THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the Name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE ROBERT FRENCH

BETWEEN

LALS HOLDINGS LIMITED
(And the Companies identified in Schedules 1 to 3 of the Claim Form)

Claimants/Respondents

and

(1) EMIRATES INSURANCE COMPANY (PSC)

First Defendant/Appellant

(2) SIACI INSURANCE BROKERS LLC

Second Defendant

JUDGMENT OF THE COURT OF APPEAL

Hearing :	**3 June 2024**
Counsel :	Mr Charles Dougherty KC and Mr Timothy Killen, instructed by Al Tamimi and Company for the Respondents Mr David Walsh, instructed by Holman Fenwick Willan Middle East LLP for the Appellant Mr Neil Hext KC and Mr Lucas Fear-Segal, instructed by Kennedys Dubai LLP for the Second Defendant
Judgment :	**2 July 2024**

ORDER

UPON HEARING Counsel for the Appellant and the Respondents at the hearing on 3 June 2024

AND UPON READING the submissions and relevant documents on the Court file

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant shall pay the Respondents' costs of the appeal to be assessed by the Registrar if not able to be agreed.

Issued by:
Hayley Norton
Assistant Registrar
Date of Issue: 3 July 2024
Time: 8am

SCHEDULE OF REASONS

CHIEF JUSTICE AZMI ZAKI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE ROBERT FRENCH:

Introduction

1. In the proceedings which have led to this appeal, the LALS Group of Companies ("LALS") alleged that its business interruption insurer, Emirates Insurance Company (PSC) ("EIC") wrongfully refused cover for business interruption losses arising out of the COVID-19 pandemic. In the alternative, LALS alleged that their insurance broker, SIACI Insurance Brokers LLC ("SIACI") had failed to arrange suitable insurance and was in breach of its contractual and tortious duties.

2. On 1 November 2023, Justice Sir Peter Gross, sitting as the Court of First Instance ("CFI"), determined Preliminary Issues ("PIs") concerning the construction of certain provisions of the relevant insurance contracts. One of the issues concerned a Loss of Attraction Clause which provided cover for loss resulting from interruption or interference with the business of LALS in consequence of:

> "(d) Closure or sealing off of the Insured Location(s) or any right of way by the police or other statutory authority."

The question was whether the cover provided was limited only to a specific local incident involving the police or a statutory authority sealing or closing-up a particular premises, or whether it extended to a national or regional government response to a global pandemic.

3. The answer given by the Primary Judge was:

> "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;"[1]

4. The answer to that question is appealed pursuant to Permission to Appeal granted by the Chief Justice on 6 March 2024. The Grounds of Appeal had two limbs:

> "(1) the CFI's construction of the Loss of Attraction clause had the effect of rendering a carefully calibrated closure clause effectively redundant; and
>
> (2) that the Trial Judge's construction was uncommercial and resulted in congruence and incoherence between the Policy terms and it failed to give proper weight to Articles 52 and 53 of the DIFC Contract Law.

5. For the reasons that follow, the Appeal is dismissed.

Procedural history

6. The originating proceedings were initiated by a Claim Form filed in the CFI on 19 October 2022 in Claim No CFI-073-2022. LALS, the Claimant, is a retail group whose business is primarily carried out in the Gulf Cooperation Council ("GCC"). EIC is an insurer and SIACI an insurance broker, which was formed in or around September 2020 by a merger between Driesassur Insurance Brokers LLC ("Driesassur") and Alpha Lloyds (Insurance Brokers) LLC.

7. LALS alleged that Driesassur had acted on their behalf in placing Property All Risk and Business Interruption Insurance Policies for the period from 1 July 2019. SIACI, as successor to Driesassur, was said to have assumed its rights and liabilities. The question whether it did or not is not in issue at this stage in the proceedings.

8. The policies recommended, advised and placed for LALS were underwritten by EIC. There were three policies. They were all described as Property All Risk and Business Interruption Insurance Policies and covered a policy period from 1 July 2019 to 30 June 2020. They were all written on the same terms and were intended to be read together and to provide uniform coverage. The coverage extended to business interruption loss caused by:

> (i) closure due to vermin, murder, suicide, infectious or contagious diseases, manslaughter and food poisoning;
>
> (ii) closure due to an order of the local authorities;
>
> (iii) loss of attraction;
>
> (iv) denial of access; and
>
> (v) customer extension.

9. LALS alleged that since about 12 March 2020 they suffered business interruption and loss and damage arising out of and/or in relation to the COVID-19 pandemic in respect of which an indemnity was due to them pursuant to the policies. EIC had failed to confirm cover or provide an indemnity and in doing so were said to be in breach of the policies. LALS further alleged that, to the extent that EIC was not required to provide an indemnity, this resulted from a breach by Driesassur of its contractual and/or tortious duty to LALS to secure suitable insurance for them and/or to advise them properly as to the suitability of the policies. SIACI was named as successor to Driesassur's liabilities.

10. The policies did not contain a governing law clause. LALS contended that UAE Law governed their claims against EIC on the ground that it was the law most closely connected with the facts of the dispute. On the same ground they alleged that UAE Law governs their claim against SIACI.

11. The jurisdiction of the DIFC Courts was invoked on the grounds that LALS Holding Limited is a DIFC establishment or entity and that the claim arises out of contracts partly concluded, finalised or performed in the DIFC. The policies referred to the relevant "jurisdictions" as "United Arab Emirates". They were written in the English language and incorporated internationally recognised wording. That reference was said to encompass an agreement to submit disputes to the DIFC Court, it being a court of the United Arab Emirates.

12. LALS sought from EIC damages and/or an indemnity pursuant to the policies, a declaration as to their rights, interest at 5% and costs. They claimed from SIACI, damages and interest, again at 5%.

13. On 4 July 2023, His Excellency Justice Nassir Al Nasser ordered that certain issues be determined by the Court as PIs. The trial of the PIs took place before Justice Sir Peter Gross, sitting in the CFI, between 11 September 2023 and 13 September 2023. Judgment was delivered on 1 November 2023. An Amended Judgment issued on 14 November 2023. EIC filed an Appeal Notice on 23 November 2023 seeking permission to appeal the judgment. That application was refused by the Primary Judge on 10 January 2024.

The Insurance Policies

14. There were three Property All Risk and Business Interruption Policies in issue. They had the same wording but covered different companies and territories. The policy to which reference was made at trial was Policy No 300/1130/11/19/00094 (the "Policy").

The Schedule to the Policy

15. The Policy commenced with a section headed "THE SCHEDULE". This set out in short form essential details of the Policy including the

Interest Insured, the Period of Insurance, the Sum Insured and Locations which were set out in an attached Excel Sheet and the Territories. Extension Clauses were summarised in two sections: Section I dealt with property damage and Section II with Business Interruption Specific Clauses. There was also a summary of clauses applicable to both Sections.

16. Against the words "Scope of Cover" the Schedule stated:

> "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."

It was common ground that the reference to the "slip" was a refence to the Schedule itself.

17. The Schedule also set out under the heading "Extension clauses", and the subheading "Section II - Business Interruption specific clauses", the following:

- " Closure Due to Vermin, Murder, Suicide, Infectious or Contagious Diseases, Man slaughter, 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."

It is noticeable that both the Closure and Loss of Attraction Clauses were characterised as specific clauses.

