Claim No. CFI 073/2022

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

COURT OF FIRST INSTANCE

BETWEEN

LALS HOLDING LIMITED
& THE COMPANIES IDENTIFIED IN SCHEDULES 1-3 OF THE CLAIM FORM

Claimants

and

(1) EMIRATES INSURANCE COMPANY (PSC)
(2) SIACI INSURANCE BROKERS LLC

Defendants

AMENDED JUDGMENT OF JUSTICE SIR PETER GROSS

Trial : **11 September 2023 - 13 September 2023**

Counsel : Mr. Charles Dougherty KC and Mr. Timothy Killen, instructed by Al Tamimi and Company for the Claimants

Mr. David Walsh, instructed by Holman Fenwick Willan Middle East LLP for the First Defendant

Mr. Neil Hext KC and Mr. Lucas Fear-Segal, instructed by Kennedys Dubai LLP for the Second Defendant

Judgment : **1 November 2023**

UPON the Part 7 Claim Form dated 19 October 2022 (the "Claim")

AND UPON the Claimants' Particulars of Claim dated 13 January 2023

AND UPON the Defendants' Defence without counterclaim dated 9 and 10 March 2023

AND UPON the Claimants' Reply to Defence dated 30 March 2023

AND UPON reviewing all relevant material added onto the Court file

AND UPON reviewing the Rules of the DIFC Courts (the "RDC")

AND UPON hearing Counsel for the Claimants and Counsel for the Defendants at the Trial held before me on 11 September to 13 September 2023 (the "Trial")

IT IS HEREBY ORDERED THAT:

1. The answers to the Preliminary Issues ("PIs") are as set out below:

(a) PI 1.2.1: Yes;

(b) PI 1.2.2: Yes;

(c) PI 1.2.3: The Requirement that there be infectious or contagious disease at or within a radius of 2 kilometres of any of the insured's business requires the Claimants to prove a case of COVID-19 at or within 2 kilometres of the particular premises ordered to close;

(d) PI 1.3.1: The Loss of Attraction Clause is not limited to a specific local incident where the police or a statutory authority seal or close up a particular premises. It is capable of responding to a national or regional governmental response to a global pandemic;

(e) PI 1.1.1: No;

(f) PI 1.1.2: Decline to answer;

(g) PI 1.1.3: The term `Customer' is capable of extending to a retail customer provided that, at the time of the damage, the Policyholder has an extant contract or trading relationship to supply that customer with goods or services; and

(h) PI 1.1.4: The burden of proof, to the requisite standard of proof (the balance of probabilities), rests on the Claimants. What the Claimants need to do to satisfy that burden is fact specific and not susceptible of general guidance, at least at this stage.

Issued By:
Delvin Sumo
Assistant Registrar
Date of issue: 1 November 2023
Date of re-issue: 14 November 2023
At: 9am

INTRODUCTION

1. This is the Trial of Preliminary Issues (*the "PIs"*), pursuant to the Order of H.E. Justice Nassir Al Nasser, dated 4 July 2023 (*the "Order"*).

2. The PIs relate to three Coverage Clauses in policies of insurance taken out by the Claimants underwritten by the First Defendant (*"EIC"*).

3. Three "Property All Risk & Business Interruption" Policies (the "Policies") were placed by the Claimants with EIC for the 2019/2020 year, on identical wording but covering different companies and Territories. The Policies each comprised both a Schedule and policy wording entitled *"Combined Material Damage and Business Interruption Policy"*. The Policy to which reference was made at the Trial was *Policy No. 300/1130/11/19/00094* (*the "Policy"*). References to *"The Schedule"* are to the Schedule forming part of that Policy.

4. It is common ground that the Policies are subject to DIFC law.

5. The Claimants are companies in the *"Lals"* group, a retail group operating and owning (*inter alia*) shops, restaurants, FMCG (i.e., fast-moving consumer goods), retail brands and a shopping mall throughout the GCC. Bahrain, Kuwait, Oman and the UAE are the *"Territories"* relevant to this dispute, but other claims relate to the Kingdom of Saudi Arabia ("KSA") and Qatar as well.

6. The Claimants seek an indemnity from EIC in respect of their alleged COVID-19 related Business Interruption losses (*"BI loss/es"*). I am told that this is the first COVID-19 BI loss insurance claim to be considered under DIFC law.

7. The Claimants say that their BI losses comfortably exceed the applicable limits of indemnity in respect of the insuring clauses under which they claim. Accordingly, the claim is limited to AED 70 million (plus Claims Preparation Costs of about AED 1 million and exclusive of interest and costs), amounting to the relevant limits of indemnity.

8. The Second Defendants (*the "Brokers"*) were retained by the Claimants in respect of the placement of the Claimants' Property All Risks & Business Interruption insurance for the year from 11 July 2019.

9. In addition to their claim against EIC, the Claimants bring a claim against the Brokers for negligent breach of duty. That claim is not directly relevant to the PIs, though the Brokers have advanced submissions on the PIs relating to the Closure Clause (see below).

10. The three coverage clauses to which the PIs relate are:

(I) The *"Customer's Extension Clause"* (for convenience, referred to below as the *"Customer Extension Clause"*);

(II) The *"Closure Clause"*;

(III) The *"Loss of Attraction Clause"*.

The terms of each are set out below.

11. The Claimants were represented by Mr Charles Dougherty KC and Mr Timothy Killen; EIC by Mr David Walsh; the Brokers by Mr Neil Hext KC and Mr Lucas Fear-Segal. I am grateful to all Counsel and their respective teams for their submissions, written and oral.

THE COVERAGE CLAUSES AND THE PIs

12. The *"Customer Extension Clause"* provided as follows:

> *"**CUSTOMER'S EXTENSION***
>
> *Subject to the limit specified in the schedule, the insurance by this policy extends to include consequential loss suffered by the Insured resulting from interruption or interference with the business in consequence of loss or damage by a peril insured by this policy but occurring at any premises of any 1 Tier (Direct) Customer of the Insured situated anywhere in the world*
>
> *For the purposes of this Extension the term Customers means those companies organizations or individuals with whom at the time of the Damage the Policyholder has contracts or trading relationships to supply goods or services*
>
> *Subject otherwise to the terms, conditions and exceptions of the policy.*

13. The *"Closure Clause"* was in these terms:

> *"**CLOSURE DUE TO VERMIN, MURDER, SUICIDE, INFECTIOUS OR CONTAGIOUS DISEASES, MAN SLAUGHTER, FOOD AND DRINK POISONING***
>
> *The indemnity under this clause is extended to include interruption or interference with the Insured's business in consequence of closure or evacuation of all or part of premises by order of local and National health Authorities, Competent Government, Public or Statutory Authorities as a result of manslaughter, murder, suicide, vermin or other pests, food or drink poisoning at the location or within a radius of 2 kilometres of the insured's business which shall prevent or hinder the use of Insured's business premises or*

access thereto, or results in cessation or diminution of trade due to temporary falling away of potential customers. This extension shall trigger even there is no Insured perils acting on the Property cover"

14. Finally, the *"Loss of Attraction Clause"* provided as follows:

"LOSS OF ATTRACTION

The insurance by this policy extends to include consequential loss as insured by this policy but resulting from interruption or interference with the business in consequence of:

(a) loss or damage to property in the vicinity of the Insured Locations and where the Insured Location(s) form(s) part of a larger complex, development or shopping centre, to such complexes, developments, centres or other property contained therein or forming part thereof

(b) unlawful occupation of the Insured Locations by any person but excluding occupation of the PREMISES Insured Locations by any person or persons taking part in a labour dispute;

(c) the presence of or suspected presence of a harmful device in or in the vicinity of the PREMISES Insured Locations provided that the police or other appropriate statutory authorities are notified immediately;

(d) closure or sealing off of the Insured Location(s) or any right of way by the police or other statutory authority;

(e) extremes of climate;

which

(i) prevents or hinders the use of the Insured Location(s) or access thereto or where the Insured Location(s) form(s) part of a larger complex, development or shopping centre prevents or hinders the use of the entire complex, development or shopping centre or access thereto;

(ii) causes a reduction in the number of people using the Insured Location(s) or where the Insured Location(s) form(s) part of a larger complex, development or shopping centre causes a reduction in the number of people using the same but excluding loss resulting from cause (e) above."

15. The Order provided for PIs in these terms:

"1.1 ***The proper construction of the Customer Extension Clause, in particular:***

1.1.1 Whether the concept of `loss or damage' relates to physical loss or damage only.

1.1.2 Whether the requirement for `loss or damage' is satisfied by: (i) a closure order (including `stay at home' advice or order, a `lockdown' order or `curfew' order of similar) as a result of a case of COVID-19 either within 2 kilometres of a customer's premises or, alternatively, at a customer's premises; and/or (ii) a closure or sealing off of a customer's premises (including `stay at home' advice or order `lockdown' order or `curfew' order or similar) within the meaning of the Loss of Attraction Clause.

1.1.3 Whether the term `Customer' extends to retail customers who would have or would have been expected to have (habitually) attended the Claimants' premises to purchase goods and services.

1.1.4 Whether the Claimants are required to prove specifically (i.e. by identifying particular customers) or generally (i.e. by proving only that there were such customers on the balance of probability) `which customers' they rely upon who by reason of a peril insured by the Policies did not purchase goods or services from the Claimants.

1.2 ***The proper construction of the Closure Clause, in particular:***

1.2.1 Whether the relevant order must be from local and National Health Authorities, Competent Government, Public or Statutory Authorities.

1.2.2 Whether the Closure Clause provides cover for closure as a result of infectious or contagious disease.

1.2.3 Whether any requirement that there be infectious or contagious disease at or within a radius of 2 kilometres of any of the `insured's business' requires the Claimants to prove a case of COVID-19 at or within 2 kilometres of any of the premises at which the Claimants carry out business, or at or within 2 kilometres of the particular premises ordered to close.

