it was too risky and impractical to send a group of schoolchildren to a remote area where only limited Covid measures might be in place. Mr Venn gave entirely credible evidence as to the concern he would have felt as the parent of a teenage daughter in sending her to the other side of the world just as a global pandemic was taking off. It is evident from the documents and the evidence of Mr Morris, in particular, that these concerns were widely shared and that WCE was coming under considerable pressure from parents to cancel trips irrespective of any government advice.

261. The steps taken by WCE in January and February show that it was accordingly attempting to manage the situation proactively some weeks before any prohibitions were put in place. In this respect, a number of factors were at play:

(a) On the one hand, WCE could cancel trips immediately, in which case it would crystallise a loss which (if the situation improved) might turn out to have been unnecessary. On the other hand, it could delay until nearer the departure date, in which case it would have to continue taking deposits which would increase the size of any claim on the insurance if the situation did not improve.

(b) I accept the evidence of Mr Morris that in the event of a cancellation by WCE, it was inevitable that demands for refunds would come flooding in as soon as the announcement was made. Nonetheless, WCE had some room for manoeuvre in the sense that if it were able to act sufficiently early, while it still had the customers' goodwill, it might be able to persuade some or all families to accept a diversion or a deferral to the following year instead of a refund. It might also have been able to encourage qualifying schools to make use of the government-backed RPA scheme which was akin to insurance. The evidence of Mr Fletcher was that WCE's sister company, TTSS, had following this approach of offering alternatives to refunds with some success. I accept his evidence that even where the PTR applied it was not impossible, albeit obviously less likely, that customers would accept a diversion or deferral.

262. Everyone was feeling their way in the early days and the situation was changing on a daily basis throughout February and March. However, as time passed and the severity and likely longevity of the pandemic became ever more apparent, parents were becoming increasingly upset at the lack of any clear statement from WCE about cancellation, not least because they were still having to make payments, and goodwill was commensurately diminishing. It is clear that the front-line customer service staff were starting to be put under intolerable pressure.

263. Matters were further considerably complicated by the fact that the Policy was approaching renewal, and from early March there was an obvious need to clarify which policy year responded to cancellations because of the severe curtailment of cover which was being proposed by Zurich going forward.

264. It would therefore be a gross over-simplification to say that cancellation was inevitable as soon as a relevant prohibition had been issued. Indeed, this is demonstrated by Zurich's own reluctance, even after the UK government prohibition of school trips in mid-March 2020, to countenance cancellations more than 60 days in advance of departure. True it is that WCE hoped to pray government restrictions in aid as a factor to convince Zurich to agree to cancellations if necessary, but a restriction in one country or region might (at least in the early days) have led only to diversions rather than all-out cancellations. Thus WCE had to balance government advice and restrictions, not just in one market but across all their markets worldwide against an assessment of when it might be possible to run trips again, whilst also taking into account practicalities, customer expectations, the need to preserve goodwill and its own financial capabilities. As can well be imagined, this was a constantly shifting kaleidoscope.

265. Against this background, I accept that at the end of February WCE had the option to offer diversions, deferrals and credit notes as an alternative to an outright refund. There was also the possibility of inviting schools to explore the option of the RPA scheme. At this stage, its policy was to wait until four weeks before departure before taken any decision and then to cancel (if appropriate) between 2-3 weeks before.

266. By mid-March 2020, however, this policy of "wait and see" was no longer sustainable. Restrictions were starting to be introduced in some countries and it could confidently be expected that others would follow. While it was not impossible that they would only be temporary, WCE was also starting to come under considerable pressure from parents and it is quite clear that by mid-March, it wanted to cancel *all* trips up to the end of the summer season if it could, irrespective of any particular regulations already in force or of the particular destination or source country but having made an overall assessment of how the situation was likely to develop and whether or not it would be practical to run trips in any event.

267. The difficulty was that, from a customer relationship perspective, WCE needed to be in a position whereby, if it did cancel, it could confirm the refund position at the same time. As Mr Morris explained in his oral evidence, WCE thought it had cover for refunds and wanted to be able to go firm to parents on that basis. The last thing it wanted was to announce a cancellation publicly but then have to stall on whether refunds would be payable or not. However, by this time, questions had arisen as to: (i) which policy would respond to cancellations and (ii) how far in advance Zurich would permit cancellation, Mr Stephens having made it quite clear internally that he thought it premature to be cancelling more than 60 days in advance.

268. It is not in dispute that WCE was therefore holding off from making any decision or public pronouncement until these points had been clarified. That was entirely understandable and eminently sensible. Quite apart from anything else, none of WCE's senior management had authority to sign off on large amounts of refund payments without authorisation from the Travelopia board. Meanwhile, its strategy was not to cancel unless absolutely necessary and not to offer any refunds except as a last resort. As the WCE witnesses accepted, they were trying at all stages to minimise costs and cash outlays and were therefore thinking about how to reduce the company's exposure (for example by offering credit notes and deferrals) if the current Policy turned out not to cover cancellation for trips departing after 1 April 2020, since it was inevitable that there would then be an enormous cash hole in its finances.

269. It was in these circumstances that the telephone conference of 17 March 2020 took place. Having listened to the evidence carefully and assessed it against the contemporaneous documentation, I find as a fact that two points were discussed:

(a) Whether WCE could proceed to cancel all trips departing up to the end of the summer (i.e., 31 August 2020);

(b) Which policy would respond where the departure date was after 1 April 2020.