The text of the Policy

18. The text of the Policy, immediately after the Schedule, contained substantive provisions. The first heading "COMBINED MATERIAL DAMAGE AND BUSINESS INTERRUPTION POLICY" opened with the following:

> "In consideration of the Insured having paid or agreed to pay to the Insurer the first premium shown in the Schedule.
>
> The Insurer named herein hereby agrees subject to the terms, exceptions, limits and conditions contained herein or endorsed hereon (hereinafter referred to as `the Terms of the Policy') that if during the period of insurance or during any further period in respect of which the Insured shall have paid or agreed to pay and the Insurer shall have accepted the premium required;
>
> In respect of Section I
>
> the Property Insured or any part thereof shall be accidentally physically lost, destroyed or damaged the Insurer will pay to the Insured the value of the Property at the time of the happening of its loss, destruction or damage for the amount of such loss, destruction or damage or at their option reinstate or replace such property or any part thereof;
>
> In respect of Section II
>
> any building or other property or any part thereof used by the Insured at the Premises for the purpose 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
>
> .
>
> And in respect of Sections I and II, provided that the liability of the Insurer shall in no case exceed in respect of each item the sum expressed in the said Specification or Schedule to be insured thereon or in the whole the total sum insured hereby or such other sum or sums as may be substituted therfor [sic] by memorandum hereon or attached hereto signed by or on behalf of the Insurer."

19. There then followed a subheading "Section 2 - Business Interruption specification" which limited the insurance provided by that section to loss of gross profit as defined due to a reduction in turnover and an increase in Costs of Working and the amount payable as indemnity thereunder was defined. It is not necessary to set that definition out for present purposes.

20. Next came a section headed "Definitions" followed by a "TREND PROVISION" and then a number of clauses under the heading "EXCEPTIONS - APPLYING TO SECTIONS I AND II OF THE POLICY". These exceptions were expressed globally, rather than by reference to any particular clauses appearing later in the Policy.

21. There followed a section headed "POLICY CONDITIONS - APPLYING TO SECTIONS I AND II". Clause 1 under the heading "Definition" read:

> "This Policy, the Schedule and Specification shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such meaning wherever it may appear."

22. The next heading was "Clauses attaching to and forming part of Policy No 300/1130/11/19/00094" and the first subheading below that was "Clauses applying to Section I". It is not necessary for present purposes to refer to those clauses.

The clauses the subject of the PIs and the subject of this Appeal

23. The next major subheading read **"SECTION 2 - BUSINESS INTERRUPTION CLAUSES".** It covered three clauses which were the

subject of the PIs. The headings of those clauses were:

"CUSTOMER'S EXTENSION

CLOSURE DUE TO VERMIN, MURDER, SUICIDE, INFECTIOUS OR CONTAGIOUS DISEASES, MAN SLAUGHTER, FOOD AND DRINK POISONING

LOSS OF ATTRACTION"

24. Two of those clauses are the subject of this Appeal. They are:

"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 acing on the Property cover." [sic]

"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." [sic]

The Preliminary Issues and the decisions on those Issues by the CFI

25. The relevant PIs as set out in the Order of Justice Nassir Al Nasser made on 4 July 2023 and the answers given by the Primary Judge in relation to the Closure Clause and the Loss of Attraction Clause, were as follows:

"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.

Answer: Yes

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

Answer: 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.

Answer: 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.

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.

Answer: 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." (emphasis in original)

Joint Statement of Assumed Facts

26. There was before the Primary Judge an Agreed Statement of Assumed Facts ("Agreed Assumed Facts") which also included facts in dispute. The purpose of the inclusion of the facts in dispute, was not apparent. According to the Joint Statement, the assumed facts were to be read subject to documents in the Combined Bundle of Documents. The facts were assumed by the parties solely for the purpose of the PI hearing. None of the assumed facts were to bind any party for any other purpose including a later trial of the factual issues. The parties also reserved their position on the relevance or irrelevance of any of the assumed facts at the PI hearing. The Agreed Assumed Facts included the following:

"1. The Claimants are all part of the Lals Group, which is a retail group which operates and owns shops, restaurants, FMCG distribution, retail brands and a shopping mall in the GCC from the addresses set out at Annexures 1 to 3 of the Particulars of Claim.

2. The First Defendant is an insurer ("the **Insurer**").

3. The Second Defendant is an insurance broker, ("the **Broker"**).

...

15. The Insurer issued three policies of *"Property All Risk & Business Interruption Insurance"* to the Claimants (namely, 300/1130/11/19/00094, 300/1130/11/19/00095, and 300/1130/11/19/00096, for policy period 1st July 2019 to 30th June 2020 ("the Policies"). The Policies were all described as *"Property All Risk & Business Interruption Insurance"* and were all in materially similar form.

16. The reference to the *"slip"* in the clause titled ***"Scope of Cover"*** is a reference to the Schedules.

17. The Broker placed cover with the Insurer in the form of the Policies"

The Agreed Assumed Facts then dealt with the origin and nature of COVID-19 beginning with the initial report of its emergence in Wuhan, Hubei Province in or around 31 December 2019 - [18]-[24]. The Agreed Assumed Facts also dealt with action taken by governments in Bahrain, Kuwait, Oman and the United Arab Emirates - together referred to as the "Territories". Those actions included the issue of curfews, stay-at-home and work from home, and orders for the closure or other restrictions, capacity restrictions in respect of shops, malls, restaurants, leisure and other facilities - [25].

27. Daily counts of confirmed COVID-19 cases and death were published through official communications - [26]-[27]. The assumed facts referred to closure orders, other restrictions and re-openings in the Territories from [28]-[44] inclusive.

28. The Agreed Assumed Facts also covered LALS' presentation of its claim to EIC - [47]-[50] and the commencement of proceedings in the DIFC CFI on 12 January 2023.

The Reasons for Judgment of the CFI

29. The Primary Judge referred to the three "Property All Risk and Business Interruption" policies in issue as having identical wording but covering different companies and territories.

30. It was common ground that the policies were subject to DIFC Law. The case was the first COVID-19 Business Interruption Loss Insurance Claim which fell to be considered under DIFC Law.[2]

31. The Business Interruption Losses which LALS claimed to have suffered were said by them to have comfortably exceeded the applicable levels of indemnity in respect of the clauses under which they claimed. Their claim was therefore limited to AED 70 million (plus Claims Preparation Costs of about AED 1 million and exclusive of interest and costs).[3]

32. The claim against SIACI was not directly relevant to the PIs although SIACI had advanced submissions relating to the Closure Clause.[4]

33. After setting out the clauses, the Primary Judge observed that the PIs could only go to their construction. Issues such as rectification, causation and the question whether particular orders satisfied the requirements of the Coverage Clauses, fell outside the scope of the PIs. The wording "in particular" in each of the PIs allowed the Primary Judge flexibility to provide guidance should it be appropriate to do so at what he called the "penumbra" of the PIs.[5]

34. The factual basis he took as the "Joint Statement of Assumed Facts" which were augmented to a limited degree by what he called the "Unagreed Joint Statement of Assumed Facts" which contained additional facts contended for by LALS but not agreed by EIC or SIACI. He dealt with the PIs relating to the Closure Clause and then those relating to the Loss of Attraction Clause.[6] There was no serious dispute as to the legal principles. The dispute was as to their application.[7]

35. The policies were governed by Part 5 of the DIFC Contract Law, DIFC Law No 6 of 2004.[8] English and common law authorities and trends

were relevant and informed a consideration of Part 5 of the DIFC Contract Law, but the provisions of Part 5 would prevail to the extent that they differed from any common law principle. Part 5 was closely aligned to a UNIDROIT approach.[9] The Primary Judge set out the relevant provisions of Part 5, Articles 49 to 54 inclusive.

36. A number of observations were made concerning Part 5 of the DIFC Contract Law:

(1) Article 49(2) required an objective approach to the interpretation of the Policy.

(2) Articles 51(a) and (c) differ from English law which generally excludes reference to pre-contractual negotiations and post-contractual conduct in dealing with contractual interpretation.

(3) Articles 52 and 53 correspond to the English law approach to construction - a unitary exercise involving an iterative approach having regard to the contract as a whole.