1.3 ***The proper construction of the Loss of Attraction Clause, in particular:***

1.3.1 Whether it provides cover limited only to a specific local incident where the police or a statutory authority seal or close up a particular premises, or whether it responds to a national or regional governmental response to a global pandemic."

16. It may at once be noted:

(1) First, that the PIs go - and go only - to the construction of the Coverage Clauses. Issues such as rectification (should it arise), causation and the question of whether (after answering PI 1.3.1) particular orders satisfy the requirements of the Coverage Clauses, fall clearly outside the scope of the PIs and are for another day.

(2) The wording *"in particular"* contained in each of the PIs allows me flexibility to provide guidance, should it be appropriate to do so, at the penumbra of the PIs. I keep this in mind.

17. Any trial of preliminary issues necessarily requires some factual basis, whether furnished by disclosure, agreed facts or assumed facts. Here, para. 2 of the Order provided for the parties to agree a set of assumed facts and those (once agreed in the *"Joint Statement of Assumed Facts"*) formed the basis on which the trial proceeded - augmented to a limited degree by an *"Unagreed Joint Statement of Assumed Facts"*, comprising additional facts contended for by the Claimants but not agreed by EIC or the Brokers.

18. As is apparent, the Customer Extension Clause is only triggered when there is "*a peril insured by this policy*"; in that sense the Customer Extension Clause is parasitic. In the event, the only perils relied upon by the Claimants in this litigation are those within the Closure Clause and the Loss of Attraction Clause. Two matters arise from this consideration.

19. First, I questioned whether there was any practical importance in considering the Customer Extension Clause. Thus, if the Claimants succeed under the Closure Clause or the Loss of Attraction Clause, they would have no interest in pursuing the same claim under the Customer Extension Clause, the more especially because, as made clear in the Schedule, the limits under the Customer Extension Clause are lower than under the other two Coverage Clauses. Conversely, if the Claimants fail under the Closure and Loss of Attraction Clauses, it was not immediately apparent that they could succeed under the Customer Extension Clause. However, as Mr Dougherty KC explained to me, in such circumstances, the Claimants may yet succeed under the Customer Extension Clause - depending on the precise reason for failing under the Closure and Loss of Attraction Clauses. Accordingly, even if concerned with no more than a narrow window, there is sufficient reason to warrant consideration of the Customer Extension Clause in this Trial.

20. Secondly, notwithstanding the order in which the PIs are listed in the Order, it will be convenient to deal, first, with the PIs relating to the Closure Clause, then those relating to the Loss of Attraction Clause before, finally, turning to those relating to the Customer Extension Clause. That was indeed the order in which the PIs were (sensibly) addressed in argument before me.

THE LEGAL FRAMEWORK

21. Before coming to the PIs, it is necessary to outline the applicable legal framework, while acknowledging that although the parties were very much in dispute as to the application of the relevant legal principles, there was no or no serious dispute as to the principles themselves.

22. *(A) DIFC Law:* As already noted, the Policies were governed by DIFC law. Part 5 of the *DIFC Contract Law, DIFC Law No. 6 of 2004 (the "DIFC Contract Law")*, dealing with *"Interpretation"*, therefore falls to be considered.

23. It should at once be underlined that:

> *".though the DIFC Courts are common law courts and DIFC law is to be interpreted and developed incrementally, in accordance with the methodology of the common law, the basis of the DIFC Courts' jurisdiction is statutory.*
>
> *.a statutory basis for the Courts' jurisdiction is inevitable, given that the DIFC is a financial free zone with its own law, comprising a carve-out from or enclave within the UAE and Dubai legal system."*
>
> See: *The Industrial Group Limited v Abdelazim Hamid* [2022] DIFC CA 005 and 006, at [105].
>
> That statutory basis is made clear by Art. 2 of the DIFC Contract Law, which provides that *"This law is made by the Ruler of Dubai."*

24. Thus, while English law and other common law authorities and trends are relevant and inform a consideration of Part 5 of the DIFC Contract Law, the provisions of Part 5 prevail to the extent that they differ from any common law system in question. As will be seen in a moment, Part 5 does not simply replicate English law; instead it is closely aligned to a *Unidroit* approach.

25. Insofar as relevant, Part 5 is in these terms:

> "***49. Intention of the parties***
>
> *(1) A contract shall be interpreted according to the common intention of the parties.*
>
> *(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.*
>
> ***50. Interpretation of statements and other conduct***
>
> *(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.*
>
> *(2) If Article 50(1) is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.*
>
> ***51. Relevant circumstances***
>
> *In applying Articles 49 and 50, regard shall be had to all the circumstances, including*
>
> *(a) preliminary negotiations between the parties;*
>
> .

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

.

52. Reference to contract or statement as a whole

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

53. All terms to be given effect

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

54. Interpretation against party responsible

If contract terms supplied by one party are unclear, an interpretation against that party is preferred."

26. Several observations can be made at once regarding Part 5 of the DIFC Contract Law:

(1) For the purposes of determining the PIs, Art. 49(2) is relevant and applicable, calling for an objective approach to the interpretation of the Policy, i.e., essentially the same approach to construction as that found in English common law. Beyond observing that Art. 49(1) is likely to be relevant, if relevant at all, to any rectification issue, should one arise and should an evidential basis be forthcoming, I decline the invitation extended by the Claimants to express views on the scope of Art. 49(1). On any view, I am not concerned with Art. 49(1) in this Trial and (subject to the further matters referred to below) adopt the same objective approach to ascertaining the parties' intention and the meaning of the Policy as I would have done, had this been a purely common law dispute. For completeness, Arts. 49(2) and 50(2) of Part 5 are to the same effect.

(2) Art. 51 (a) and (c) are noteworthy. They differ from English law which, generally at least, excludes reference to pre-contractual negotiations and the conduct of the parties subsequent to the conclusion of the contract when dealing with an issue of contractual interpretation.

(3) Arts. 52 and 53 correspond to the English law approach to construction - a unitary exercise involving an iterative approach having regard (*inter alia*) to the contract as a whole - to which I turn next.

(4) To the extent that it matters (see below), Art. 54 is akin or similar to the common law *contra proferentem* maxim.

27. *(B) The English law approach to contractual interpretation:* It is a feature of English law over the past few decades that the House of Lords and subsequently the Supreme Court, have repeatedly grappled with the question of contractual interpretation. To my mind, it is largely unnecessary to go beyond the synthesis provided by Lord Hodge JSC in *Wood v Capita* [2017] UKSC 24; [2017] AC 1173, at [10] - [15]:

"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

11. . Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.

.

15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

28. In a nutshell, contractual interpretation seeks, by way of a unitary exercise and proceeding iteratively, to ascertain the objective intention of the

parties, having regard to: (1) the language of the contract (2) the context (but, in English law, excluding pre-contractual negotiations) (3) commercial common sense and (4) the contract as a whole. The contract of course is that which the parties have agreed; it is not for the Court to impose a bargain which it thinks the parties should have agreed; that a contract turns out, with hindsight, to be a bad bargain for one of the parties is neither here nor there.

29. Another aspect of contractual construction - and separate from any question of rectification - is the correction of errors: see, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1060, at [22] and following, per Lord Hoffmann. This is a part of the *"single task of interpretation"* (at [24]); the requirement (at [25]):

> *".is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."*

Put another way (paraphrasing *Chartbrook* at [22]), there must be (1) a clear mistake on the face of the instrument and (2) it must be clear what correction ought to be made to cure the mistake. As concisely summarised by Foxton J, in *Generali Italia v Pelagic Fisheries* [2020] EWHC 1228 (Comm); [2020] 1 WLR 4211, at [108]:

> *"(i) There must be a clear and obvious mistake.*
>
> *(iii) In determining whether there is a clear and obvious mistake, the court is not confined to reading the document without regard to its background and context.*
>
> *(iv) It must be clear what correction ought to be made to correct the mistake."*

30. With regard to the present context, guidance is available from *FCA v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] 2 WLR 123 (*"FCA v Arch (UKSC)"*), at [47] and [77], in the judgment of Lord Hamblen and Lord Leggatt JJSC. Having referred to *Wood v Capita (supra)*, they said this:

> *"47. .The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task.*
>
> *77. .the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs [i.e., small and medium enterprises], the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis.It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting."*

31. A helpful gloss has been added to this passage by Lord Mance, sitting as an Arbitrator in *China Taiping Insurance Co Ltd., Arbitration Award*, at [18] (described in *Corbin & King v Axa* [2022] EWHC 409 (Comm); [2023] 1 All ER Comm 429, by Cockerill J, at [179], as "the Mance Variation"):

> *"This latter passage does not address all the conundra raised in an insurance context by the law's familiar invocation of the `reasonable person'. The pedantic lawyer is easily and uncontroversially despatched. The insurer and any broker through whom the policy may have been placed are not mentioned. The reasonable person is identified with the ordinary policyholder. That is an assimilation by which I am probably bound, but with which I can also have sympathy , since insurance policies, and especially standard wording, should be readily digestible by the users to whom they are sold, even though they may in some cases have brokers who can sometimes advise them."*

32. *(C) The Schedule and Headings:* Although likewise aspects of contractual construction, the Schedule and (clause) Headings merit specific mention at this stage.

33. *The Schedule:* As a matter of common sense, it seems plain that the Schedule will be of considerable importance to the *"ordinary policyholder"*, whether or not advised by a broker. In very broad terms, the contrast lies between the "specifics" of the Schedule and the "general" of Policy wording. Further, the observation of Tomlinson J (as he then was) in *Standard Life v Oak Dedicated* [2008] EWHC 222 (Comm); [2008] 2 All ER Comm 916, at [91] has resonance in this case:

> *"The words in the schedule must be read with those in the main body of the policy wording which they may qualify. I do not accept that the words in item 4(ii) of the schedule should be regarded simply as a highly abbreviated summary of the substantive provisions in the policy.".*

That observation is reflected in cl. 1 of the *Policy Conditions - applying to sections I and II of the Policy:*

> *"DEFINITION*
> *This Policy, the Schedule and Specification shall be read together as one contract.".*

It may be noted that the Schedule and the policy wording are set out in a single document, with consecutive page numbering.