270. I also find as a fact that Zurich agreed during the call that trips departing up to the end of May could be cancelled under the Policy but that they would need to consult further internally about cancellation more than 60 days in advance and would revert on both that and the policy allocation point. These, therefore, were the two outstanding points referred to in Mr Morris' email to Mr Stephens sent at 1301 on 17 March following the call. These findings are entirely consistent with:

(a) The unanimous evidence of the WCE witness who were all under the clear impression that Zurich had agreed to cancellation of trips departing up to the end of May;

(b) WCE's conduct following the call, for example:

(i) Mr Fletcher's email at 1213 on 17 March 2020 confirming WCE's decision to cancel all trips departing in this time period;

(ii) Mr Morris' email of 17 March at 1301 expressly stating that WCE was starting to process claims for trips within the 60 day window, and Mr Stephens' response regarding the personnel who would be involved for the *"initial claims"*;

(iii) Mr Morris' email to Mr Stephens of 18 March stating that WCE was still finalising the first 60 days' cancellations and would aim to get the first fifty to Zurich that day;

(iv) Mr Sapsford's email of 20 March 2020 confirming that WCE had now cancelled all trips departing to the end of May and that Zurich were covering all cancellations for 60 days as a minimum;

(c) Zurich's internal correspondence and conduct:

(i) Mr Moss' email to Ms Robinson on 16 March 2020 stating that WCE would be told during the call on 17 March 2020 that Zurich's current stance was to consider cancellations up to 60 days prior to departure;

(ii) The fact that ZM was also working on the basis of a 60 day window;

(iii) Mr Stephens' email to Mr Dowsing and Mr Moss at 1307 following the call. The phrase *"looking to offer"* I find to be a figure of speech which is consistent with him having agreed 60 days and WCE wanting to know the rationale for this specific number. I do not accept his oral evidence that he only put this forward as a matter for consideration, not least because it is inconsistent with him recording in this email – without any qualification or reservation – that WCE was in the process of submitting its first claim for trips to be cancelled within the next 60 days;

(iv) Mr Blake's manuscript notes of the call. In his oral evidence, Mr Blake could not really remember anything about the call and was dependent on the documents. He said he thought he would probably have been trying to align the cancellation window across the business. This is consistent with him noting that 60 days had been agreed with WCE but also reminding himself to query why it was 60 days rather than 30, which he said was the last position that he personally knew about;

(v) Mr Blake's email at 1358 on 17 March 2020 referring to WCE submitting a spreadsheet for 20 trips already cancelled and 80 further trips about to be cancelled – these being the 100 trips recorded in his manuscript notes as being due to depart in the next 60 days;

(vi) Ms Robinson's email of 25 March 2020 and Mr Moss' response confirming that Zurich's initial response to WCE had been to accept that cancellation within a 60-day window was appropriate.

271. I therefore reject Zurich's case that the 60-day window was still to be agreed.

272. So far as relevant, I find that nothing was said during the call about the Policy only covering third party costs, although I accept that something was said about giving credit for recoveries: see Mr Morris' emails of 24 March 2020 to Mr Fletcher and 29 March 2020 to Ms Northey. However, that is not the same as making clear that refunds were not covered at all and, as the WCE witnesses made clear, they were relatively relaxed about this because they had very little outlay at that point, even though it did not conform to their understanding of how the Policy worked.

273. Following the 17 March call, WCE proceeded to cancel all trips departing to the end of May. However, as time passed thereafter, it became ever more difficult to hold off making any announcements to customers while waiting for clarification from Zurich of the outstanding points. Mr Morris, in particular, was of the view that WCE ought to bite the bullet and cancel, not least to relieve the pressure on his customer service team but, as at 8 April, Mr Fletcher felt that WCE still had some time available to it as the school holidays afforded some respite. Nonetheless, it is clear that the pressure from parents to have a definitive statement was increasing and that goodwill was rapidly slipping away.

274. Meanwhile, Mr Morris had begun to appreciate that Zurich's reference to recoveries might have wider implications and he articulated this possibility in his email to Ms Northey of 29 March 2020. This, coupled with Mr Blake's email of 8 April 2020, only served to increase WCE's desire to get confirmation from Zurich that refunds would be covered in full, or at least to clarify the extent to which it would be expected to mitigate. Even then, however, I accept that WCE was not in any serious doubt that refunds were indemnifiable in principle.

275. Confirmation was obtained, or so WCE thought, during the 9 April 2020 call with Mr Blake. I have already set out my findings in relation to this call when discussing Mr Blake's evidence and I do not repeat them here. Suffice it to say that I accept that WCE came away from that call with the clear impression that Zurich accepted that customer refunds were covered subject only to giving credit for recoveries: see, for example, Mr Fletcher's email of 19 April 2020 set out at paragraph 130 above. The fact that WCE was pressing for Zurich's written confirmation thereafter is not inconsistent with this understanding. As reflected in both Mr Blake's contemporaneous notes and his witness statement, the reason

WCE wanted a written statement of Zurich's position was because it was under intense pressure from its customers and needed to ensure that any external communication precisely matched the insurance position. It does not imply that WCE had any internal doubts about refunds being covered in principle even if credit had to be given for recoveries.

276. The Easter weekend then intervened and matters were not picked up again until 15 April 2020. All the WCE witnesses accepted that the conversation between Mr Blake and Mr Venn on that day gave rise to serious doubts as to whether Zurich would after all confirm cover in the terms of the 9 April call as they had understood and expected, and that there was now a possibility that Zurich would only agree to pay WCE's own irrecoverable costs. Nonetheless, Mr Blake was new to the account and they believed (as I accept) that once the matter had been considered by more senior personnel, Zurich was more likely than not to confirm that the Policy would be operated as hitherto, subject to deduction of recoveries. It therefore came as a shock when the position paper arrived without any warning that such a *volte face* was being contemplated and without any opportunity having been given for further discussion. I accept that Mr Venn was generally more Eeyore-ish than his colleagues, but I am satisfied that (at least until 15 April 2020) this was because of a healthy dose of scepticism regarding insurers in general rather than specific concerns about this particular policy.