(4) Article 54 is akin or similar to the common law *contra proferentem maxim.*

The reference to Articles 51(a) and (c) and to Article 54 were not directly material as the PIs did not turn upon any question of precontractual negotiations, post-contractual conduct or involve a factual basis for the contra proferentem maxim as set out in Article 54.

37. As to the approach to contractual interpretation, the Primary Judge held it was largely unnecessary to go beyond the statement of Lord Hodge JSC in *Wood v Capita Insurance Services Ltd.*[10] The Primary Judge encapsulated that statement in his observation that:

"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." (emphasis in original)

38. In *Arnold v Britton*[11] Lord Neuberger said:

"19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

39. In a published Arbitral Award referred to as the *China Taiping* Award,[12] Lord Mance observed that what Lord Neuberger had said contained important truths which were all consistent with *Wood v Capita Insurance Services.* The only further point to be made about Lord Neuberger's observation, that the reliance on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision, was that it concentrated on situations of real contractual choice. That is where "the parties have control over the language they use in a contract" and "must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision".[13] That was unlikely to have been the position in relation to an insurance policy entered into on an insurer's standard detailed and complex policy wording.

40. It may be noted that that qualification, if it be a qualification, from Lord Mance, did not apply to the insurance policy in issue in this appeal. The Schedule was plainly bespoke and the provisions of the Policy itself while, for the most part perhaps, drawn from a standard contract, did not necessarily reflect an overall coherent unity - particularly in relation to the two clauses in issue in this appeal.

41. The Primary Judge also referred to the correction of errors as another aspect of contractual construction as part of the "single task of interpretation", *citing Chartbrook Ltd v Persimmon Homes Ltd.*[14] The interpretive correction of error required a clear mistake on the face of the instrument and clarity as to what correction ought to be made to cure it.[15] As appears below, this is not a case in which the Court can discern a drafting error in that sense.

42. Specific reference to the application of general interpretive provisions to insurance policies reflected the same principles.[16] Lord Mance was also cited on this point for an observation in his arbitral award:

"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."[17]

43. The Primary Judge turned to the Schedule and headings in the Policy which merited specific mention. He adopted the statement of Tomlinson J in Standard Life Assurance Ltd v Oak Dedicated Ltd[18] that:

"The words in the Schedule must be read with those in the main body of the policy wording which they may qualify."

That approach was mandated by cl 1 of the Policy Conditions which included the following:

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

The Schedule and the Policy wording comprised a single document, with consecutive page numbering.[19] The common law approach, consistently with Part 5 of the DIFC Contract Law, meant that unless the contract expressly said otherwise, which it did not in this case, the heading to a clause could be taken into account in construing it. It could not, however, prevail over the express wording of the clause, or create ambiguity where, absent the heading, none would exist.

44. The Primary Judge looked to the terms of the Schedule and in particular the references to the "interest insured" and the "Scope of Cover". It was common ground that the reference to the word "slip" under "Scope of Cover" was a reference to the Schedule itself.

45. His Honour then considered the proper construction of the Closure Clause. The first question, 1.2.1, was:

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

There was no dispute that the correct answer to that preliminary issue was "Yes"[20]

46. The second question, 1.2.2, was whether the Closure Clause provided cover for closure as a result of infectious or contagious disease. The Policy text omitted any express mention of infectious or contagious disease, although it was included in both the Schedule and the heading to the clause.

47. After referring to the contending submissions, the Primary Judge expressed a clear preference for those of LALS and SIACI. His reasons for that preference were as follows:

> (1) The Schedule was the place to which 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".
>
> (2) The reasonable policyholder would expect the Schedule to set out the specifics of the cover with the general policy wording coming later.[21]
>
> (3) The Schedule was not merely an abbreviated summary of the substantive provisions of the Policy. Nor was it an index to the Policy wording. It was not simply a case of incorporation by reference. It contained ".substantive provisions that were intended to add to, or override, parts of the more formal wording found later in the policy".[22]
>
> (4) In a significant number of cases the Schedule differed from and was plainly intended to prevail over the more formal policy wording.[23]
>
> (5) The Policy comprised a layered patchwork. The layers were apparently drawn from different sources resulting in discrepancies and inconsistencies.
>
> (6) The Schedule was to be found at the top of the notional pyramid and it was the Schedule to which primacy was to be given[24].
>
> (7) The heading to the Closure Clause pointed unequivocally to the provision of cover for infectious or contagious disease. A heading could not prevail over the express wording of a clause or generate ambiguity, but that was not the position in this case.[25]
>
> (8) It was necessary to give effect to all the Policy provisions and to read the Policy as a whole.

48. The Primary Judge's answer to question 1.2.2 was not challenged on appeal. It does, however, form part of the background to the other constructional questions which followed.

49. As to question 1.2.3, LALS submitted that all that was required was the occurrence of infectious or contagious disease within two kilometres of the "Insured's business" wherever that might be carried out. This submission was not accepted. The Primary Judge held that:

> "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."[26]

50. The Primary Judge then turned to the proper construction of the Loss of Attraction Clause. LALS contended that the wording of the Clause applied not only to specific local incidents but also to a national or regional government response to a global pandemic. EIC contended that the Clause was specifically directed at a "police or other statutory authority" response to a local incident or event. It was not triggered by "generic" stay at home orders. It required the actual/physical closure or sealing off of the locations in question or any right of way.

51. The Primary Judge adopted the approach taken by Cockerill J in *Corbin & King Ltd v AXA Insurance UK plc ("Corbin & King")*[27] namely that the focus must be on the wording of the clause, rather than on a paradigm example. Just because police tapes, cones or cordons sealing off particular premises might have been very much in mind, did not determine the true width of the clause. Its ambit was not coextensive with or limited by a paradigm example.[28]

52. The word "closure" in sub-cl (d) was not an incidental add on to the words "sealing off". The clause was results-based rather than focussed on the reasons for or the nature of the order or action resulting in the closure.[29]

53. Enforced closure of premises would extend to a closure legally capable of being enforced as distinct from advice or exhortations to stay at home. The local nature of sub-cll (a)-(c) did not compel a reading of sub-cl (d) confined to specific physical local incidents.[30] Sub-clause (e), which referred to extremes of climate, could not sensibly be locally confined.

54. EIC submitted that the propounded localisation limitation on the width of the clause was necessary in order to avoid inconsistency with the specific regime contained in the Closure Clause. Although the Primary Judge characterised that argument as formidable, he was unable to accept it. While a delineation between the clauses might have been sensible, it could not overcome the hurdle of the language actually used by the parties.[31]

55. The Primary Judge held that in any event the submission proved too much.32 It sought to achieve an outcome where cover under the Closure Clause would result in no cover under the Loss of Attraction Clause. If that were right, cover under the Loss of Attraction Clause would be excluded for a purely local case of infectious disease, even where there had been a physical sealing off of the location in question.

56. Further, the impact of the pandemic on the relationship between the two clauses was being considered with hindsight, whereas when the Policy was concluded the pandemic was an unknown and almost certainly unforeseen future occurrence. Accepting that the Policy contained discrepancies and inconsistencies, too much should not be made of duplication and overlap.

57. The Primary Judge then gave the answer set out above to PI 1.3.1.

EIC's Submissions

58. EIC relied upon the Skeleton Argument filed in aid of its First Application for Permission to Appeal and a Supplemental Skeleton Argument filed for the Appeal hearing.

59. The principal issue as defined in its First Skeleton Argument was:

> "..the interaction between the Closure Clause and the Loss of Attraction Clause, in light of the CFI's conclusions on the proper construction of both."[33]

60. The Primary Judge's answer to PI 1.3 was said to be wrong because his construction of the Loss of Attraction Clause completely undermined the carefully calibrated Closure Clause. The impugned construction was said to be not dictated by the wording of the Loss of Attraction Clause, to be uncommercial and not sensibly what the parties objectively intended.