34. *Headings*: The common law approach, consistent with Part 5 of the DIFC Contract Law (especially Arts. 49(2) and 52), is that unless the contract expressly says otherwise - which the Policy does not - the heading to a clause may be taken into account in construing the clause. Such headings are part of the parties' contract: *Classic Maritime v Limbungan* [2019] EWCA Civ 1102, at [39]. That said, a heading cannot prevail over the express wording of the clause, or create ambiguity where, but for the heading, none would exist: *Cott UK Ltd v Barber Ltd* [[1997] 3

All ER 540, at p. 545; see too, *Lewison, The Interpretation of Contracts* (7th ed.), at 5.108 and following.

THE POLICY WORDING

35. The three Coverage Clauses have already been set out. It is convenient here to note various other provisions of the Policy which featured in the argument.

36. I begin with the Schedule. The *"Type"* is *"PROPERTY ALL RISK & BUSINESS INTERRUPTION INSURANCE"*. The *"Interest Insured"* is in these terms:

"All activities of the Insured, including but not limited to: Operation, Management Administration, Leasing & Renting of Malls, Buildings, Warehouses etc; Wholesale, Retail & On-Line sales; Trading & Distribution, fitness centres, contracting etc related to client's trade & business."
The "Sum Insured" is stated to be a total of AED 1,574,814,786.17 and the "Territories" are listed as "Bahrain, Kuwait, Oman, United Arab Emirates."

The *"Scope of Cover"* is:

> *"The property insured or part thereof being accidentally and or physically lost, destroyed or damaged due to any cause other than those specifically excluded plus Business Interruptions and additional benefits extensions as indicated in the slip."*

As agreed by the parties (para. 5 of the *Joint Statement of Assumed Facts*), the reference to the *"slip"* is a reference to the Schedule itself.

The *"Claims Settlement"* is *"as per LM7"*, which, I was told, is a basic form of Property Damage cover.

37. I am not concerned with the *"Extension clauses"* dealing with *"Section 1 - Property Damage"* but those falling under Section II are of the first importance:

> "***Section II - Business Interruption specific clauses***
>
> - Closure due to order of local authorities - AED 25,000,000 any one occurrence and 48 Hrs excess.
> - Customer's extension - Unnamed - AED 10,000,000/- any one occurrence and in the aggregate; within GCC; BI excess to apply; 60 days indemnity period; Tier 1 only
> - Closure Due to Vermin, Murder, Suicide, Infectious or Contagious Diseases, Manslaughter, Food and Drink Poisoning - AED 25,000,000 /-
> - Loss of Attraction - Limit AED 25,000,000/- any one occurrence and in the aggregate 48 hours excess; radius 1 KM; BI excess to apply.
> - Material Damage Qualification Waiver"

38. Coming to the Policy wording, it is headed **"COMBINED MATERIAL DAMAGE AND BUSINESS INTERRUPTION POLICY"**; the introductory wording to Section II (i.e., BI cover) is as follows:

> *"any building or other property or any part thereof used by the Insured at the Premises for the purposes of the Business shall be accidentally physically lost, destroyed or damaged and the Business carried on by the Insured at the Premises be in consequence thereof interrupted or interfered with*
> *then the Insurer will pay to the Insured in respect of each item in the Schedule hereto the amount of loss resulting from such interruption or interference in accordance with the provisions therein contained.*

39. Under *"Section 2 - Business Interruption Clauses"* - the Section where the Coverage Clauses are located - there is also to be found the ***"MATERIAL DAMAGE QUALIFICATION WAIVER"***, which provides as follows:

> *"Any requirement under this Section of the policy for there to be in existence material damage insurance on the property which suffers loss or damage resulting in interference with the Insured's Business under this Section of the policy, shall not apply to the following extensions of cover:*
>
> .
>
> *b) Customers*
>
> .
>
> *f) Prevention of Access and Loss Of Attraction*
>
> *g) Closure Due to Vermin, Murder, Suicide, Infectious Or Contagious Diseases, Food and Drink Poisoning*
>
> .
>
> *Subject otherwise to the terms, conditions and exceptions of the policy.*

PI 1.2: THE PROPER CONSTRUCTION OF THE CLOSURE CLAUSE

40. Three PIs fall to be considered under this Heading. I deal with each in turn.

1.2.1 Whether the relevant order must be from local and National Health Authorities, Competent Government, Public or Statutory

Authorities

41. This Issue goes to the nature of the Qualifying Order under the *Closure Clause*. Given the language of the clause, the order must be that of the authorities identified in the clause. The answer to this PI must be **"Yes"**. There was no dispute in this regard between the parties.

1.2.2 Whether the Closure Clause provides cover for closure as a result of infectious or contagious disease.

42. *(A) Introduction:* This Issue, by contrast, was the subject of intense debate, essentially flowing from the fact that the policy wording omitted any mention of *"infectious or contagious disease"* notwithstanding that such wording was included in both the Schedule and the Heading to the Clause. The Claimants and the Brokers contended for an answer of "yes"; EIC, for an answer "no".

43. The Claimants and the Brokers submitted that, as a matter of construction, reading the Schedule, the Heading to the Clause and the policy wording together and giving effect to each, the cover was to be construed as including closure by order of the relevant authorities as a result of infectious or contagious disease. The Claimants additionally sought to reinforce this argument by reference to pre-contractual exchanges and post-contractual conduct. If wrong about all that, the Claimants and the Brokers submitted that this was a case calling for the correction of an obvious error by construction. An obvious mistake - omitting the reference to infectious or contagious disease in the policy wording - could be unequivocally identified. It was equally clear that this mistake was to be corrected, by reading the words *"infectious or contagious disease"* into the policy wording. If wrong on that too, then a question of rectification would arise, but that was not for this Trial.

44. For its part, EIC argued it was clear that the *Closure Clause* did not provide cover for *"infectious or contagious disease"*. The omission in the policy wording in the clause was an insuperable obstacle as a matter of construction; it could not be made good by resort to the Schedule, the Heading or any pre-contractual exchanges or post- contractual conduct. Furthermore, correction by construction did not assist, fundamentally because it was not clear whether the error lay in *omitting* the language in question from the policy wording or *retaining* the reference to *"infectious or contagious disease"* in the Schedule and Heading. Moreover, questions arose as to the number of errors which would need correction in the Clause, if the Claimants and Brokers might otherwise be right. Whether there was a good rectification argument was a matter for another day.

45. With respect to Mr Walsh's excellent submissions, I have reached a clear preference for those of the Claimants and the Brokers; to my mind, Part 5 of the *DIFC Contract Law* and the approach of the common law authorities speak with one voice. My reasons follow.

46. *(B) Construction I (Deferring for the moment correction by construction): (1) The nature of the Schedule:* Starting with the perspective of the reasonable policyholder and in accordance with the *"Mance Variation"*, I entirely agree with Mr Hext's submission in the Brokers' skeleton argument:

> *".to the insured, the Schedule is where one would look to identify the fundamental nature of the cover that was provided together with the limits of indemnity. It could not be clearer that what was intended was that there would be cover for closure due to a number of potential events, which included `Infectious or Contagious Disease'. One might expect that cover to be further delineated and described in the policy wording. But one would not expect the policy wording to exclude the very thing that had been indicated was included, namely cover for Infectious and Contagious Disease."*

In my judgment, that submission encapsulates the essence of the considerations relating to the Schedule. As Mr Dougherty expressed it, the reasonable policyholder would expect the Schedule to set out *".the specifics of the cover with the general policy wording coming later"*. It is the Schedule which is tailored to the insured and the specific policy in question; it provides bespoke cover.

47. Furthermore, it is readily apparent that the Schedule here - as it was in *Standard Life v Oak (supra)* - is neither merely an abbreviated summary of the substantive provisions of the Policy, nor an index to the policy wording. It did not simply involve *"incorporation by reference"* as Mr Walsh contended. The Schedule instead contained, as Mr Hext submitted, *".substantive provisions that were intended to add to, or override, parts of the more formal wording found later in the policy"*. Again, I agree.

48. In a significant number of instances, the Schedule differs from and was plainly intended to prevail over the more formal policy wording. In some instances, the Schedule provided substantive cover not otherwise furnished in the policy wording; in others, it reduced the cover otherwise apparently provided; and in others still, there was a conflict between the Schedule and the policy wording. It is unnecessary to burden this Judgment with a compendious list; the following examples suffice:

(i) In Section II (i.e., the BI section of the cover) and with regard to the *Customer Extension Clause*, the Schedule - but not the policy wording - limits the occurrences to those in the GCC; the policy wording purported to provide cover in respect of premises *"situated anywhere in the world"*. It was not, and could not have been, suggested that the policy wording was intended to prevail.

(ii) In the three Coverage Clauses in issue, the *Customer Extension Clause*, the *Closure Clause* and the *Loss of Attraction Clause*, the relevant limits appear in the Schedule, not the policy wording. Additionally, the *"radius 1 KM"* provision in the *Loss of Attraction Clause* is provided in the Schedule not the policy wording.

(iii) Under the Heading, *"Clauses applying to both the sections"*, the *"Fire protection or security installation"* provision in the Schedule introduces an obligation to take precautions that does not appear in the corresponding wording.

(iv) In Section 1, i.e., the Property Damage (*"PD"*) section of the cover, the *"All other contents clause"* in the Schedule introduces a per occurrence limit of AED 250,000 and an aggregate limit of AED 1,000,000. The corresponding policy wording refers only to an AED 1,000,000 limit. So too, the *"External Works"* clause in the Schedule adds *"Signboards"* to the items covered; no mention of *"Signboards"* is found in the relevant policy wording.

49. Pausing here, it should be underlined that giving importance or primacy to the Schedule (see below), does not entail the suggestion that the Schedule is the cover. Plainly it is not. As Mr Walsh pointed out, correctly, the Schedule does not furnish cover for *"other pests"* nor does it

contain a radius provision, by contrast with the policy wording which does. This consideration does not, however, suggest that the Schedule is to be ignored or downplayed. It serves, instead, to underline the importance of reading the Policy as a whole - Schedule, clause headings and policy wording - to ascertain the objective intentions of the parties.