277. Be that as it may, I accept Mr Fletcher's evidence that by 15 April 2020 WCE was left with no realistic option but to cancel all trips departing to the end of August come hell or high water. The decision to do so was accordingly taken on 20 April 2020, even before Zurich's position paper had been received, and was implemented in the following days with WCE taking such steps as were still open to it to mitigate the cashflow impact.

278. In the event, cancellations were made as follows:

(a) 16 expeditions between 28 February and 16 March 2020;

(b) 28 expeditions between 17 and 26 March 2020;

(c) 4 expeditions between 27 March and 8 April 2020;

(d) All remaining expeditions departing to the end of August following the decision on 20 April 2020.

279. On the basis of the foregoing, I find that:

(a) By mid-March, WCE would have taken steps at that point to cancel all trips departing before the end of August but for the need to resolve the issues left open after the 17 March 2020 call, namely which policy responded and whether Zurich would permit a cancellation window of more than 60 days.

(b) WCE cancelled the trips referred to in paragraph 278(b) above in reliance on the agreement reached on 17 March 2020 as to the 60-day cancellation window and in the belief that refunds were covered under the Policy.

(c) However, WCE delayed making any decision on the remaining trips pending Zurich's clarification of the two outstanding points and (from the end of March) also the position regarding recoveries.

(d) It continued to believe that refunds were covered in principle under the Policy and any uncertainty which may have started to surface at the end of March/early April regarding the precise scope of cover was resolved by the 9 April call with Mr Blake which left WCE with the clear understanding that refunds were indeed covered but subject to a deduction for recoveries.

(e) Only on 15 April 2020 following Mr Blake's call with Mr Venn did WCE have reason for serious doubt that Zurich might not provide cover even on this basis. Even then, however, it did not believe that this was a foregone conclusion and thought it likely that Zurich would ultimately adopt a less extreme position.

(f) WCE took the decision to cancel the remaining trips on 20 April 2020 because by then it had no other realistic option. There was nothing that it could have done between 15 and 20 April 2020 to improve its position vis-à-vis the Challengers. This is therefore not a case where WCE is asserting reliance on an assumption which has been shown to be false.

(g) Had WCE not believed and understood that refunds were in principle recoverable under the Policy and that Zurich shared this understanding, it would not have delayed its decision, but would have proceeded to cancel all trips departing up to the end of August in mid-March. Its options for managing cancellations thereafter were steadily diminishing with time and it was starting to lose customer goodwill. There would therefore have been no point in waiting; if refunds were not covered at all, the question of which policy responded or how far in advance it could cancel was meaningless.

280. Applying these findings to the various cancellations, the position is as follows:

281. Trips cancelled between 28 February-16 March 2020: I am not satisfied that WCE can establish any detrimental reliance in relation to the trips cancelled between 28 February and 16 March. There was little evidence regarding the circumstances in which these specific trips were cancelled although they seem to have been largely from the Middle East where a specific restriction had been introduced on about 28 February 2020. There does not seem to have been any question at this stage of deferring the decision and I infer that WCE cancelled these trips because it had no option to do anything else irrespective of any assumption it may have made about the scope of cover under the Policy.

282. I am also satisfied on the basis of the evidence that WCE was in any event attempting wherever it could to minimise the number of refunds offered. In relation to these trips, therefore, it cannot be said that WCE did anything – whether in terms of cancelling or offering refunds – that it would not otherwise have done in any event. There was no change of position in reliance on the common assumption and accordingly no estoppel arises.

283. Trips cancelled on the basis of the 17 March 2020 agreement: I have found that Zurich expressly agreed during the call on 17 March 2020 that WCE could cancel trips departing up to 31 May 2020. It follows that there was no relevant delay to which WCE can point. WCE sought Zurich's agreement to cancel trips over this timescale and Zurich agreed. WCE therefore acted exactly as it had planned to do in any event. I am also satisfied that with these cancellations as well, WCE was attempting to minimise its financial exposure by offering refunds only where absolutely necessary – in this case for the added reason that it was as yet unclear whether the policy allocation point would go its way.

284. Again therefore, no estoppel arises with regard to trips cancelled on the basis of the 17 March 2020 agreement. As I understand it, these include not only the trips cancelled between 17 and 26 March 2020 but also the further four trips cancelled between 27 March and 8 April 2020. However, the evidence was not entirely clear in this respect and I will, if necessary, hear further submissions.

285. Trips cancelled thereafter: By contrast, in my judgment WCE can establish detrimental reliance in relation to the trips departing after 31 May 2020, all of which were cancelled as a result of the decision taken on 20 April 2020. I accept WCE's evidence that it would have had more options at its disposal had it cancelled in mid-March as it wanted to do and would have done but for the need to secure Zurich's agreement to cancelling more than 60 days in advance of departure.

286. It was put to Mr Morris that he could not say whether in fact WCE would have been in any better position had it cancelled earlier and he very fairly accepted that he could not. However, it was his evidence, based on his considerable experience, that at least some trips could have been deferred. Moreover, detriment for the purposes of an estoppel does not have to be financial provided it is more than trivial and leaves the claimant in a worse position.