61. The Primary Judge it was said, ought to have concluded that sub-cl (d) of the Loss of Attraction Clause was limited to business interruption losses following a specific local incident where police or a statutory authority actually/physically closed or sealed off a premises or right of way.

62. The Closure Clause only responded to closures in very particular circumstances, identified as:

> (1) Where there is an order of local and National health Authorities, competent government or statutory authorities.
>
> (2) "as a result of murder, suicide, vermin or other pests, food or drink poisoning" or (now) infectious or contagious disease; and
>
> (3) Even then, only where those perils are "at the location or within a radius of 2km".

63. In support of its propounded construction, EIC relied upon:

> (1) the stipulation in the Schedule of a "radius 1 KM" for the Loss of Attraction Clause which, as the Primary Judge said, "carries a local connotation";
>
> (2) the words "sealing off" which carry a physical connotation and should lend colour to the word "closure";
>
> (3) the absence of any reference to "orders" in the Loss of Attraction Clause.

64. EIC also called in aid Articles 52 and 53 of the DIFC Contract Law.

65. EIC challenged the Primary Judge's finding that its argument proved too much. Its case did not involve reading the Loss of Attraction Clause with twenty:twenty hindsight in the aftermath of the pandemic. It preferred a legitimate and natural reading of the clause resulting in coherent and congruent cover under the Policy. EIC referred to the acknowledgment by the Primary Judge of competing arguments and the approach by different common law lawyers to issues of overlapping cover and policy incongruence. Reliance was placed on the decision of the Full Court of the Federal Court of Australia in *LCA Marrickville Pty Ltd v Swiss Re International SE ("Marrickville")*[34] in which the Court was anxious to avoid the "profound incongruence and incoherence" which would result from specific requirements of an infectious disease clause being circumvented by a broad construction given to a prevention of access clause.

66. In its Supplemental Appeal Skeleton Argument, EIC repeated what it had said in the Skeleton Argument in support of the First Application for Permission to Appeal. It also set out relevant excerpts from the two key clauses side-by-side, pointing to the difference in their language so far as they were concerned with closures. The following points were made:

> (1) The Closure Clause refers to closures *"by order"* of various types of authority. It responds to a specific direction or instruction. It envisages a situation where the policyholder "shuts up shop" because it has been told to do so. The Loss of Attraction Clause refers to closures "by the police or other statutory authority". The word "by" and the absence of the word "order" connote relevant authority coming to the property and physically closing down the premises.
>
> (2) The closures contemplated by the Loss of Attraction Clause are by law enforcement designated as "the police". This was said to reinforce the impression that sub-cl (d) is focussed upon physical attendance at the premises by the relevant authority. The Closure Clause envisages

closure by order of a wide range of state bodies or institutions.

(3) The Schedule stipulates a "radius 1 KM" for the Loss of Attraction Clause, which was rightly considered by the Primary Judge to mean that the Loss of Attraction Clause carried a local connotation.

(4) In the Loss of Attraction Clause the word "closure" appears next to "sealing off". Sealing off was considered by the Primary Judge to carry a physical connotation. The words "sealing off" lend colour to the word "closure" and that also ought to have had a physical connotation in the Loss of Attraction Clause. As used in the Closure Clause however, the word "closure" appeared alongside the word "evacuation". Unlike "sealing off" it did not contemplate a physical act being done to the premises. The Loss of Attraction and Closure Clauses were not aimed at the same target.

67. EIC went on to elaborate its submissions with reference to the Rules of the DIFC Courts (the "RDC"), the common law, UNIDROIT Principles and the Vogenauer Commentary on those Principles which states that:

> "Examination of the whole contract can reveal inconsistencies between different parts. Such inconsistencies have to be remedied by way of interpretation. The underlying assumption is that the parties meant to express themselves coherently and that terminology is used consistently." [35]

The Primary Judge's approach was said to embrace, rather than seek to rationalise, apparent "discrepancies", "inconsistencies", "duplication" and "overlap". Reliance was also placed upon Lewison on *The Interpretation of Contracts;*[36] *Wickman Machine Tools Sales Ltd v L Schuler AG;*[37] *Rainy Sky SA v Kookmin Bank;*[38] *EE Ltd v Mundio Mobile Ltd;*[39] *Wiki v Gordian Runoff Ltd,*[40] *Re Media Entertainment & Arts Alliance; Ex* parte Hoyts Corp Pty Ltd (No 1)[41] and Cooke v Anderson.[42]

68. EIC submitted that the well-recognised approach to harmonious businesslike and congruent construction was to accept that more general provisions should yield either entirely or in part to more specific provisions. The Vogenauer Commentary was called in aid on this point also.

69. The Loss of Attraction Clause was said to be more general than the Closure Clause in two important respects:

(1) The Closure Clause covers closures or evacuations only. The Loss of Attraction Clause covers a variety of other circumstances which might interrupt or interfere with the business.

(2) The Closure Clause responds to closures or evacuations only in very particular circumstances whereas the Loss of Attraction Clause is unconcerned with the reason for the closure.

70. Another compelling analogy was said to be found in the reasoning of the High Court (Commercial) of Ireland in *Brushfield v Arachas Corporate Brokers Ltd ("Brushfield").*[43] In that case the Court held that a denial of access clause was only intended to respond to "localised dangers or disturbances", a category which did not include the spread of COVID-19.

71. There followed a discussion of the approach adopted by Lord Mance in the *China Taiping* Award. The difference between the provisions in issue in *China Taiping* and the Loss of Attraction and Closure Clauses were said to be self-evident. In *China Taiping* there were, as Lord Mance explained, "two very specifically worded Extensions with potentially overlapping effect, and different detailed requirements. It is hard to regard either as more clearly specific than the other overall."[44] He had concluded that he could not regard Extension 2 as a specific provision precluding reliance on Extension 1 in circumstances otherwise within that Extension.[45] EIC also cited the observations of the Full Federal Court in *Marrickville* about the passages from the *China Taiping* Award.

72. The Supplemental Appeal Skeleton Argument went on to deal with the "Proves Too Much" argument. Venn diagrams were used to make the point graphically. The Primary Judge's construction was reflected in the following drawing:

73. EIC's argument was represented graphically as follows:

The graphic representation of the EIC argument was said to demonstrate how its construction was the more coherent and commercial analysis consistent with the different language of the two clauses in question.

The LALS' Submission

74. LALS submitted that the Primary Judge was entirely right to find that the Loss of Attraction Clause provided cover where Insured Locations were closed or sealed off by a national or regional government in response to a global pandemic.[46]

75. The EIC case against available cover required reading words into the Loss of Attraction Clause:

(1) That the closure is "actual/physical".

(2) That the closure is in response to a "specific local incident".

LALS submitted that the clause said no such things. The Primary Judge was correct to conclude that such limitations were not to be read in. It was wrong to say that the construction given to the clause was in any way inconsistent with the language of the Loss of Attraction Clause.

76. There was nothing incongruent or incoherent in an insurance policy providing cover under more than one clause in response to a single circumstance. The Policy did not make clear implicitly or expressly that one clause was to take precedence over the other.[47]

77. LALS took as the starting point of contractual interpretation the ".plain and ordinary meaning if there exists unambiguous language to that

effect, regardless of what commercial result arises from it" - citing *DAMAC Park Towers Company Limited v Youssef Issa Ward.*[48] It submitted that that was the beginning and the end of the issue. The words of the Loss of Attraction Clause used clear and unambiguous language requiring no reinterpretation. EIC's case required a substantial rewriting of the language of the clause.