50. (2) *The hierarchy and structure of the Policy:* A feature of the Policy is that, as described to me, it comprises a layered patchwork. As stated in the Schedule, the Policy is on *"LM7"* wording, a form of standard wording providing nothing other than all risk PD cover. To that basic wording, additions have been made extending the cover provided, including BI cover, together with the variety of further extensions. Perhaps unavoidably, these layers, it would seem drawn from different sources, have resulted in discrepancies and inconsistencies in the Policy - not unknown in the realities of commercial contracts as distinct from textbook perfection.

51. For my part, I accept the submission that the Schedule is to be found at the top of this notional pyramid and it is the Schedule to which primacy is to be given. As Mr Hext put it, it is the Schedule:

> *".that delineates the cover, it's not just a list of headings. It's the document that sets out the main intent and object of the insurance policy in respect of the cover that's to be provided."*

For my part and at the very least, I would not anticipate specific cover for infectious or contagious diseases so clearly expressed in the Schedule to be excluded save by clear words - and not by way of no more than an omission in the detailed policy wording. It would not be expected that a reasonable policyholder would necessarily notice such an omission; but if he/she did, a commonsense reaction would be that the cover given in the Schedule was intended to prevail.

52. *(3) Headings:* It was common ground, or at least not seriously disputed, that clause Headings, such as the Heading to the *Closure Clause* (in bold type) form part of the Policy and may be taken into account in construing it; the Policy contains no provision saying otherwise. If taken into account, the Heading to the *Closure Clause* points unequivocally to the provision of cover for infectious or contagious disease. While I agree with Mr Walsh that a Heading cannot prevail over the express wording of a clause or create ambiguity where otherwise none would exist, I part company with him insofar as he submitted that such was the position here. Once effect is given to all the Policy provisions (Schedule, Headings, policy wording) read as a whole, no question arises either of overriding express wording or creating ambiguity where otherwise none would exist. To the contrary, with respect, it is Mr Walsh's submission which hinges - wrongly in my view - on reading the policy wording in isolation and without regard to either the Schedule or the Heading.

53. *(4) Giving effect to all the Policy provisions and reading the Policy as a whole:* Both as a matter of Arts. 52 and 53 of the *DIFC Contract Law* and as an exercise in common law unitary and iterative construction, it is necessary to give effect to all the Policy provisions and to read the Policy as a whole. Mr Walsh posed the question as to how the *Closure Clause* would be construed had the policy wording stood alone. The short answer is that it did not - but the question serves to underline the need for reading the Policy as a whole. Giving effect to the Schedule, reinforced by the Heading to the *Closure Clause*, illuminates the intention of the parties: cover for infectious or contagious disease was an insured peril provided the other requirements of the *Closure Clause* were met. The policy wording is simply augmented. The contrary construction, urged by EIC, gives no effect to the wording *"Infectious or Contagious Diseases"* in the Schedule and the Clause Heading - or, for that matter, the further reference to this peril in the *Material Damage Qualification Waiver*. That is a significant consideration weighing against EIC's proposed construction.

54. *(5) Inconsistencies and discrepancies:* I take this point shortly. For reasons already given, this Policy, developed in layered form, includes a variety of mismatches, inconsistencies, and discrepancies. As made clear by *FCA v Arch (UKSC)* and *China Taiping*, the objections of the pedantic lawyer are to be brushed aside. Additionally, given the structure of this Policy, there need be no reluctance in doing so. The way is therefore cleared for the solution, which lies in giving effect to the entirety of the Policy, including the Schedule and the Heading to the *Closure Clause*, reading it as a whole. Here, as already suggested, that entails the provision of cover for infectious or contagious diseases within the scope of the *Closure Clause*.

55. *(6) Reading the Closure Clause as a whole:* A further pointer to the Closure Clause providing cover for infectious or contagious diseases is the provision contained within the policy wording as to *".a radius of 2 kilometres of the insured's business."*. As it seems to me and to put it no higher, the peril within the *Closure Clause* to which the radius provision most naturally relates is that of infectious or contagious diseases. All the other perils in the Clause are overwhelmingly more likely to impact on the Insured's business at the location in question, rather than within a radius of 2 kilometres from any such location. Thus, even disruption caused by *"murder"* or *"vermin"* is unlikely, realistically, to warrant the radius provision. Mr Walsh's submissions to the contrary, postulating *"an infestation of vermin up the road"* or a murder *"1 kilometre up the road"* leading *"to the evacuation of the premises"* struck me, with respect, as unpersuasive. While in no way of itself decisive, the radius provision lends support to the Claimants' and Brokers' case.

56. *(7) Miscellaneous:* I record here a number of matters raised in argument which, in my view, did not or did not significantly advance the argument on construction.

57. *(i) The background to the placement of the Policy:* It appears to be common ground that the wording of the *Closure Clause* was supplied by the Claimants to the Brokers and by the Brokers to EIC, mirroring the wording of a clause in the previous year's policy, which had been placed for the Claimants by different brokers (Willis). While this consideration is of some relevance to the topic of correction by construction (below), it would only be of significance here if I thought any real issue arises as to the maxim of *contra proferentem*, whether at common law or under Art. 54 of the *DIFC Contract Law*. As I am not persuaded that the wording of the *Closure Clause* is unclear or ambiguous so as to warrant consideration of the maxim of *contra proferentem*, the background to the placing of the Policy need not be addressed further here.

58. *(ii) Pre-contractual negotiations and post-contractual conduct:* The Claimants placed considerable store on pre-contractual negotiations and some (if lesser) emphasis on post-contractual conduct as supporting their case that the *Closure Clause* included cover for infectious or contagious diseases. As will be recollected, both these matters are *"Relevant circumstances"* under Art. 51 of the *DIFC Contract Law*, albeit (generally) excluded by English law in respect of questions of construction.

59. So far as concerned pre-contractual negotiations, the Claimants relied on quotations for such cover from the Brokers (see *Unagreed Joint Statement of Assumed Facts*, paras. 7-13), which, they submitted should be taken as emanating from EIC. Regarding post-contractual conduct, the Claimants pointed to the fact that after they had made a claim under the *Closure Clause* for COVID-19 BI loss, EIC had not positively asserted - prior to its Defence - that no cover for infectious or contagious disease was included in the Policy (see *Unagreed Joint Statement of Assumed Facts*, para. 51).

60. In my judgment:

(1) Having reached the view already indicated on the true construction of the *Closure Clause*, it is unnecessary to express any final view on pre-contractual negotiations or post-contractual conduct and I do not do so.

(2) I remind myself that the *"Unagreed"* facts within the *Unagreed Joint Statement of Assumed Facts* represent no more than facts asserted by the Claimants. They are neither admitted by the other parties nor do they form part of the assumed facts on which this trial of the PIs is based. Necessarily, therefore, had I been minded to reach a final view on any issue based on *Unagreed* facts, I could have gone no further than concluding that if those facts were made good, then such conclusions as were justified could be reached.

(3) By way of no more than provisional inclination, the post-contractual conduct relied upon by the Claimants appeared to be a makeweight as best - but of course it can be considered further should it ever be appropriate to do so (subject to the views of the Trial Judge).

(4) Likewise, by way of no more than a provisional inclination, my concern with regard to the pre-contractual negotiations relied upon was that they were in danger of veering into subjective intent. Moreover, on their face, these were exchanges between the Claimants and the Brokers; without more, it could not necessarily be assumed that EIC had contributed to the Brokers' responses. Again, should it ever become appropriate to do so, such matters could be explored further (subject to the views of the Trial Judge).

61. *(iii) Microorganism Exclusion:* Not foreshadowed in the pleadings, Mr Walsh raised the *"Microorganism Exclusion (MAP) Absolute"* contained in the Schedule. He submitted that this exclusion related to a standard market wording which excluded cover for any loss or damage related to any microorganism *".of any type"* which posed *"an actual or potential threat to human health"*. In EIC's skeleton argument, he contended that cover would be excluded by this Exclusion - even if the wording *"infectious or contagious disease"* was written into the *Closure Clause* - because COVID-19 was a microorganism. There was understandable concern on the part of the Claimants (and the Brokers) at this unforeshadowed submission. Helpfully, however, in his oral argument, Mr Walsh accepted, first and inevitably, that such a submission could not be considered at this trial of PIs without evidence; secondly, that he was not asking me to decide whether or not a virus was an organism. Instead:

> *"All we are saying is if one is looking for an objective explanation as to why the infectious disease language might not be in the body of the closure clause, one possible explanation is this exclusion which some people, rightly or wrongly, would consider covers or excludes cover for infectious or contagious disease.it's not anything more than a make weight point."*

On this footing, this argument adds nothing at this stage. I return to it, briefly when considering correction by construction below.

62. *(8) Summary:* For the reasons given, individually and cumulatively, I am satisfied that, construing the Policy as a whole and giving effect to all its terms and constituent parts, the parties objectively intended the Closure Clause to furnish cover for infectious or contagious disease. Accordingly, I would answer PI 1.2.2 ***"yes"***.

63. *(C) Construction II:* Correction by construction: In the light of my conclusion thus far as to the true construction of the *Closure Clause*, no question of correcting errors arises. However, in deference to the arguments advanced and in case I am wrong, I go on to consider whether, had I concluded that the omission of the infectious or contagious disease wording in the policy wording meant that the *Closure Clause* did not cover this peril, that was an error which could be corrected by construction.

64. The legal framework is as set out above in *Chartbrook* and *Pelagic Fisheries*. The first question is whether (on this hypothesis) there was a clear and obvious mistake; if there was, the second question is whether it is clear what correction ought to be made to correct that mistake.