287. In this case the delay deprived WCE of a real chance of exploring and potentially taking advantage of other options so as to preserve customer goodwill. Instead there was only a loss of goodwill and alienation of customers which was clearly capable of adversely impacting WCE's business over and above any effects of the pandemic itself. This is sufficient detriment for these purposes: see *The Law of Reliance-Based Estoppel and Related Doctrines* (ed. Spencer Bower, 5th ed.) at §5.46.

288. I am also satisfied that in all the circumstances, it would be inequitable for Zurich now to resile from the common assumption:

(a) The course of dealing giving rise to the shared assumption stretched back nearly four years.

(b) Responsibility for the continuation of the incorrect assumption rested almost entirely with Zurich.

(c) True it is that WCE never told Zurich in terms that its customer refunds would almost always be considerably in excess of its third party outlays. However, this was not a culpable failure on its part. Its understanding and expectation during the years it was insured by RSA was that customer refunds were covered, and Zurich had been requested to provide cover on the same basis. However, WCE was at all times entirely open and transparent about what it was doing and it was perfectly obvious for anyone with eyes to see that its cancellation claims were for the amount of its customer refunds.[16]

(d) Zurich had every opportunity to identify WCE's erroneous understanding of the cover but failed to do so, whether at the outset in April 2016 when setting up the claims handling procedures or at any time thereafter.

[16] As demonstrated by Mr Saha's appreciation from the 17 March 2020 call that WCE thought it was covered for refunds as opposed to irrecoverable costs.

(e) The overriding impression is that Zurich's employees operated in compartmentalised silos. None of them apparently regarded it as any part of his or her function to look outside their own little box and there was seemingly no-one in overall control to provide any joined-up thinking.

(f) Thus the assumption was made that refunds represented irrecoverable third party costs and this persisted without anyone making any real attempt (save in the early Bentley sisters' claim) to investigate whether it was the case or not.

(g) No doubt nobody really cared very much anyway because the cancellation was only small part of the overall cover and there had never been any danger of exceeding the deductible.

(h) It is striking that the only person to identify the problem was Mr Saha, who had no prior knowledge of the account and participated (so far as can be seen) in only one telephone call on 17 March 2020. He spotted immediately that WCE was labouring under a misapprehension as to the nature of the cover. Yet no steps were apparently taken to investigate the matter for weeks.

(i) Nor did anyone apparently think it necessary to warn WCE that it had incorrectly understood the Policy, even though it was perfectly clear that getting clarification was a matter of the utmost importance and urgency (see Mr Morris' emails of 18 and 19 March 2020 and Ms Northey's email of 27 March 2020 - paragraphs 88, 90 and 96 above.) It took a further six weeks after the Saha email for Zurich to make their position clear.

(j) This is not an impressive performance even in the difficult circumstances of early 2020 and ordinary policyholders might well be appalled to think that a reputable insurance company could treat a long-standing and supposedly valued customer in this way.

289. I was referred by Mr Hough to a passage in *Spencer Bower (op. cit.)* at §§8.46-8.47 suggesting that an estoppel by convention permits of a modulated or *pro tanto* response, rather than dictating an all or nothing outcome. However, the weight of authority binding on me is that the effect of the estoppel is to preclude the defendant from denying the assumption. See, for example:

(a) The judgments of Brandon and Eveleigh LJJ in *Amalgamated Investment & Property Co. Ltd v Texas Commerce International Bank Ltd*, [1982] 1 QB 84 citing with approval the following sentence from an earlier edition of Spencer Bower to the effect that *"each will be estopped as against the other from questioning the truth of the statement of facts so assumed."*

(b) The judgment of Kerr LJ in *The August Leonhardt*, [1985] 2 Lloyd's Rep. 28 at 34-35 quoting the same passage from Spencer Bower stating that *"depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered."*

(c) The speech of Lord Steyn in *The Indian Endurance (supra)* at 913 referring to the effect of an estoppel being *"to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption"*.

(d) The approval of the Supreme Court in *Tinkler (supra)* of the principles articulated in *Benchdollar*, including detriment which is *"sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

290. Cases involving proprietary estoppel such as *Guest v Guest*, [2022] UKSC 27 seem to me to fall into a different category where it may be easier to fashion a more flexible remedy. It is also noteworthy that Mr Hough was unable to suggest what a modulated and *pro tanto* remedy might look like in this case beyond saying that it would involve estimating the value of the opportunity lost. However, that does not seem to me to accord with authorities referred to above, or with the fact that estoppel by convention does not require any specific financial detriment. I therefore conclude that the effect of the estoppel which I have found to be established is to prevent Zurich from denying in principle that the Policy indemnified WCE for the amount of its customer refunds.

291. That said, the prospect of having to give credit for recoveries had been lurking in the background from 17 March onwards, and by 9 April 2020 WCE was aware that Zurich had resiled from the common assumption to that extent. In my judgment, it would not be inequitable to permit Zurich to rely on that qualification.

292. WCE's claim accordingly succeeds in relation to the trips cancelled on 20 April 2020 subject to giving credit for any third party recoveries.

Promissory estoppel

293. I would not have found that any promissory estoppel was established. Whilst the necessary promise or assurance could have been made out, the fact is that WCE was blissfully unaware until 15 April 2020 at the earliest that the Policy only covered its irrecoverable costs. In those circumstances, it cannot possibly have understood before then that Zurich were giving up any right to rely on the true construction of the Policy.

294. In these circumstances, it is strictly unnecessary for me to deal with the further ways in which WCE put its case but I do so briefly for the sake of completeness. Each was put forward on a "stand-alone" basis on the assumption that all previous ways of putting the case had failed.