78. LALS also relied upon Principles of Interpretation in relation to insurance policies summarised by Butcher J in Stonegate *Pub Co Ltd v MS Amlin Corporate Member Ltd ("Stonegate Pub Co")*[49] which took into account the approach of the Supreme Court of the United Kingdom in *Financial Conduct Authority v Arch Insurance (UK) Ltd*[50] and by Lord Mance in the *China Taiping* Award:

> "What is clear is that the question to be asked is what would the language of the policy have been understood to mean to a policyholder, rather than an insurer, who has read through the policy conscientiously, and who has been able to consult with well-informed brokers, but who is not a pedantic lawyer."[51]

79. LALS submitted that the Policy would have to be interpreted as read and understood by the reasonable policyholder at the time it was taken and not in hindsight with reference to the COVID-19 pandemic.[52]

80. There was no restriction on what the words said. The Loss of Attraction Clause was said to "obviously" respond to the closure of policyholder's premises by order of national and local government as the result of COVID-19.

81. The reference to a "closure" being "by the police or other statutory authority" did not qualify how the closure was to be communicated, executed or enforced. It could be by way of physical closure, but it could be by way of a promulgation of an order or a direction.

82. EIC's reliance upon the word "police" in the Loss of Attraction Clause was misplaced. The full phrase was "police or other statutory authority". This covers a wide array of bodies who could effect a closure. And even if statutory authority were to be read narrowly, there would still be nothing in the use of the word "police" which suggests a requirement for physical attendance. It was also an agreed fact that the police in each of the territories are national bodies. The term "police" did not imply anything inherently local about the application of the Loss of Attraction Clause.

83. As to EIC's reliance upon the reference in the Schedule to the "radius 1 KM", LALS supported the Primary Judge's finding that it could only sensibly apply to the references to "vicinity" in sub-cll (a) and (c) of the Closure Clause, replacing a provision of uncertain geographic ambit with a specific geographic ambit. The reference to the radius meant nothing more than that the relevant closure would need to be within the radius. It did not mean that the direction for closure had to be made within it.[53]

84. LALS argued that it was odd to submit that the Loss of Attraction Clause applied only to local incidents when the requirements in the Closure Clause were of a nature likely to be more locally confined, such as manslaughter, vermin, suicide, food or drink poisoning. The reference to the "extremes of climate" in sub-cl (e) of the Loss of Attraction Clause was necessarily geographically broad. It also referred to a closure of "insured locations" suggesting the possibility of a closure of more than one location thus pointing away from a specific local closure and towards a wider one, potentially involving multiple locations. And on any view all of the Closure Clause was subject to a 2 km radius.[54]

85. While it was accepted that "sealing off" sometimes carries with it the physical connotation, the clause used both "sealing off" and "closure", the latter being clearly broad. It carried with it no requirement of premises being physically sealed off as opposed to simply being closed as the result of an order or instruction.

86. LALS then went on to refer to various authorities including Brushfield and Corbin & King and sought to distinguish the wording of the relevant clause in Brushfield. The Loss of Attraction Clause was not dependent upon the occurrence of anything at all which engendered a response from police or statutory authorities. It was simply the closure by the police or statutory authority itself which triggered the Clause. It was, as the Primary Judge put it, "results based, rather than focussed on the reasons for or the nature of the order or action resulting in the closure."[55]

87. LALS further contended that reading together and commercial considerations did not change the clear meaning of the Loss of Attraction Clause. It referred to Articles 52 and 53 of the DIFC Contract Law and then to common law authorities relied upon by EIC.

88. The construction for which EIC contended required substantial "reading in". And even if commercial considerations were in play, there was nothing uncommercial in two insuring clauses providing an indemnity in response to the same set of circumstances. A policyholder can never recover any more than its actual loss. Such a situation is not unusual. Reference was made in the COVID-19 context to *Stonegate Pub Co; Various Eateries Trading Limited v Allianz Insurance PLC*[56] *and Greggs PLC v Zurich Insurance PLC.*[57] There, three different insuring clauses all responded to business interruption losses caused by COVID-19.

89. The proposition that a general provision yields to a more specific provision in a contract had no application in this case. This construction might be helpful where two clauses were in clear and direct conflict, but that was not this case. There was no conflict created by two insuring clauses covering the same set of circumstances.

90. In any event the taxonomy of general and specific was challenged. The two clauses were said to be simply directed at different situations subject to some overlap.[58]

91. The point was made that the limits of cover in each clause were expressed differently. The Closure Clause provided for a limit of AED 25 million for each occurrence, while the Loss of Attraction Clause was limited to an aggregate of AED 25 million.[59]

92. Before considering these submissions, it is necessary to reflect upon the nature of the appeal function in a case of contested contractual interpretation by reference to the Dubai Judicial Authority Law, No 12 of 2004 ("Judicial Authority Law"); the DIFC Court Law, No 10 of 2004 and the RDC.

Jurisdiction of the Court of Appeal - legislative provisions

93. The DIFC CFI and the DIFC Court of Appeal were established by the Judicial Authority Law. The appellate jurisdiction of the Court of Appeal is defined by Article 5(B):

"(B) The Court of Appeal:

(1) The Court of Appeal shall have exclusive jurisdiction to hear and determine:

(a) appeals filed against judgments and decisions made by the Court of First Instance;."

The term "appeal" is not defined and the nature of the appeal is not spelt out.

94. The DIFC Court Law also provides for the jurisdiction of the Court of Appeal in s 26. The relevant parts of s 26 are in the following terms:

"26. Appeals

(1) The Court of Appeal has jurisdiction, pursuant to Article 5(B) of the Judicial Authority Law, to hear and determine appeals filed against judgments and awards made by the Court of First Instance.

(2) The Court of Appeal may in exercising its appellate jurisdiction under Article 26(1):

(a) make or give any order that could have been made or given by the Court of First Instance or Tribunal appealed from;

(b) attach terms or conditions to an order it makes;

(c) annul or set aside a decision;

(d) require or prohibit the taking of a specific action or of action of a specified class;

(e) make a declaration of facts; or

(f) make any other order that the Court of Appeal considers appropriate or just."

95. Article 26(1) is not an additional source of jurisdiction. It is declaratory of the jurisdiction conferred upon the Court by Article 5(B) of the Judicial Authority Law. Article 26(2) sets out the powers of the Court of Appeal in the exercise of its jurisdiction.

The nature of the appeal

96. The nature of a statutory appeal depends upon the construction of the term "appeal" in the statute conferring jurisdiction. There is more than one class of appeal:

(1) An appeal may be an appeal in the strict sense. In an appeal in the strict sense only such judgment can be given as ought to have been given at the original hearing - *Quilter v Mapeleson.*[60] An appeal in the strict sense may be narrowed in its scope by being limited to a question of law only.

(2) An appeal by way of rehearing is one in which the appeal court generally relies upon the evidence before the primary judge, albeit it may have a special power to call further or fresh evidence. Where no further evidence has been admitted and the law has not changed, the court hearing an appeal by way of rehearing will only exercise its powers if satisfied that there was error on the part of the primary decision-making.[61]

(3) In an appeal *de novo,* the appeal court hears a matter afresh. It is not bound by what happened below. It is open to the parties in such case to recall witnesses and further evidence. Such an "appeal" is not really appellate in character. It is akin to a fresh exercise of original jurisdiction. It does not arise in the case of appeals from the CFI to the Court of Appeal.

97. As appears from the RDC set out below, an appeal to the Court of Appeal of the DIFC is treated as an appeal by way of re-hearing but only in the sense that the Court has a special power to receive further evidence. Absent the exercise of that power, the appeal proceeds in the same way as an appeal in the strict sense. That is to say, an error of law or fact must be demonstrated in the result reached by the court below. It is also important to remember that an appeal to the Court of Appeal is an appeal against the order made by the primary judge. It is not an appeal against the reasoning of the primary judge. If, despite error in the reasoning, the final order is correct, the appeal must be dismissed.