65. Mr Walsh submitted that, even assuming there to be a mistake, the requirements for correction by construction were not satisfied. As already noted, he submitted that it was not clear whether the error lay in *omitting* the language in question from the policy wording or *retaining* the reference to *"infectious or contagious disease"* in the Schedule and Heading. There was no objective reason for concluding that the error lay in the policy wording rather than the Heading; that would be the tail wagging the dog. Moreover, there were other inconsistencies too; were they also to be corrected? Still further, the fact that some people thought that COVID-19 was a microorganism, provided a possible objective explanation for the omission of the infectious or contagious disease wording in the policy wording of the Closure Clause: *"there would be no point in writing the cover back in only for it to be excluded anyway" ("the microorganism exclusion")*.

66. With respect to Mr Walsh, I am unable to accept these submissions; I have no hesitation in answering both the questions posed above, "yes"; there was a clear and obvious mistake; the correction required is likewise clear.

67. My starting point is that there clearly was a mistake. As to whether the mistake lay in the policy wording or the Heading and the Schedule, essentially for the reasons already given when dealing with the true construction of the *Closure Clause* (leaving any question of correction of errors to one side), it is clear to me that it lay in the body of the clause. The notion (with which Mr Walsh had toyed) that there had perhaps been some discussion between EIC and the Brokers resulting in leaving the wording erroneously in the Schedule and Heading could not apply in this case - as seen when dealing with the background to the placing of the Policy, there had been no such discussions. Any suggestion that a mistake in the Schedule and Heading lay in the previous year's placing is purely speculative. So too, Mr Walsh's submission that the microorganism exclusion might furnish an objective explanation for the omission of the infectious and contagious disease wording from the body of the clause, has no evidential foundation and, with respect, amounts to no more than speculation. In any event, as to the microorganism exclusion, I agree with Mr Hext that it would have proved too much - as it would at once have raised questions as to the retention of *"food and drink poisoning"* in the policy wording. Finally, although there are (as already seen) other inconsistencies between the Schedule, the Heading and the policy wording in

connection with the *Closure Clause*, it suffices that the correction required to the omission of the infectious and contagious disease wording is clear: those words are to be read into the body of the clause. It is unnecessary for these purposes to resolve the remaining inconsistencies; no more need be said than that, had they arisen for decision, they would have been resolved on similar lines: namely, by reading the Policy as a whole and giving effect to all its provisions so as to ascertain the parties' objective intent.

68. Accordingly, by this route as well, I would again answer PI 1.2.2 ***"yes"***.

> *1.2.3 Whether any requirement that there be infectious or contagious disease at or within a radius of 2 kilometres of any of the `insured's business' requires the Claimants to prove a case of COVID-19 at or within 2 kilometres of any of the premises at which the Claimants carry out business, or at or within 2 kilometres of the particular premises ordered to close.*

69. I can take this PI shortly. Here, the Claimants were on their own, opposed by both the Brokers and the EIC.

70. For the Claimants, Mr Dougherty, while accepting that the practical impact of a decision on this PI might be minimal (other than in terms of ease of proof), contended that as a matter of the proper interpretation of the clause all that was required was the occurrence of infectious or contagious disease within 2 km of the *"insured's business"*, wherever that might be carried out. That it was or might be more *"commercial"* to link the radius to the specific premises closed was not a reason to re-write the clause. The language of the *Closure Clause* had clearly distinguished between *"the insured's business"* on the one hand (i.e., the insured's business as a whole) and specific premises of the insured.

71. I am unable to accept this submission. A close look at the language of the clause points overwhelmingly to the interchangeable use of the wording *"Insured's business"*, *"premises"*, *"location"* and *"Insured's business premises"*, so focusing on the specifically affected premises.

72. In his oral submissions, Mr Walsh put the matter well:

> *"We say there's a clear linkage between (i) the closure or evacuation of all or part of the premises, and (ii) on this posit infectious disease at the location and (iii) the prevention or hindrance of the use of .[or]. access to the insured's business premises. We say the natural and ordinary reading of the clause is .to read it as on each occasion referring to the same site.*
>
> .
>
> *.the words `location', `premises' and the `insured's business premises' are all being used synonymously.in this clause. .the reference to `insured's business premises' must equally be a reference to the same site."*

I agree - a conclusion in any event reinforced by Mr Hext's submission that the wording, *"Insured's business"*, is well capable of being a reference to the business being carried on by the insured at the specific premises in question.

73. Approached as an iterative exercise, this construction dovetails with commercial good sense. The *"Territories"* covered by the Policy were *"Bahrain, Kuwait, Oman, United Arab Emirates"*. It is implausible for the parties to have intended to provide cover under the Closure Clause for the financial impact on the business in Oman because of an occurrence of an infectious or contagious disease within 2km of the insured's premises in Bahrain. To meet this objection, Mr Dougherty submitted that the Claimants would in any event have to satisfy a causation test, so guarding against absurdity. While Mr Dougherty was correct in accepting the need for the Claimants to prove causation to succeed on any individual claim, that acknowledgment itself highlights the curiosity of the Claimants' preferred construction.

74. Accordingly, I answer PI 1.2.3, as follows: **"The requirement that there be infectious or contagious disease at or within a radius of 2 kilometres of any of the insured's business requires the Claimants to prove a case of COVID-19 at or within 2 kilometres of the particular premises ordered to close."**

PI 1.3: THE PROPER CONSTRUCTION OF THE LOSS OF ATTRACTION CLAUSE

> *1.3.1 Whether it provides cover limited only to a specific local incident where the police or a statutory authority seal or close up a particular premises, or whether it responds to a national or regional governmental response to a global pandemic*

75. *(A) The rival cases:* The Claimants' case is straightforward. Mr Dougherty submitted that the wording of the *Loss Attraction Clause* means what it says and is capable of responding not only to specific local incidents but also to a national or regional government response to a global pandemic. EIC has fallen into error by reading requirements into sub-clause (d) which are not there. The wording is *results* rather than *reasons* based. The proper approach to the construction of the clause is to focus on its *wording* rather than what might be the *paradigm* case. In Mr Dougherty's submission:

> *".the problem that infects EIC's argument here is that it focuses on what the clause must have intended without looking at the actual words of the clause itself. The starting and the end point.is to look at the wording of the clause.it's results based, the question is: has the insured location been closed or sealed off by the police or statutory authority? It's unrestricted in terms of what is necessary for a trigger for closure."*

It was no part of this Trial to decide which specific orders satisfy the clause.

76. For EIC, Mr Walsh submitted, as a matter of ordinary language, that sub-clause (d), providing cover for *"closure or sealing off of the insured Location(s) or any right of way"* was specifically directed at a *"police or other statutory authority"* response to a local incident or event. It was not triggered by (what he termed) *"generic"* stay at home, lockdown or curfew advice or orders. Indeed, the clause was not triggered by orders at all but instead by the actual/physical closure or sealing off of the location/s in question or any right of way. In his submission, the clause contemplated *".for example, the police putting tape across the doorway of a particular premises or cordoning off the road outside with cones whilst they investigate a burglary."*. This reading of the clause was consistent with the cover provided by the Closure Clause:

"The latter is calibrated to provide cover where there is an order to close a premises but only in very specific circumstances. Construing the Loss of Attraction Clause as covering orders to close for any reason whatsoever would result in profound incongruence and incoherence."

77. Both Mr Dougherty and Mr Walsh placed reliance on the assistance to be obtained from the other limbs of the clause and the Schedule, to which I come in due course, together with various authorities to which I now turn.

78. *(B) Authority:* Although I am not bound by any of the authorities to which I was referred, they merit consideration with a view to such guidance as they may offer

79. In the Irish decision, *Brushfield Ltd v Axa* [2021] IEHC 263 (*"Brushfield"*), McDonald J, held that COVID-19 was not an excluded peril and (at [187]), in principle, that a *"denial of access"* clause could be triggered by a local outbreak of a highly dangerous disease, which required action to be taken by the police or by a health authority. However, he concluded that a reference to *"danger or disturbance"* within the *"denial of access"* clause was not intended to extend to a pandemic which had nationwide effects.

80. McDonald J's reasoning (at [190]) included the following observations. At [(a)], he held that the word *`danger'* was to be read in context, not in isolation:

".the clause is concerned not with dangers or disturbances simpliciter but with dangers or disturbances at the insured's premises or within one mile of the premises.[This] strongly suggests a localised form of cover."

At [(b)], the Judge noted that the word *"danger"* had been used in juxtaposition with the word *"disturbance"*; the latter had a very obvious local connotation. At [(d)], he said this:

".it is crucial to keep in mind the terms of the clause as a whole. The clause is concerned with a restriction on access to the insured premises as a consequence of the actions of the police or a statutory body in response to a danger or disturbance within a one-mile radius. The restriction on access is therefore expressly linked to the danger or disturbance within that radius. the effect of the clause is that there will only be an entitlement to an indemnity under the clause if the insured can demonstrate that it was the risk of COVID-19 within that one-mile radius which led to the relevant actions which restricted access to its premises.

.I cannot see how it could plausibly be said that the measures taken a national level by the Government or the Minister for Health could be said to have been proximately caused by a risk of COVID-19 within a one-mile radius of the hotel. The measures in question were taken in response to the position in the State as a whole.

. the clause has a local focus and appears to me to be concerned with actions taken to address local events in the nature of dangers or disturbances."

81. Turning to *China Taiping*, for immediate purposes, little more need be said than that contained in Cockerill J's admirable summary, in *Corbin*, at [115] - [121]:

"[115] It is perhaps unusual to cite an arbitration award; but these are unusual times and the China Taiping Award is an unusual award.

[116] In June 2021 a group of 183 hospitality policyholders and China Taiping Insuance (UK) Co Ltd agreed an ad hoc arbitration agreement, to submit certain coverage issues to arbitration by Lord Mance, the former Deputy President of the Supreme Court, and.a noted authority on insurance law, as sole arbitrator.

[117] On 10 September 2021, Lord Mance issued an award in The Policyholders Specified in Sch 1 to the Arbitraiton Agreement v China Taiping Insurance (UK) Co Ltd [2022] Lloyd's Rep IR 379 (`the China Taiping arbitration').