Estoppel by convention and/or promissory estoppel based on the handling of claims under the Policy

295. Mr Shapiro accepted that only the third aspect of reliance was open to him under this head, as to which my findings above apply equally. However, only three cancellation claims were approved under the Policy before matters came to a head and had the case depended solely on these, I would have held that they were insufficient to establish any common assumption or convention. In fact, they do not stand alone, but confirm and continue the course of dealing established under the Earlier Policies and can only have strengthened WCE's reliance on the common assumption. They are therefore best regarded as part and parcel of that continuing course of dealing and do not independently add to WCE's case based on the handling of claims under the Earlier Policies.

296. The case based on promissory estoppel fails for the same reason given in paragraph 293 above.

Collateral contract and/or promissory estoppel arising from the agreement on 27 February 2020

297. It is not apparent that Mr Stephens ever replied to Mr Brown's email of 27 February 2020 or to his subsequent chaser on 13 March 2020. In his oral evidence, he said that he could not remember the call specifically although he recalled receiving the email and accepted it as a correct record.

298. As appears from my findings above, I accept Mr Stephens' evidence that he was only concentrating on the point of principle raised by Mr Morris, namely whether Zurich would start making physical payments once the aggregate deductible had been exhausted. He did not form any view as to what the £3k figure mentioned might or might not represent as this was not a job for him as an underwriter but would have been something he left to the claims handlers. Mr Morris in his evidence likewise accepted quite candidly that the principal purpose of his enquiry was to get confirmation that Zurich would start to pay out once the aggregate was exhausted. This was also how Mr Brown understood the query.

299. In these circumstances, it is impossible to spell out any unequivocal representation that refunds were covered under the Policy. Mr Morris' original query did not expressly ask about the basis of adjustment and while he may reasonably have thought it clear that he was postulating a customer refund, his email does not naturally read as being specifically directed to questions of assessment.

300. The case on promissory estoppel accordingly fails at the first hurdle as also does the case based on collateral contract (even assuming that any consideration for the alleged contract could have been found). WCE would also have had to confront: (i) the difficulty already identified that it would not have been aware that Zurich were giving up any rights; and (ii) the lack of evidence that it did anything in reliance specifically on the alleged representation over and above regarding it as further confirmation of the common assumption discussed above.

Collateral contract and/or promissory estoppel arising from the agreement on 9 April 2020

301. On the basis of my findings above, I am satisfied that Mr Blake unequivocally represented during the call on 9 April 2020 that claims for refunds would be covered subject to giving credit for recoveries. Although the question of recoveries had first been raised on 17 March 2020 and repeated by Mr Stephens to Mr Brown on 24 March 2020, I find that nothing was ever said by Mr Blake or anyone else at Zurich to suggest that refunds were not covered at all. On the contrary, the clear impression given by Mr Blake on 9 April 2020 was that they would be covered subject to recoveries. Given WCE's pressing need (known to Zurich) for urgent clarification of the cover, it could reasonably have expected Zurich to say explicitly if this was not the case. However, Mr Blake accepted that he had not been clear with WCE at that point – not doubt because, as I have found, he too believed until 15 April 2020 (although for different reasons) that the Policy covered the amount of WCE's customer refunds.

302. Nevertheless, it seems to me that any assertion of promissory estoppel must fail for the same reasons as already given, namely that WCE cannot have understood the representation as a promise by Zurich to give up rights which WCE did not believe existed. I would also

have been doubtful whether WCE could show sufficient change of position in reliance on the 9 April 2020 representation taken alone.

303. I reject the submission that the 9 April 2020 call gave rise to a collateral contract. WCE's witnesses accepted that there was no explicit agreement by Mr Blake, and despite Mr Shapiro's valiant submissions, I struggle to find any consideration to support it.

Conclusion on estoppel

304. For all these reasons, I find that Zurich is estopped by convention from denying that WCE was entitled to be indemnified under the Policy for the amount of its customer refunds subject only to giving credit for any recoveries. WCE relied on the common assumption in relation to the cancellation of trips due to depart after 31 May 2020 and its claim succeeds to that extent but not otherwise.

AGGREGATION

305. As set out above, the Policy Schedule contained an Event Aggregate Limit of £25 million and a separate Cancellation/Curtailment Limit of £100,000. WCE's claim is well within the former and it is only the latter limit which is potentially applicable.

306. The Definitions section of the Policy defined the Cancellation/Curtailment Limit as the maximum amount for which Zurich could be held liable in respect of all claims under Section 8 *"for loss and expense arising out of any one event." "Event"* in turn was defined as a *"sudden, unforeseen and identifiable occurrence"* with provision for separate occurrences to be treated as a single occurrence where they arose from or were attributable to one source or original cause and occurred within a 10 mile radius and 72 hours of that source/cause.

307. WCE's case in a nutshell is that on the facts of this case, there is no aggregation because the cancellations did not arise out of any one *"event"* as so defined. On the contrary, they were the result of a cause or causes, alternatively of a mixture of causes and occurrences, alternatively of occurrences which did not fall within the definition of *"event".* WCE submitted that all the cancellations arose from the pandemic as a whole, alternatively from the spread and prevalence of Covid (both actual and anticipated) in departure countries, coupled with the spread and prevalence of Covid (both actual and anticipated) in destination countries, coupled with actual and anticipated governmental restrictions/advice taken as a whole. In these circumstances, it argued that it was impossible to isolate particular occurrences as the cause of particular cancellations.

308. By contrast, Zurich's case was that the cancellations arose from:

(a) The imposition of exit travel restrictions in each relevant departure country; alternatively

(b) The imposition of entry travel restrictions in each relevant destination country; alternatively

(c) The decision to cancel taken on 20 April 2020, alternatively multiple decisions to cancel taken within a 72 hour period in implementation of that decision.