The RDC governing appeals

98. The RDC provide for the exercise of the Court's appellate jurisdiction.

99. The gateway to an appeal in the Court of Appeal is through the process of permission to appeal set out in Rule 44.19:

"44.19

Permission to appeal may only be given where the lower Court or the appeal Court considers that:

(1) the appeal would have a real prospect of success; or

(2) there is some other compelling reason why the appeal should be heard."

100. Rule 44.31 specifies the content of the grounds of appeal in the following terms:

"44.31

The grounds of appeal must:

(1) Set out clearly the reasons why it is said the decision of the lower Court was:

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court;

(2) specify, in respect of each ground, whether the ground raises an appeal on a point of law or is an appeal against a finding of fact; and

(3) state the orders sought on appeal."

101. Rule 44.108 sets out the powers of the Court of Appeal on an appeal from a decision of the CFI. Those powers are set out in terms set out in the DIFC Court Law to which reference has been made.

102. Rule 44.110 is in the following terms:

"44.110

Every appeal will be limited to a review of the decision of the lower Court unless:

(1) the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing;

(2) Rule 44.111 applies; or

(3) any other Rule or enactment requires a re-hearing."

Rule 44.111:

"44.111

The hearing of an appeal will be a re-hearing (as opposed to a review of the decision of the lower Court) if the appeal is from the decision of a person or other body and the person or other body:

(1) did not hold a hearing to come to that decision; or

(2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence."

103. Rule 44.114 provides that unless it orders otherwise the appeal court will not receive oral evidence or evidence not before the lower Court. Subject to that Rule, Rule 44.115 provides that the Court may receive further evidence and, under Rule 44.116, may draw any inference of fact which it considers justified on the evidence.

104. The conditions for allowing an appeal from the CFI are set out in Rule 44.117 and reflect the language of the DIFC Court Law. That is to say, the appeal will be allowed where the decision of the lower Court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

105. There may be a question, not raised in this case, whether the rule-making power extends to the power to define the character of the appellate jurisdiction. In the ordinary course however and consistently with the DIFC Law, it appears that the appellate jurisdiction is, by way of review as an appeal in the strict sense requiring determination of whether or not there was some error of law or fact on the part of the primary judge.

The standard of appellate review

106. The standard of appellate review is a qualitative measure of what must be demonstrated before the Court of Appeal is to say that a primary judge was in error.

107. This Court in *Investment Group Private Limited v Standard Chartered Bank*[62] held that the relevant test for an appeal was whether the Court appealed against was wrong, that is to say whether it had erred in fact or in law.[63] On factual matters, this Court has taken the view that an appellant on a question of fact needs to show that the judge was plainly wrong.[64] A similar approach has been taken to challenges to factual inferences on the part of the judge. The appellant will need to show that its preferred inference was "one that should inevitably have been drawn". Disagreement about the weight given to some factors over others is insufficient.[65]

108. In appeals involving questions of fact, there may be a degree of deference to the findings of the primary judge who will have been immersed in the detail of the evidence and argument to an extent that the Judges hearing the appeal may not be able to replicate. This is particularly so where there has been a lengthy hearing involving extensive evidence.

109. Beyond that, generally speaking, this Court will not lightly interfere with a primary judge's findings as to the credibility of witnesses or the weight which should be attributed to various pieces of evidence in reaching an inference. The mere fact that the Court of Appeal might have attached different weight to that attached to particular evidence by the primary judge, does not demonstrate error on the part of the primary judge. When the final decision of the primary judge is discretionary, it is not sufficient to persuade the Court that it should have a different view and substitute its view for that of the primary judge. Error must be demonstrated. This may also be said of evaluative findings of the judge which border on the discretionary in their character.

110. The present appeal does not involve any complex factual issues. Nor does it involve the exercise of a discretion. It does involve the construction of a contractual provision for which different constructions are arguable - a reality recognised by the Primary Judge himself.

111. What then does the law have to say about the standard of appellate review in a case involving contested interpretation of a contract?

The standard of appellate review in contractual interpretation

112. The Supreme Court of Canada has dealt with the question of the standard of appellate review when contractual interpretation is in issue.

113. The characterisation of questions of contractual interpretation was discussed in the judgment of the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp ("Sattva Capital").*[66] Rothstein J, delivering the judgment of the Court, observed that historically the determination of the legal rights and obligations of parties under a written contract was considered a question of law. The rule was said to have originated in England at a time when there were frequent civil jury trials and wide spread illiteracy. The interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract.[67] While that historical rationale no longer applied, the courts of the United Kingdom continued to treat the interpretation of written contract as a question of law.[68] Even so, UK courts considered the surrounding circumstances.[69] Some Canadian courts have abandoned the historical approach and treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed law and fact.[70] The shift away from the historical approach was reflected in the adoption of an approach to contractual interpretation directing courts to have regard to the surrounding circumstances of the contract - or the factual matrix.[71] The Court observed:

> ".in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties - a fact-specific goal - through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law ."[72]

The Court was of the opinion that contractual interpretation involved issues of mixed fact and law in which principles of contractual interpretation were applied to the words of the written contract considered in light of the factual matrix. Rothstein J found that the relevant principles weighed in favour of deference to a first instance decision-maker on points of contractual interpretation.

114. The approach taken in Sattva Capital was qualified by the decision of the Supreme Court in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*[73] which concerned the interpretation of an exclusion clause in a common form of all-risk property insurance.[74] The appropriate standard of review was said to be correctness. Wagner J, who delivered the judgment of the majority, observed:

> "Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review."[75]

115. Sattva Capital concerned a complex commercial agreement between two sophisticated parties - not a standard form contract.[76] Wagner J noted that standard form contracts are particularly common in the insurance industry. His judgment quoted from a textbook on Canadian insurance law which advanced the general proposition that parties to an insurance contract may negotiate over matters like the cost of premiums, but the actual conditions of the insurance coverage are generally determined by the standard form contract.[77]

116. The precedential effect of interpretation of standard form contracts was said to underscore the need for them to be interpreted consistently.78 The characterisation of contractual interpretation as a question of mixed fact and law was based on the importance of the factual matrix and carried less weight in cases involving standard form contracts.[79]

117. The insurance policy in issue in this appeal cannot be characterised as a standard form contract. It has a Schedule which was, on its face, the bespoke outcome of negotiations between SIACI and EIC. The drafting of the Policy overall was suggestive of a cut and paste inclusion of different clauses. That said, the factual matrix against which the Policy was entered into was of fairly limited scope. One fact is that the policyholder is a large corporate group operating over a large geographical area. Another fact is that it was represented in negotiations by a broker, SIACI. The post-contractual incidents of COVID-19 and various governmental actions that resulted from the pandemic, are not part of the factual matrix going to interpretation. Against that background, this is not a case which requires deference to the Primary Judge's interpretation. It is perhaps of some significance that there was no suggestion that the Primary Judge had erred in his enunciation of the legal principles governing the interpretation of the contract.

Legislative framework for interpretation of contracts

118. Because this appeal concerns a contested interpretation of a contractual term, it is necessary to have regard to the provisions of the DIFC Contract Law, No 6 of 2004 which deal with the interpretation of contracts. A number of Articles appear under the heading `Interpretation' in Part 5 of the Act. The relevant parts of those provisions are as follows:

> **"49. Intention of the parties**
>
> (1) A contract shall be interpreted according to the common intention of the parties.
>
> (2) Subject to Article 49(3), 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."[80]

> **"50. Interpretation of statements and other conduct ."**

No statements and conduct of the parties were in issue for the purposes of the preliminary issue. Article 50 is therefore not applicable.

> **"51. Relevant circumstances**

In applying Articles 49 and 50, regard shall be had to all the circumstances, including

.