[118] In those arbitration proceedings, coverage was considered under two limbs of a Denial of Access clause which responded to:

Section 2 is extended to include interruption of or interference with the Business in consequence of.

b the closing down or sealing off of the Premise or property in the vicinity of the Premises in accordance with instructions issued by the Police or other competent local authority for reasons other than the conduct of the Insured or any director or partner of the Insured or the condition of the Premises or the carrying out of repair or maintenance work at the Premises

c the actions or advice of the Police or other competent local authority due to an emergency threatening life or property in in the vicinity of the premises.'

[119] There were three key disputed issues. First, whether the existence of Notifiable Disease cover elsewhere in the policy (which did not extend to COVID-19) negated the possibility of Denial of Access wording responding to the pandemic. Secondly, whether the requirement for an emergency in the vicinity of the premises' in limb (c) meant that the clause could only respond to narrow, localised events, rather than national ones. Thirdly, whether the UK Government was a `competent local authority' within the meaning of the clause.

[120] On the first issue, Lord Mance found in favour of the policyholders. The existence of the express notifiable disease cover elsewhere in the policy did not limit the cover under the prevention of access extension. It was common for the coverage provided by various insuring clauses and extensions to overlap, and if insurers intended to exclude diseases from the scope of the prevention of access clause, they should have used clear language to do so.

[121] On the third issue, Lord Mance agreed with the insurers that the UK Government was not a `competent local authority'

within the meaning of the clause, meaning that there could be no coverage under limbs (b) or (c) of the Denial of Access extension for losses caused by closures and other restrictions imposed by the UK Government in response to the COVID-19 pandemic. This was ultimately therefore fatal to the policyholders' claim, which failed at the last hurdle."

82. It may be noted that in *China Taiping* (limb (c)), the relevant authority was identified as local: see *Corbin*, at [183].

83. On the question of (potential) overlap, Lord Mance held (at [28]) that the Extensions in question should be allowed *".to operate according to their respective terms, whether they contain elements which potentially overlap or not."*.

84. Next is the Australian Federal Court decision in *Marrickville v Swiss Re* [2022] FCAFC 17 (*"Marrickville"*), dealing with six appeals raising issues concerning BI policies and the COVID-19 pandemic. It is only necessary to refer to one passage in the Judgment of the Federal Court. The Judge (in the case in question) held that a *Prevention of access* clause (cl. 7) did not apply to diseases, which, she held, were regulated exclusively by a *Murder, suicide & infectious disease* clause (cl. 8). Those clauses provided as follows:

"7. Prevention of access by public authority

We will pay for loss that results from an interruption of your business that is caused by any legal authority preventing or restricting access to your premises or ordering the evacuation of the public as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises.

8. Murder, suicide & infectious disease

We will pay for loss that results from an interruption of your business that is caused by:

a) any legal authority closing or evacuating all or part of the premises as a result of:

i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of your premises, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended) irrespective of whether discovered at the location of your premises, or out-breaking elsewhere."

85. The Federal Court said this (at [17]):

"The primary judge's view was based on construing cl 7 in the context of the policy as a whole, including, in particular cl 8. Her Honour considered that the operation of the policy would otherwise involve `profound incongruence and incoherence'. Her Honour inferred that the parties could not have intended that cl 7 would apply to an authority preventing or restricting access to the premises under cl 7 where the threat of damage to persons was from a disease. This was because, if that were so, the various conditions or requirements within.[cl 8]. would be circumvented or would not apply."

The Federal Court (at [18]) upheld the Judge's construction of these clauses, essentially for the reasons given by the Judge.

86. Finally, I come to the decision of Cockerill J in *Corbin (supra)* to which I have already referred. The case concerned a *Denial of Access (Non Damage) ("NDDA")* clause. Access to the insured parties' business premises had been restricted or hindered by government regulations imposed in response to the COVID-19 pandemic. The policy contained an exclusion for *"notifiable diseases as detailed in the Murder, Suicide or disease cover"* (the *`MSDE clause'*); COVID-19 was not listed under the MSDE clause. Insurers denied liability; the insured brought proceedings and succeeded.

87. So far as relevant for this trial, the head note captures the nature of Cockerill J's decision:

"(1) The NDDA clause provided effective cover; COVID-19 was capable of being a `danger' within one mile of the insured premises, which, coupled with other uninsured but not excluded dangers outside, led to the regulations which caused the closure of businesses and caused the claimants' business interruption loss. (i) With regard to construction, as a matter of law contractual provisions were not construed by reference to paradigm examples of what might be covered or evidence of historical derivation of a clause. Rather the overriding question was how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs the person to whom the document should be taken to be addressed was not a pedantic lawyer who would subject the entire policy wording to a minute textual analysis. The reasonable person was identified with the ordinary policyholder. The court should approach the policy on its words, as if it were a small businessman, albeit with a broker to assist it. On that basis the wording of the clause in the instant case was linguistically apt to cover disease as one among the dangers covered.there was no locality limitation other than the radius. Danger was not itself paired with local. Nor was any relevant authority identified as local. The wording `any other statutory body' was manifestly wide enough to encompass central government. .the clause explicitly excluded cover for NDDA caused by the diseases covered by the MSDE clause. The natural reading was therefore that diseases not on the excluded list (such as COVID-19 in this case) could be covered - if the other conditions were met. An orthodox approach to construction pointed to the conclusion that the NDDA clause provided a localised cover, but one which was capable of extending to disease. The natural reading of the clause was that the driver of the clause was the result, not the nature of the danger which produced it."

88. Given the debate before me as to the *"local"* question in the context of the *Loss of Attraction Clause*, further passages in Cockerill J's judgment repay study. Having observed that the outline of the argument had developed in the light of *FCA v Arch (UKSC)*, she said this:

"[172].The dichotomy between local (with but for causation problems) and vicinity equating to national is no longer the boundary of the argument.

[173] The Claimants here accept the need for local manifestation inherent in the radius, but they draw the line at an exclusively

local risk. They submit that on the true construction of the clause it would be wrong to say that danger can only be local.

[174].the Claimants are right about this. The difficulty which presents itself is the relationship between what has been described as the paradigm coverage under the NDDA/AOCA clause and the construction of the particular NDDA/AOCA clause; and in particular to what extent the paradigm drives or informs the approach to contractual construction.

[177].The first problem is that the clause is couched in general language.It does not.indicate that the clause must be concerned with something of very local significance.

[178] The second problem is that as a matter of law we do not construe contractual provisions by reference to such paradigms or such evidence of historical derivation."

89. Cockerill J went on (at [183]) to underline that there was no locality limitation other than the radius: *"Danger is not itself paired with local."* In this respect the relevant clause in *Corbin* differed from that in *China Taiping*. Furthermore (ibid), rejecting the insurer's submission that the wording for the authority (with police coming first) tended to suggest locality, Cockerill J held that the wording *"any other statutory body"* was *"manifestly wide enough to encompass central government"*.

90. Later in her judgment and still with regard to the *"local"* question, Cockerill J considered and emphatically parted company with the reasoning of McDonald J in *Brushfield* (at [198] - [203]). In essence, Cockerill J took the view (at [202]) that McDonald J's reasoning had been *".overly concerned with the paradigm and inferred subjective intention and not enough with the wording."*. She then went on (at [205]) to reach the conclusion already noted, namely, that the clause in question provided *".a localised cover, but one which is capable of extending to disease"*; the driver of the clause was the result not the nature of the danger which produced it

91. On the separate topic of the relationship between the NDDA and MSDE clauses, Cockerill J (at [187]) reached the conclusion foreshadowed in the head note:

"In other words the clause says that some diseases are excluded with the logical correlate that not all are. The natural reading is that diseases not on the excluded list can be covered - if the other conditions are met (which, of course, in many cases they will not be). Given the different limits and structure of the MSDE cover and the NDDA cover there is no reason why the two should be mutually exclusive."

92. *(C) The clause as a whole and the Schedule:* Although the primary focus concerns sub-cl. (d) of the *Loss of Attraction* clause, it is necessary to have regard to the remaining limbs of the clause, so as to construe it as a whole - a requirement of both common law construction and Art. 52 of the *DIFC Contract Law*.

93. Sub-cl. (a) applies *"in the vicinity"* of the Insured Locations. Sub-cl. (b) applies to occupation of the Locations themselves. Sub-cl. (c) relates to the presence or suspected presence of *"a harmful device"* in, or in the vicinity of, the premises in question. Thus, all of sub-cll. (a) - (c) may properly be said to have a distinctly local tenor. By contrast, in my view, sub-cl. (e), *"extremes of climate"*, while capable of *applying* locally cannot naturally be read as *confined* locally.

94. So far as sub-para. (d) itself contemplates action taken by *"the police or other statutory authority"*, unlike England and Wales, it cannot be assumed that "police" has a local connotation; to the contrary, as agreed paragraphs within the *Unagreed Joint Statement of Assumed Facts* suggest (see paras. 29, 34, 38 and 42), they are assumed to be national in Bahrain, Kuwait and Oman, and are Emirates based in the UAE. The reference to "police" in the context of the Policy does not therefore point to a local limit for the remainder of sub-para. (d). In any event, the wording, *"other statutory authority"* (whatever such authorities may be, a matter for another day), read naturally, is amply wide enough to encompass a national authority: see, *Corbin, supra*, at [183].

95. The Schedule stipulates a *"radius 1 KM"*. Plainly, such a radius carries a local connotation, to the extent that a radius is applicable at all to the different limbs of the Clause; that said, whether it suggests that the clause *only* responds to a specific local incident is another matter, as seen below.

96. *(D) Discussion and conclusions: (1) The wording of the PI:* The wording of this PI is stark. A "yes" answer would limit the *Loss of Attraction Clause* to responding *only* to specific local incidents of the kind set out in the Clause while cover under the Clause would not be available *at all* where there is a national or regional governmental response to a global pandemic resulting in the closure of the Insured Location(s). The question is whether the language of the Clause, in context, is to be read as confined in this way.