309. Zurich's pleaded case that Covid-19 itself could be treated as an aggregating factor was (sensibly) withdrawn before trial.

Relevant principles

310. The principles governing the correct approach to aggregating provisions have recently been considered in detail by Butcher J in a trio of cases concerning business interruption losses sustained in the wake of the pandemic: *Stonegate Pub Co. Ltd v MS Amlin Corporate Member Ltd,* [2022] EWHC 2548 (Comm); *Greggs plc v Zurich Insurance plc,* [2022] EWHC 2545 (Comm); *Various Eateries Trading Ltd v Allianz Insurance plc,* [2022] EWHC 2549 (Comm).

311. I respectfully refer to paragraphs 78-90 of his illuminating judgment in *Stonegate* for a full discussion. For present purposes, I can summarise the position as follows:

(a) The choice of language by which the parties designate the unifying factor is of critical importance;

(b) There are some commonly adopted unifying factors which have acquired relatively settled meanings, although this is always subject to the surrounding terms of the policy: *Mann v Lexington Insurance Co.,* [2001] 1 Lloyd's Rep. 1 at [36].

(c) Thus "event" and "occurrence" are usually treated as synonymous and meaning *"something which happens, at a particular time, at a particular place"*. This is to be contrasted with a "cause" which is something altogether less constricted and *"can be a continuing state of affairs; it can be the absence of something happening"*: *Axa Reinsurance (UK) Ltd v Field,* [1996] 1 WLR 1026 at 1035G.

(d) In considering whether there has been an "event" or "occurrence", the matter is to be judged from the perspective of informed observer in the position of the insured. An important consideration is *"the degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible"*: *Kuwait Airways Corp. v Kuwait Insurance Co. SAK,* [1996] 1 WLR 664 at 685-686, citing Mr Michael Kerr QC in the *Dawson's Field Award* (29 March 1972).

(e) The four "unities" are not to be applied mechanistically but are simply an aid in determining whether the circumstances of the losses involve such a degree of unity as to justify being described as *"arising out of one occurrence"*: *Simmonds v Gammell,* [2016] 2 Lloyd's Rep. 631 at [29].

(f) It is also necessary to identify the nature of the causal link required. Generally speaking, the words *"arising from"* require a significant causal connection (albeit not necessarily that of proximate cause), this being inherent in the very concept of aggregation: *Scott v Copenhagen Reinsurance Co. (UK) Ltd,* [2003] Lloyd's Rep. IR 696 at [68].

(g) The aggregating event under consideration must not be too remote: *Caudle v Sharp,* [1995] LRLR 433 at 438-439.

(h) Ultimately, the question is one of judgment based on all the relevant facts and the purpose of the clause: *Scott v Copenhagen Re (supra)* at [81]

312. In the present case, the definition of *"event"* is narrower than the generally accepted meaning referred to above, due to the superadded requirements that the relevant occurrence be both *"sudden"* and *"unforeseen"*. In the same way that the assessment of whether there has been a single occurrence falls to be carried out from the perspective of an informed observer in the position of the insured, so too in my judgment does the assessment of whether the occurrence is sudden and unforeseen.

Discussion

313. The first point to note is that the question of aggregation arises, and arises only, in relation to the specific sub-set of cancellations which were implemented pursuant to the decision taken on 20 April 2020 in relation to trips departing after 31 May 2020.

314. Secondly, it follows from my findings above in relation to reliance that:

(a) The decision ultimately taken by WCE on 20 April 2020 was based on a conclusion which had in fact been reached internally in mid-March.

(b) The decision in mid-March was based on an assessment of the situation as a whole looked at holistically and globally, not just in relation to specific countries. The assessment thus included not only such restrictions as had already been imposed, but those which could be anticipated in the future along with an assessment of how long they might last.

(c) WCE's internal decision was not acted on in March because of Zurich's reluctance to permit cancellations more than 60 days ahead. By 20 April 2020, WCE took the view that cancellation was inevitable, but this was not so much because of the initial imposition of particular restrictions but because their continuance effectively confirmed the conclusion which had been reached in March, combined with what was by now considerable parental pressure.

315. In my judgment, the overall situation on the basis of which I accept WCE reached its decision cannot be said to be an identifiable occurrence. Rather it was a state of affairs contributed to by a number of interrelated factors.

316. Thirdly, however, provided the requisite causal connection exists, I accept in principle that effect can and should be given to an aggregating factor even if the losses in question might also be said to have arisen from a cause such as a state of affairs and/or other occurrences: see, for example, *Stonegate* at [192]. Whether this is in fact the case depends of course on the particular facts and circumstances.

317. I therefore turn to the various aggregating factors relied upon by Zurich.

Imposition of exit travel restrictions in each departure country

318. It was not argued by Zurich that the various restrictions imposed in different countries at different times could be regarded compendiously as a single occurrence. Such an argument would have been almost certainly doomed to failure: see *Greggs v Zurich (supra)* at [76], [87]. Nor was it argued that different sets of restrictions in different countries could be treated as a single occurrence because they all arose out of or were attributable to one original source or cause and occurred within 10 miles and 72 hours of that source/cause.

Since the only plausible source/cause was the pandemic itself, this would have been an unpromising submission.