(d) the nature and purpose of the contract;

52. Reference to contract or statement as a whole

Terms (including Coded Terms) and expressions (including expressions in Code) 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."

The DIFC Contact Law - principles of interpretation

119. The first principle of construction mandated by the DIFC Contract Law requires the Court to determine whether there is "a common intention of the parties" according to which the contract must be interpreted.

120. In *DAMAC Park Towers Company Ltd v Youssef Issa Ward*[81] Chief Justice Michael Hwang SC observed that:

"Although Article 49(1) provides that a contract shall be interpreted according to the ` common intentions of the parties', this provision is only engaged when disputing parties have jointly put forward an interpretation of the contract."[82]

In that case the parties were in disagreement about the proper interpretation of the contract in question so it was said to be Article 49(2) that applied. The Chief Justice added "[a]rticle 49(2) mandates that the inquiry should be an objective one."[83]

121. That observation was made in the context in which there was no agreement about the common intention of the parties and, although the question does not appear to have been raised, no other indication of their common intention. It may be that the generality of that observation should be considered in that context. The relevant common intention may be at a high level, namely that of the contract as a whole or of particular provisions. It may be declared by the parties in the contract albeit its application may be in contest.

122. It was said in the CFI in 2021 that Article 49(1) requires a contract to be interpreted "subjectively" and if the common intention of the parties cannot be established, it is to be considered "objectively". [84]

123. A subjective approach to contractual intention is applied in some civil jurisdictions, for example, under French law in Ordonnance no 2016-131 of 10 February 2016, Article 1188 provides:

"A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.

Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it."[85]

Justice Edelman of the High Court of Australia, in an extra-curial paper on contractual interpretation published in 2020, observed:

to be a reference to their subjective intentions. Only where their subjective intentions are not clear does the objective rule apply."[86]

124. On the other hand, the common law of England and Australia do not accept a subjective theory of contract. As Edelman J observed:

"In 1983, Mason ACJ, Murphy and Deane JJ said that the objective approach had `command of the field'. Since then, the High Court of Australia has reiterated that `[t]he legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions."[87]

125. That said, the application of a subjective common intention is an element of rectification.[88]

126. The words of Article 49(1) bear a striking resemblance to those of the provisions of the French law. Even without that antecedent, they point to a subjective common intention given the fallback position in Article 49(2) which clearly relates to an objectively established intention consistent with the common law by reference to "the meaning that reasonable persons of the same kind as the parties would give to [the contract] in the same circumstances".

127. There is no agreed subjective common intention in this appeal and no evidentiary basis for the finding of a subjective common intention. It is thus necessary to refer to the objective criterion of "reasonable persons of the same kind as the parties". The parties in this case are large sophisticated commercial actors, one of which was advised and evidently represented by an insurance broker.

The use of common law principles in the interpretation of contracts in the DIFC

128. The approach to contractual interpretation in the DIFC Courts is to be found in the DIFC Contract Law. The Court may also adopt approaches to the interpretation of contracts at common law so long as they are consistent with the statute law of the DIFC.

129. EIC in its Supplemental Appeal Skeleton observed in a footnote that decisions from other common law jurisdictions may be used to interpret DIFC legislation, although DIFC Court Judges are not free simply to incorporate into DIFC Law any common law development from any

common law jurisdiction. EIC cited *The Industrial Group Limited v Abdelazim El Shikh El Fadil Hamid ("Industrial Group").*[89] In the present case, this Court is concerned with the application of a statute and the common law to the interpretation of a contract rather than with the application of the common law to the interpretation of a statute.

130. In the *Industrial Group case* this Court pointed to and approved of the extra curial observation of former Chief Justice Michael Hwang SC, that the DIFC Courts comprise a "common law island in a civil law ocean".[90] The Court went on to say:

> "Moreover, it is plain that the DIFC comprises a free zone with its own legal system, an *"enclave"* within the Emirate of Dubai; the selection of a common law foundation for the DIFC legal system facilitated international investment and buy-in by placing the DIFC courts within the same legal family as the major financial hubs internationally."[91]

The Court said that the approach of the DIFC has been described as "developing DIFC Law and shaping principles taken from various common law jurisdictions".[92]

131. The Court of Appeal made the cautionary observation that:

> "It does not, however, follow that DIFC Courts' Judges are free to incorporate into DIFC law any common law development from any common law jurisdiction, simply because there has been such a development elsewhere and because the outcome might prove attractive to the Judges sitting on the individual case. It is to be kept in mind that, from time to time, different approaches are adopted in different common law jurisdictions; internationally, the common law is by no means necessarily uniform. The DIFC Courts do not and could not sensibly import all foreign causes of action. Properly analysed, 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."[93]

The Court also observed that reference must be made to the statutory framework to ascertain the scope for proper judicial interpretation and development of DIFC law and to avoid straying into impermissible judicial legislation.

132. In the Advisory Opinion of the Court of Appeal in *The Dubai International Financial Centre Authority*[94] the Court answered a question about whether the reference in Article 10 of the Trust Law was limited to the common law of trusts and principles of equity as understood under the law of England and Wales. The Court answered in the following terms:

> *". the common law of trusts and principles of equity referred to in Article 10 of the Trust Law is the common law of trusts and principles of equity as determined by the Courts of the DIFC from time to time drawing upon the common law of England and Wales and other common law jurisdictions as they see fit."*[95]

133. None of the above is really controversial. As in other common law jurisdictions, however, the development of the common law yields to two constraints:

> (1) Consistency with statute law.
>
> (2) The boundaries of the judicial function.

134. A number of cases from common law jurisdictions were cited to the Court which contain statements of a general character about the approach to particular issues of contractual interpretation. While these approaches may provide general guidance, their application in any particular case must depend upon the particular features of the contractual provisions in issue.

Commercial common sense and the avoidance of absurdity

135. The "reasonable persons in the same position as the parties" test does not require a finding as to an objective intention which precedes the process of interpretation. If there be a single plain meaning of the relevant provision with no ambiguity, then no constructional choice arises and the provision will be construed according to its plain and unambiguous meaning. That construction will be taken to reflect the intention of the parties. Where the language of the provision presents a contested constructional choice, then the reasonable persons criteria can be brought to bear through such proxy terms as "business common sense" and the avoidance of "absurdity", which have been invoked from time to time.

136. As Lord Diplock said in *Antaios Cia Naviera SA v Salen Rederierna AB*[96] if one construction of a contract "flouts business commonsense" that construction must "yield to business commonsense". A similar approach was set out in the Supreme Court decision of Rainy Sky SA v Kookmin Bank.[97] Lord Clarke observed that where a provision was capable of two meanings it was appropriate for the Court to have regard to "considerations of commercial common sense in resolving the question what a reasonable person would have understood the parties to have meant."[98] In that case one of two arguable constructions of bank bonds was preferred "because it [was] consistent with the commercial purpose of the Bonds in a way in which the Bank's construction [was] not."[99]

137. There is a caveat to be attached to that approach. In *Wood v Capita Insurance Services* Lord Hodge, whose judgment was relied upon by the Primary Judge, observed that:

> "Interpretation is . 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. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the drafting of the clause . and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest.[100]

In that case, Lord Hodge, with whom other members of the Supreme Court agreed, said of a Sale and Purchase Agreement ("SPA") that:

> "From Capita's standpoint the SPA may have become a poor bargain, as it appears that it did not notify the sellers of a warranty claim within

two years of Completion. But it is not the function of the court to *improve their bargain."*[101]

All the parties to the SPA were commercially sophisticated and had experience of the insurance broking industry.[102]

138. A recent Australian textbook on the construction and performance of commercial contracts makes the same general point that some bargains do not turn out to be as fruitful for one party as it was at first thought at the time of entry into the contract:[103]

> "Consequently, the principle which spoke of `business common sense' as a guide to construction has been heavily qualified by recognising judicially that a contractual arrangement may in fact work out `disastrously'. The fact the parties may have made a poor bargain, inconsistent with usually commercial expectations, should not deter a court from giving effect to the ordinary, natural language of the contract."[104]

139. In the present case as appears from the submissions already made, the *desiderata* of "commercial common sense" and the "avoidance of absurdity" have been cited against the construction for which LALS contended.