97. *(2) Approach to construction:* When considering the authorities, it is necessary to keep in mind that each was a decision on the wording of a particular clause or clauses in the fact specific context of the case in question. The general guidance available is therefore limited.

98. That said, when construing the *Loss of Attraction* clause, I agree with the view taken by Cockerill J in *Corbin*: the focus must be on the wording of the clause (of course in context and without searching for a strained or artificial meaning), rather than on a paradigm example. The fact that police tape, cones or cordons sealing off particular premises were or might have been very much in mind does *not* determine the true width of the clause. Put another way, the ambit of the clause is not co-extensive with or limited by a paradigm example. I therefore respectfully prefer the approach adopted by Cockerill J to that adopted by McDonald J in *Brushfield*.

99. *(3) The language of the clause:* Sub-cl. (d) begins with the word *"closure"*, which is not some incidental add-on to the words *"sealing off"*, a feature which prompts this question: if a business in the Territories was closed as a result of an order by a statutory authority, what is there to preclude coverage in principle under the *Loss of Attraction Clause* (subject to all the other conditions of the clause being met and assuming that consequences (i) and/or (ii) can be established)? For my part, nothing in the wording of the clause compels cover to be declined in such circumstances. As with the clause in *Corbin*, I conclude that it is *results* based rather than focused on the reasons for or the nature of the order or action resulting in the closure. Mr Walsh sought to distinguish actions from orders; but I am not persuaded that the interposition of an *order* between an authority and the closure of a business rules out cover in such circumstances. Realistically, Mr Walsh needs to read some wording of

limitation into the *Loss of Attraction Clause* to make good his case - wording which is not there and for which there is no or no adequate justification, subject only to the question of overlap dealt with below.

100. With regard to the interposition of orders, my inclination as to the language of the clause is fortified by the discussion in *FCA v Arch (UKSC)*, at [119] and following, where the Court accepted the Divisional Court's conclusion that *"enforced closure"* of premises would extend to a closure which is legally capable of being enforced - as distinct from advice or exhortations or stay at home instructions.

101. That conclusion found expression the *FCA Declarations* which followed (on 13 July 2021) (*"the FCA Declarations"*). Thus, Declaration 31.1 is instructive even recognising that it was obtained by consent and was specifically linked to clause *RSA 4*. This Declaration provided:

> *"While advice, exhortations or social distancing and stay at home instructions do not constitute `enforced closure', an instruction need not always have the force of law to amount to an `enforced closure'. An instruction given by a public authority may amount to an `enforced closure' if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required without the need for recourse to legal powers. For such an instruction to amount to an `enforced closure' it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, is also capable of being an `enforced closure'."*
>
> In my judgment, as with an instruction in *FCA v Arch (UKSC)*, an order here, if otherwise complying with the clause, *completes* rather than *breaks* the chain between a statutory authority and closure of the *"Insured Location(s)"*.

102. I add the following, by way of provisional guidance, keeping well in mind that the question of which specific national or regional governmental responses or orders qualify within the Clause is not for this trial:

> (i) As it seems to me, any qualifying order under this Clause would need to be addressed to closing a business or businesses - *not* to keeping customers at home.
>
> (ii) Additionally, here, unlike in *China Taiping*, there is no pairing of the peril with a local authority and therefore nothing in the wording of the clause requiring *"statutory authority"* to be read as confined to a local authority. If anything, as already suggested, statutory authority is naturally to be read more widely: see, Corbin, at [183].
>
> (iii) I accept, as far as it goes, that *"sealing off the Insured Location(s) or any right of way"* by the "police" may well connote (as Mr Walsh put it) something physical happening locally; it is certainly redolent of some such local event. But even on that assumption, there is no good reason in the language of the clause for similarly confining *"closure.by.any statutory authority"*.

103. *(4) Reading the Schedule and the clause as a whole:* Turning to the other limbs of the Clause and the Schedule, I am not persuaded that the local nature of sub-cll. (a) - (c) compels reading sub-cl. (d) (with which we are directly concerned) as confined to specific, physical, local incidents. Self-evidently, sub-cl. (e) (*"extremes of climate"*) is not and cannot sensibly be locally confined - even though it would plainly need to have local consequences for a claim to succeed. So far as concerns the 1 km radius contained in the Schedule, I see it as neutral. It applies to *"define"* the *"vicinity"* in sub-cll. (a) and (c). It is difficult to see that it has any application to sub-cl. (b). It *might* have a bearing on whether a *"right of way"* qualified under (d), but I cannot accept that a provision confining the rights of way in question would have any bearing on whether an event (be it an order or action) resulting in closure of the location/s qualified under the clause. I express no final view on whether a local manifestation of extremes of climate must occur within 1 km of the location/s in question to qualify under the clause but, whatever the answer, it does not affect my conclusion with regard to sub-cl. (d)

104. *(5) Overlap and the contract as a whole:* Thus far, as it seems to me, the Claimants have a powerful case for reading the *Loss of Attraction* clause naturally, in accordance with its wording and without the limitation to specific, local, physical events which Mr Walsh seeks to read into the clause. I come now to the one matter which has caused me to reflect further: namely, whether the limitation on the width of this clause, advocated by Mr Walsh, is necessary to avoid it driving a coach and horses through the more specific regime contained in the *Closure Clause*. Distinguishing *Corbin*, Mr Walsh underlined that here, unlike in *Corbin*, the *Loss of Attraction Clause* had to be read together with the *Closure Clause*. If sub-cl. (d) of the *Loss of Attraction* Clause was capable of providing cover for a national response to the pandemic, where does that leave the scheme of the contract as a whole?

105. This was a formidable argument but, on balance, I am unable to accept it.

> (1) First, however sensible a delineation between the clauses that such a construction might have achieved, it cannot overcome the hurdle of the language actually used by the parties. For the reasons already given, the language of the clause tells, strongly, against the more limited construction urged by Mr Walsh.
>
> (2) Secondly, as Mr Dougherty contended, Mr Walsh's submission proved too much. It seeks to achieve an outcome where if there is cover under the *Closure Clause*, there will not be cover under the *Loss of Attraction* clause. But if that is right, it would exclude cover under the *Loss of Attraction* clause for a purely local case of infectious disease or, for that matter (by way of example) vermin - even where there had been a physical sealing off of the location/s in question. Any more generalised submission - as to the oddity of a wide *Loss of Attraction* clause given a narrow *Closure Clause* - founders on the wording, as discussed above.
>
> (3) Thirdly, it is to be appreciated that the impact of the pandemic on the relationship between the two clauses is being considered with hindsight. When the Policy was concluded, the COVID-19 pandemic was an unknown, almost certainly unforeseen, future occurrence.
>
> (4) As is apparent, the Policy is not a model of precision; it contains discrepancies and inconsistencies. In the circumstances, too much should not be made of duplication and overlap. I cannot agree that in the case of these two clauses such duplication or overlap produces or risks *"incongruence or incoherence"*. By analogy with the conclusion reached by Lord Mance in China Taiping (at [28]) - whose broad approach, necessarily turning on the clauses before him, I respectfully prefer to that adopted in *Marrickville (supra)* - each of the

independent *Closure* and *Loss of Attraction Clauses ".must be allowed to operate according to their respective terms, whether they contain elements which potentially overlap or not"*. At all events, in my view, that is how the two clauses would have been seen by the reasonable policyholder.

106. For these reasons, I answer PI 1.3.1: **"The Loss of Attraction clause is not limited to a specific local incident where the police or a statutory authority seal or close up a particular premises. It is capable of responding to a national or regional governmental response to a global pandemic."**

PI 1.1: THE PROPER CONSTRUCTION OF THE CUSTOMER EXTENSION CLAUSE

107. As already noted, this Coverage Clause may well prove to be of limited practical importance, given both its parasitic nature and the Claimants' obvious incentives to proceed under the other Clauses (insofar as entitled to do so). Nonetheless, it has given rise to a number of PIs.

108. The rival cases set the scene. The Claimants submit that there is nothing to limit the words *"loss or damage"* to physical loss or damage only and there is no basis for reading any such limiting words into the Clause. Further narrowing the likely practical application of these PIs, the Claimants contemplate that the retail aspect of the Clause will be small, but contend that the words are capable of including retail customers; the business encompasses retail business; and, accordingly, the term *"Customer"* is naturally to be read as extending to retail customers. Finally, while the Claimants accept the burden on them to make good their claim, they submit that this is a matter of evidence, not lending itself to a ruling (or guidance) from me at this stage.

109. EIC's case is clearly summarised in a single passage in Mr Walsh's oral submissions:

> *".the customer extension clause, on a proper and rigorous analysis, only responds to physical loss or damage. We say that the customer, the first tier direct customer, relates to corporate customers. That's companies, organisations or individuals running businesses purchasing goods o service from the claimants, where that relationship is either formalised in supply contracts that are afoot at the time of the damage or they have historically been so formalised, such that there is an established trading relationship at the time of the damage.*
>
> .we do say that in order to get home on this clause or perhaps even just get going on this clause, the claimants do have to identify who the customers are that they are relying upon, so that we can actually grapple with this issue when it comes to trial."

I come to the individual PIs.

1.1.1 Whether the concept of `loss or damage' relates to physical loss or damage only.

110. As already noted, the Claimants urge an answer of "no"; EIC contends for an answer of "yes".

111. With a view to keeping his submissions realistic, Mr Walsh sought to confine them. It was not EIC's case that the BI section of the Policy, as a whole, only responded to physical loss or damage. Instead, he submitted that that such a limitation applied to the *Customer Extension Clause*. The insuring provisions (set out above) for both Sections of the Policy involved a *"classic combination of.PD with BI bolt on where you have PD."*. That was the starting point; a non-physical loss or damage bolt on could be added but clear language was needed to displace the physical damage requirement in the insuring provisions. There was none such here. Further, the loss or damage in question under the *Customer Extension Clause* was loss or damage occurring *"at any premises"*. That wording more naturally referred to physical loss or damage. Still further, the Clause spoke of *"consequential loss"*; that wording made sense or better sense on Mr Walsh's construction: loss consequential on physical damage. Otherwise, there would be BI loss caused by BI loss.