319. Instead Mr Hough submitted that the imposition of restrictions in each departure country was a separate occurrence which operated to aggregate all cancellations from that particular country. As to this, I accept that the imposition of restrictions in a single country is capable of being an occurrence. However, that on its own is not sufficient, since the wording of the Policy requires that the occurrence be additionally both sudden and unforeseen. Even if the various restrictions imposed from mid-March onwards could be said to have been "sudden", it does not seem to me that they can possibly have been regarded as unforeseen by the informed observer in the position of WCE at mid-March, let alone by 20 April 2020. On the contrary, restrictions had already been introduced in some countries by early March and from then on it was very much a question of "when and to what extent" rather than "if" they would be introduced elsewhere.

320. Furthermore, I am not satisfied that the decision to cancel (whether viewed as at mid-March or 20 April 2020) could be said to have arisen from any particular set of restrictions. Nor in my judgment can it properly be said that particular cancellations taken in the wake of that decision can be isolated and attributed to the imposition of particular restrictions. This was a blanket decision to cancel *all* future trips across the board to *all* destinations worldwide and there are no grounds for distinguishing between individual cancellations initiated in implementation of that decision.

321. The position might well be different in respect of trips which were caught by particular regulations and due to depart imminently, since Zurich can fairly argue, for example, that the UK government ban on school trips necessarily caused the cancellation of trips due to depart from the UK in the next two to three weeks. I have held that there is no claim for these trips in any event. However, the same was not necessarily true for more distant departures, where there was still a prospect whether in mid-March or even at 20 April 2020, that they might be able to go ahead or be diverted. The situation is therefore distinguishable from that in *Stonegate*, *Greggs* and *Various Eateries* where all pubs, bars and restaurants were instructed to close immediately for the foreseeable future without any choice in the matter. It should also be noted that it was Zurich itself which initially refused to accept in mid-March 2020 that existing restrictions were sufficient reason to cancel more than 60 days ahead. In those circumstances, it is somewhat unattractive for it now to argue that cancellations nonetheless arose from those self-same restrictions.

322. But even if it could be said that the continuing effect of various restrictions was to make the ultimate decision to cancel inevitable, a continuation of restrictions (as opposed to their initial imposition) cannot in my view be said to be an identifiable occurrence - certainly not one which is sudden and unforeseeable.

323. For these reasons, I reject Zurich's case that the imposition of exit travel restrictions in each departure country can be regarded as aggregating "events" for the purposes of the Policy.

Imposition of entry travel restrictions in each destination country

324. The alternative case based on entry restrictions likewise fails for the same reasons.

WCE's decision(s) to cancel

325. WCE argued that its decision to cancel the remaining trips on 20 April 2020 could not be a relevant occurrence for two reasons: (a) because a decision or plan cannot constitute an event or occurrence; and (b) because it would be inimical to the purpose of the insuring clause.

326. As to the first of these, I was referred to the decision of David Steel J in *Midland Mainline Ltd v Commercial Union Assurance Co. Ltd,* [2003] EWHC 1771; [2004] Lloyd's Rep. IR 22 at [97] to the effect that a decision to impose speed restrictions was not an occurrence because *"a decision or a plan cannot constitute an event or occurrence."* However, as Butcher J pointed out in *Stonegate*, this was not a decision made in the context of an aggregating provision and on the facts there was no single decision at all, merely the incremental implementation of a series of measures. Like Butcher J and for substantially the reasons given by him at paragraphs [176]-[179] of his judgment (an analysis supported by the recent decision of HHJ Pelling in *Sky UK Ltd v Riverstone Managing Agency Ltd,* [2023] EWHC 1207 (Comm) at [95]-[107]), I do not consider that there is any reason in principle why a decision cannot in appropriate circumstances be regarded as an occurrence. The question of aggregation is ultimately one of judgment and if, as Butcher J held in *Stonegate*, the decision taken by the UK Government at its COBR meeting on 16 March 2020 or the instructions on 20 March 2020 to all hospitality venues to shut could each be regarded as a single occurrence, I do not see why WCE's instructions to cancel all trips to the end of August 2020 cannot similarly be regarded as an occurrence for aggregation purposes.

327. There is, however, force in WCE's second argument. The insuring clause in Section 8 provides indemnity only where cancellation is the direct result of a cause outside the control of WCE. It is trite law that insurance responds only to a fortuity and not to self-induced losses. WCE's own decision cannot therefore be a trigger for indemnity in the first place.

328. It is true that indemnity and aggregation are dealing with different things. The former is looking to the cause of the cancellation, while the latter looks to the cause of the loss, which is not necessarily the same thing. Nonetheless, it is highly unlikely that the insured's own decision could ever be said to be sudden or unforeseen from the perspective of the informed observer in the position of the insured. It would in any event be very easy for the insured to make sure that it was not sudden or unforeseen by trailing it well in advance. Moreover, it is not implausible that an astute insured on the facts of this case could engineer multiple separate occurrences by dint of documenting a separate decision in respect of each individual trip.

329. This possibility of manipulation leads me to conclude that it cannot have been the intention of the parties that the insured's own decisions should be capable of constituting relevant occurrences. This would be entirely consonant with the indemnification clause where both parties have accepted that trips were cancelled as a direct result of the pandemic. Certainly, Zurich has never sought to argue that WCE was not entitled to indemnity in principle because each individual cancellation was the result of its own decision.

330. I therefore reject Zurich's case that WCE's decision on 20 April 2020 can be regarded as an aggregating event. The same applies to individual notices of cancellation issued in implementation of that decision.

Conclusion on aggregation

331. In short, I accept WCE's case that the aggregation provision does not operate in this case to reduce its claim. The cancellations for which I have held it is entitled to be indemnified did not arise out of a relevant *"event"*, but instead from the overall situation which is not an occurrence for these purposes.