140. "Commercial common sense" and the "avoidance of absurdity" are terms which do not have bright lines around their meaning. They are evaluative in character and should generally only be applied in clear cases. A construction of a contractual provision which is disadvantageous to one party in unforeseen circumstances is not on that account a construction which lacks commercial common sense, much less a construction which is absurd. While the construction adopted by the Primary Judge was disadvantageous to EIC in the unforeseen circumstances of a global pandemic giving rise in various ways to business interruption and losses incurred thereby, it was not, on that account, lacking commercial common sense. Nor was it absurd.

Inconsistency and general and specific clauses

141. The resolution of inconsistency between clauses in a contract is another objective of contractual interpretation. Commercial common sense and perhaps even avoidance of absurdity may be in play where on one construction two clauses are inconsistent with each other, and on another construction they are not.

142. Inconsistency may arise in a number of ways:

> (1) where on one construction one clause is directly inconsistent with the text of another;
>
> (2) where on one construction one clause applies to circumstances dealt with exclusively by another.

143. The second class of inconsistency may emerge in cases in which one clause deals specifically with a particular subject matter and the other has a general application which, according to constructional choice, may or may not deal with that same subject matter. If the "specific" clause is construed as exhaustively covering the field to which it applies, then the "general" clause may be read as not applicable to that field if such a reading is open on its language. This class of inconsistency was asserted in this appeal.

144. EIC relied upon Lewison, *On the Interpretation of Contracts* and the statement that:

> "Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions."[105]

145. That principle was stated subject to the caveat that it does not apply unless one of the rival provisions is a general provision and the other is a special provision. Where both are special provisions there is no room for the principle to apply.[106]

146. A somewhat related point focusses upon the position of two provisions within the body of the contractual document. In this respect Lewison states:

> "If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, or if the contract itself indicates which is to have priority, then the two are to be read together, and effect given to both."[107]

147. These general criteria involve consideration of the ordinary meaning of a provision to be construed, the purpose of the provision, if that can be identified, and the constructional choices which are presented. A helpful overview was given by Lord Hodge in *Wood v Capita Insurance Services* when he described construction as a unitary exercise and said:

> "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."[108]

The construction of the Loss of Attraction Clause - Conclusion

148. Notwithstanding the careful and comprehensive arguments advanced by both parties, the constructional issue in this case is not complex.

149. There is no relevant common intention able to be discerned arising by agreement or otherwise. In the result, the objective test set out in

Article 49(2) of the DIFC Contract Law applies, informed and supplemented by common law approaches consistent with it which have been described here. In approaching its task, the Court is concerned with whether the Primary Judge erred. It is not suggested by EIC that he erred in the principles he enunciated but rather in their application.

150. A starting point is the text of sub-cl(d) of the Loss of Attraction Clause taken in isolation:

> "Closure or sealing off of the Insured Location(s) or any right of way by the police or other statutory authority."

Those words state an insurable cause of "consequential loss resulting from interruption or interference with the business". What is insured is loss resulting from events falling within (d). The events are "closure or sealing off of the Insured Locations or any right of way". The cause of those events must fall within the description "by the police or other statutory authority". The word `by' relevantly means "[t]hrough the agency, means, instrumentality or causation of ..". Closure and sealing off set out the class of required results. The term `by' encompasses, but is not on its face, limited to a local cause. On the ordinary meaning of (d), it applies to closures effected by police or statutory officers acting in person at a location and directing or effecting the erection of a physical barrier or closure or the placing of sealing signs at the location. There is, however, nothing in the ordinary meaning of the words to exclude a closure or sealing of the same character mandated by a direction emanating from a physically remote statutory authority, including by government. The insurable loss is a class of loss flowing from a defined class of causes.

151. On the ordinary meaning of sub-cl (d) of the Loss of Attraction Clause, the Primary Judge's answer to the question posed by the PI was correct.

152. The next question is whether the Loss of Attraction Cause can be characterised as a general provision relative to the Closure Clause. The taxonomy is elusive and requires something of an evaluative judgment. On its face however the Loss of Attraction Clause brings together a number of specific causes of interruption or interference with the business resulting in insurable consequential loss. Its declared character is that of an extension of the insurance provided by the Policy. The causes of business interruption for which it provides are disparate in character. They cover loss or damage to property in the vicinity of the Insured Locations, unlawful occupation of the Insured Locations, the presence or suspected presence of a harmful device, closure or sealing off of the Insured Locations by the police or other statutory authority and extremes of climate. The character of the clause as an extension and the litany of causes leading to insurable loss do not mark it off as a clause of general application.

153. The Closure Clause is results oriented, although it does not refer to consequential loss as does the Loss of Attraction Clause. Like the Loss of Attraction Clause, it is an extension of cover. There is an overlap to the extent that it refers to closure of all or part of the premises by order of various authorities resulting from any one of a number of causes which, as interpreted by the uncontested answer to the PI question, include "infectious or contagious diseases". It is simply not possible to characterise the Closure Clause as any more specific than the Loss of Attraction clause.

154. The Primary Judge correctly characterised the Policy as comprising a layered patchwork whose layers were apparently drawn from different sources resulting in discrepancies and inconsistencies. There is, however, no logical inconsistency between two provisions which allow for overlapping coverage and recovery under both. Nor is there any inherent want of commercial common sense or absurdity resulting from such a construction of the two provisions. It may be that from the point of view of the insurer, the infelicitous drafting of the Policy has exposed it to a liability arising from unforeseen circumstances which nevertheless fall within the scope of each provision. Commercial common sense cannot be a proxy for redrawing the terms of the contract to achieve a preferred balance between insurer and insured. And this is not a case in which the construction of this layered patchwork will have any significant precedential effect. The Court is not here dealing with a standard form contract. The Venn diagram set out in the Supplemental Appeal Skeleton Argument depended, for its persuasive effect, on the proposition that recoveries provided by one clause to be a subset of the coverage provided in the other, was untenable. For the reasons already given, overlapping coverage is not untenable, albeit it might have been unexpected in the circumstances.

155. The reference to various decisions based upon other insurance contracts with similar or analogous clauses does not assist in the resolution of this appeal, which turns upon the terms of the two clauses in issue in this case and, importantly, the Schedule.

156. The objectives of coherence and congruence are not to be achieved by improving upon the parties poor choices in bespoke drafting. EIC relied upon the concern of the Court in *Marrickville* to avoid the "profound incongruence and incoherence" which would result from specific requirements of an infectious disease clause being circumvented by a broad construction to a prevention of access clause. That again depends upon characterisation of the Loss of Attraction Clause as general and the Closure Clause as specific. That characterisation, as already noted, is not accepted.

157. In its submissions, EIC pointed to a distinction between the word `closure' and the words `sealing off', arguing that the words `sealing off' in the Loss of Attraction Clause lent colour to the word `closure' which was on that account said to have had a physical connotation in the Loss of Attraction Clause. However, the dictionary definition of the term `closure' includes "[s]omething that closes or seals, e.g. a cap or tie."[109] The concept of a sealing off may be embedded in the concept of the word `closure' but does not limit it. In fact the use of both words in the Loss of Attraction Clause suggests an expansive view of closure rather than a limited view.

158. In the view of this Court, the Primary Judge was correct in the conclusions which he reached. The appeal will be dismissed with costs.