112. Carefully constructed as these submissions were, I am unable to accept them. It is plain that the introductory insuring provisions, restricted as they were to physical damage, were substantially augmented or overtaken by the various Extensions; I am not persuaded that those introductory provisions significantly inform the construction of the Extensions, of which the *Customer Extension Clause* is one. On a natural reading, while *"damage"* often connotes physical harm, neither damage nor, especially, *"loss"*, necessarily requires a physical element. In any event, loss and damage are here being considered in the context of the *Customer Extension Clause*, where the relevant perils include the *Coverage Clause* and the *Loss of Attraction Clause*, neither of which is restricted to physical perils. To my mind, this is a powerful pointer in favour of *"loss or damage"* not being restricted to physical loss or damage; it would seem at least curious if the breadth of the perils exceeded the ambit of the recoverable loss or damage without clear wording to such effect. Furthermore, there was some (if limited) force in Mr Dougherty's submission that, where the Policy wished to indicate *"physical"* loss or damage, it did so in terms, as in the *Protection and Preservation* clause. As to the words *"consequential loss"*, I do not accept that they carry the significance Mr Walsh attached to them. I read those words simply as permissive with regard to the *Insured's* entitlement to recovery in consequence of its *Customer's* loss or damage. The context is far removed from contractual provisions or tort law principles restricting recovery and distinguishing between direct and consequential loss

113. Accordingly, I answer PI 1.1.1: **"No"**.

1.1.2: Whether the requirement for `loss or damage' is satisfied by: (i) a closure order (including `stay at home' advice or order, a `lockdown' order or `curfew' order of similar) as a result of a case of COVID-19 either within 2 kilometres of a customer's premises or, alternatively, at a customer's premises; and/or (ii) a closure or sealing off of a customer's premises (including `stay at home' advice or order `lockdown' order or `curfew' order or similar) within the meaning of the Loss of Attraction Clause.

114. This is a somewhat curious PI both because it duplicates or adds nothing to the discussion and (for reasons already discussed) would seem to be of no practical value. Understandably, neither the Claimants nor EIC devoted any time to argument on this PI.

115. I accordingly **"decline to answer"** PI 1.1.2.

1.1.3: Whether the term `Customer' extends to retail customers who would have or would have been expected to have (habitually)

attended the Claimants' premises to purchase goods and services.

116. The nature of the rival contentions will by now be clear. This was a hotly fought PI, even though, according to Mr Dougherty, it too may well be of limited practical importance - the reason being that the indemnity (he said) is likely to be almost entirely consumed by business Customers.

117. The question as posed admits of an easy answer, subject, however, to a proviso which, to my mind, discloses the real battleground.

118. It was common ground that *"1? Tier (Direct) Customer"* meant no more than a Customer in a direct relationship with the Insured. In his skeleton argument, Mr Dougherty illustrated well the operation of the Clause (given the view I have already taken on other issues):

> *"18. A typical case would be a customer who suffered a fire at their premises and who therefore cancelled, or did not place, orders from an insured. The ensuing BI loss suffered by the insured would be covered.*
>
> *19. However, given the Policies here include perils other than classic physical damage perils.the Customer Extension Clause.also operates to insure against the happening of those other perils (such as closure a customer's premises by reason of infectious or contagious disease, or closure of a customer's premises by order of [a] statutory authority)."*

More controversially, for the purposes of this PI, Mr Dougherty went on to say this (*ibid*):

> "Accordingly, if a lawyer's office which normally ordered sandwiches from one of the Claimant's restaurants for its lunches was closed by reason of infectious or contagious disease, the loss of profit suffered by reason of the cancelled food orders would also in principle be covered by the Customer Extension Clause."

119. In Mr Walsh's submission, the language of the clause was indicative of its focus on corporate relationships in the supply chain. The Clause carved out a particular class of customer:

> "We're not talking about retail customers, people that have gym memberships or walk into buy their samosas."

As, on the Claimants' own case, there were many non-retail Customers, it could not be said that the construction advocated by EIC deprived the Clause of meaning.

120. In my view, the emphasis placed by EIC on whether a Customer was *"retail"* or not is misplaced. The resolution of this Issue does not require an analysis as to the market segment from which the Customer comes. In Mr Dougherty's example, it would (if Mr Walsh is right) call for an inquiry as to whether the lawyer's office is a wholesale or retail customer with the answer perhaps the determinant of whether the Clause would respond. It would or might therefore make a difference whether the lawyer was a sole practitioner or if the *"lawyer's office"* was that of a large firm. But, either way, the loss or damage is capable of occurring at his or their *"premises"*. Nothing in the Clause calls for any such (retail/wholesale) inquiry and, for my part, I am readily content to accept (as the Claimants submit) that the language of the Clause is capable of including retail customers, the more especially in circumstances where the Claimants' business encompasses the retail sector. I therefore conclude that even assuming the emphasis of the Clause to be on corporate relationships and the supply chain, it does not exclude *"retail"* Customers *because* they are *"retail"*.

121. It is immediately necessary to qualify this answer with a proviso - and it is here that, as foreshadowed, I think the real battleground emerges. The only *"Customers"* who come within the Clause are those with whom at the relevant time *"the Policyholder has contracts or trading relationships to supply goods and services"*. This Trial is not the occasion to express any view on individual claims but, for my part, this proviso should be taken as meaning what it says. Generally, at least, it would require either extant supply contracts at the time of the *"Damage"* or a sufficient contractual course of dealing in the past to warrant coming within the wording *"trading relationships"*. Provisionally at least, it must be unlikely that an individual who from time to time, or even regularly, purchases sandwiches or samosas from one of the Claimants' outlets would qualify as a *"Customer"* within the meaning of the Clause; such an artificially extended meaning of *"contracts or trading relationships"* is unlikely to occur to a reasonable policyholder. Beyond this, what does or does not qualify as a *"trading relationship"* gives rise to a fact specific inquiry and is for another day.

122. For these reasons, I would answer PI 1.1.3 as follows: **"The term `Customer' is capable of extending to a retail customer provided that, at the time of the damage, the Policyholder has an extant contract or trading relationship to supply that customer with goods or services."**

1.1.4: Whether the Claimants are required to prove specifically (i.e. by identifying particular customers) or generally (i.e. by proving only that there were such customers on the balance of probability) `which customers' they rely upon who by reason of a peril insured by the Policies did not purchase goods or services from the Claimants.

123. Here too, the broad outline of the rival contentions has already been indicated. This PI does not readily admit of straightforward answers in advance of a Trial on the merits. I state my conclusions shortly.

124. First, it was common ground, as I understood it, that the *burden of proof* rested on the Claimants to make good such claims as they advanced to the *standard of proof* of the *balance of probabilities*.

125. Secondly, in large measure, *how* the Claimants satisfy the burden resting on them to the requisite evidential standard, is fact specific and is not amenable to a necessarily generalised ruling or generalised guidance given at this stage. It is the Claimants' decision as to the evidence they choose to adduce, and the risk of adducing insufficient evidence to make good their case rests squarely on the Claimant.

126. Thirdly, at first blush, as the Clause responds to loss or damage by a peril insured occurring at a (qualifying) Customer's *"premises"*, the Claimants may struggle to make good their claims without identifying the Customers whose premises were impacted by an insured peril. Similar considerations, again at first blush, may apply to the need for the Claimants to quantify the loss or damage suffered and claimed.

127. Fourthly, however, it would be wrong - at this stage - to be unduly prescriptive, in particular having regard to the nature of the COVID-19 pandemic, the prevalence of the disease, the inferences that can properly be drawn, governmental data, statistical evidence and governmental responses to the pandemic. The possibilities in this area and the difficulties in moving beyond anything other than a most generalised discussion at this stage, are fully discussed in the Divisional Court in *FCA v Arch* [2020] EWHC 2448 (Comm) (*"FCA v Arch (Divisional Court)"*), at [561] and following, inter alia drawing on the decision in *Equitas Ltd v R&Q Reinsurance* [2009] EWHC 2787 (Comm); [2010] 2 All ER (Comm) 855 (*"Equitas"*). As pointed out in *Equitas* (at [70]), and is similarly applicable here, the risk run by the Claimants is one of fact not law.

128. Declaration 8.1 in the *FCA Declarations* is instructive and to the same effect:

> *"What evidence may prove actual prevalence will vary depending on the factual context, and for the purpose of different policies.as well as the particular timing and location of a claim. Different inferences might be drawn from a combination of underlying data in different contexts."*

In agreement with *FCA v Arch (Divisional Court)*, at [579], further than that I am not able to go.

129. Doing the best I can, I answer PI 1.1.4 as follows: **"The burden of proof, to the requisite standard of proof (the balance of probabilities), rests on the Claimants. What the Claimants need to do to satisfy that burden is fact specific and not susceptible of general guidance, at least at this stage."**

ANSWERING THE PIs:

130. For ease of reference, the answers to the PIs are set out in the *Annexe* below.

ANNEXE: ANSWERS TO THE PIs

- PI 1.2.1: **Yes**
- PI 1.2.2: **Yes**
- PI 1.2.3: **The Requirement that there be infectious or contagious disease at or within a radius of 2 kilometres of any of the insured's business requires the Claimants to prove a case of COVID-19 at or within 2 kilometres of the particular premises ordered to close.**
- PI 1.3.1: **The Loss of Attraction Clause is not limited to a specific local incident where the police or a statutory authority seal or close up a particular premises. It is capable of responding to a national or regional governmental response to a global pandemic.**
- PI 1.1.1: **No**
- PI 1.1.2: **Decline to answer.**
- PI 1.1.3: **The term `Customer' is capable of extending to a retail customer provided that, at the time of the damage, the Policyholder has an extant contract or trading relationship to supply that customer with goods or services.**
- PI 1.1.4: **The burden of proof, to the requisite standard of proof (the balance of probabilities), rests on the Claimants. What the Claimants need to do to satisfy that burden is fact specific and not susceptible of general guidance, at least at this stage**.