MISCELLANEOUS POINTS

Cover for related entities other than WCE

332. In correspondence, Zurich have taken the point that some of the deposits which form the basis of WCE's claim were in fact charged and refunded not by WCE itself but by separate companies based in the USA, Australia and New Zealand respectively (the "**WCE Entities**"). They submit that losses sustained by the WCE Entities are not recoverable under the Policy as this only covers WCE itself and Insured Persons.

333. This is a technical point which is not pleaded, and which in my judgment is in any event misconceived for the following reasons:

(a) The RSA policy had expressly covered *"World Challenge Expeditions Limited and Subsidiary and Associated Companies"*;

(b) The Aon Renewal Submission provided to Zurich in January 2016 expressly described the insured in the same terms;

(c) It was expressly requested and understood that Zurich would provide cover on the same basis as the RSA policy;

(d) The handling of claims for Challengers based in Australia was expressly discussed at the claims handling meeting of 25 April 2016 following which Mr Thomas provided details of the bank accounts to which payments should be made in respect of Australian and New Zealand Challengers. These details were then included in the Claims Protocol for the purposes of claims notified by *"World Challenge, Asia Pacific"*. Following the meeting there was also correspondence as to whether the Refund Request Form should state the relevant market or country to which the claim related or both;

(e) The passenger numbers on which the premium was based included Challengers based in markets other than the UK, as also did the claims history to which Zurich had regard at each renewal;

(f) No distinction was drawn between different markets or WCE entities during the operation of the Earlier Policies and the Policy. To the contrary, Zurich adjusted and agreed claims relating to Challengers from all markets indiscriminately;

(g) The SHI noted that the Master Policy was written out of the UK and that there were no local policies in place, although discussion took place at the time of the 2018 renewal as to whether a local policy was required for Australia.

334. In these circumstances, it is quite clear that Zurich understood and agreed that they were covering claims relating to Challengers from markets other than the UK and accepted premium on that basis.

335. If necessary, I would be prepared to find that as a matter of the construction of the Policy, the reference to WCE as insured should be read as including the WCE Entities on the basis that this was the obvious objective intention of the parties, taking into account the genesis of the contract, the relevant factual background and the fact that the WCE Entities were acknowledged to be covered for the purposes of the TUI policy.

336. However, it does not seem to me that it is necessary to go that far. Under the Policy, the category of Insured Persons included *"Any Challenger whose details are lodged with the Company".* However, as noted above, Challengers themselves were not entitled to sue under the Policy and accordingly only WCE could properly bring a claim relating to the cancellation of a Challenger's expedition. It follows in my judgment that WCE is entitled to bring a claim in its own name in relation to refunds paid to Challengers declared under the Policy wherever they came from. The fact that the physical payment of the refund may have been made by one of the WCE Entities on behalf of WCE seems to me to be solely a matter of accounting.

Non-cash refunds and recoveries

337. Further points arise in relation to those cases where WCE has not made an immediate cash refund. These fall into broadly the following categories:

(a) Refunds which have been offered but not yet paid;

(b) Credit notes;

(c) Deferrals.

There are also apparently some expeditions where the evidence is insufficient to determine into which category they fall.

338. Zurich submit that they are not obliged to provide indemnity in relation to any of these cases since WCE has not suffered any loss. WCE, on the other hand, argues that it is entitled to be indemnified for all these categories on the basis that they represent deposits which are *"forfeit or payable under contract"* irrespective of the form that the refunds take.

339. In my judgment, the answer to this question is dictated by the basis on which I have held WCE's claim to succeed, namely that it is entitled to be indemnified for the amount of the refunds which it paid to Challengers. It follows from this that there is no right to indemnity where there has not been any payment.

340. Accordingly:

(a) In the case of refunds to which WCE is committed but which it has not yet paid, no indemnity is due until such time as physical payment is made and WCE is entitled to a declaration to that effect. This was ultimately not disputed by Mr Hough.

(b) In the case of credit notes which have been redeemed against expeditions, or deferred expeditions which take place, again no refund has been paid and no indemnity is payable in the absence of any evidence that WCE has been deprived of the opportunity of running an additional fee-paying trip.

(c) Where, however, credit notes have to be paid and/or deferred expeditions cannot in fact be honoured, any cash refunds are indemnifiable as and when paid.

341. One further question is whether WCE has to give credit for non-cash third party recoveries, e.g., compensatory future flights offered by an airline. In so far as any such recoveries represents money's worth, it seems to me that credit should be given and I so hold.

342. Further arguments adumbrated rather faintly in the Amended Particulars of Claim concerning breach of section 13A of the Insurance Act 2015 and in the Defence concerning double insurance and failure to mitigate were not pursued in argument and I say no more about them.

CONCLUSION

343. In conclusion, I find that WCE is entitled to be indemnified by Zurich under the Policy (and otherwise in accordance with its terms) in the amount of refunds actually paid to Challengers (whether or not through another WCE Entity) in respect of expeditions which were due to depart from 1 June-31 August 2020 and which were cancelled on or after 20 April 2020, subject to giving credit for the amount of any third party recoveries in money or money's worth made in respect of such cancellations. It is further entitled to a declaration that Zurich is obliged to indemnify it for any refunds which may become payable and are paid in the future in respect of such cancelled expeditions, again giving credit for any third party recoveries in money or money's worth.

344. The parties are agreed that I should not attempt to grapple with quantum at this stage but should allow them an opportunity to work out the consequences of my decisions on the points of principle considered above. Any outstanding issues can be considered at that stage.

345. I conclude by expressing my thanks to both counsel and their respective juniors for their very helpful and interesting submissions.