IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT DATED 10 JUNE 2021

BETWEEN

THE POLICYHOLDERS SPECIFIED IN SCHEDULE 1
TO THE ARBITRATION AGREEMENT

Claimants

and

CHINA TAIPING INSURANCE (UK) CO LTD

Respondent

AWARD ON COVERAGE ISSUE

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Introduction

1. This Award is made pursuant to an ad hoc Arbitration Agreement dated 10 June 2021 between Policyholders listed in schedule 1 to the Agreement ("the Policyholders")[1] and China Taiping Insurance (UK) Limited ("the Insurer"). The Policyholders operate hospitality businesses (restaurants, cafes, bars or public houses) in England. Each of them was at the material times insured with the Insurer on the terms of a DOA Package Insurance Policy Wording v1.2018 underwritten by DOA Underwriting Ltd on behalf of the Insurer. Insured Section 2 of the Policy includes various Extensions, the first of which is headed Denial of Access ("Extension 1").

2. The Policyholders all claim to have suffered loss within Extension 1 due to interruption of or interference with their businesses arising from the UK Government's orders or advice, issued at various times in 2020 and in response to the COVI-19 pandemic, regarding the closure or use of their premises. The Arbitration Agreement relates to a Coverage Dispute which has arisen as to whether and how far Extension 1 is capable of covering such loss. By the Arbitration Agreement the Parties agreed to refer the Coverage Dispute for arbitration in London before me as sole arbitrator.

3. The Coverage Dispute embraces two main issues: (1) whether and how far there may in principle be cover ("the Coverage Issue"); and (2) if there is cover, the meaning and

[1] Some 74 Policyholders are listed in Schedule 1, but the number may have reduced in consequence of a letter written by the Insurer in July 20121 indicating that individual Policyholders could withdraw from the Agreement, if any so wished.

effect of a provision stating the maximum amount payable under the Extension ("the Aggregation Issue"). A hearing was fixed and took place before me by remote means on 27 and 28 July, to address at this stage only the Coverage Issue. The Policyholders were represented by Mr Tom Weitzman QC and Mr Peter Radcliffe, instructed by FenchurchLaw and the Insurer was represented by Mr Gavin Kealey QC and Ms Sushma Ananda, instructed by DAC Beachcroft LLP.

4. Under the Arbitration Agreement, the Coverage Issue is to be determined in relation to a set of facts agreed between the Parties ("the Agreed Facts") and "to be based on the agreed facts documents produced as part of the *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* business interruption test case": [2020] EWHC 2448 (Comm) and [2021] UKSC 1 ("the *FCA* test case"). The Agreed Facts duly agreed between the Parties are annexed to and made part of this Award as Annex A. The Agreement provided for the possibility that "full agreement" might not be achieved on the facts, by permitting the Parties to advance further facts, which I might then determine and/or take into account as I thought fit. Full agreement was in the event achieved, so that this possibility does not arise. The Agreement also provided that there would be no obligation on the Parties to give disclosure and that no factual or expert evidence would be heard, and there has therefore been no disclosure and no such evidence. Further, pursuant to an agreed Objective to have the Coverage Dispute determined as soon as possible and in accordance with a target timetable set out in the Agreement, the Parties recognised the potential existence of other issues which could not be resolved in this arbitration. Consistently with this, my Award on issue (1) is to be declaratory in nature, and not give rise to any enforceable monetary award in favour of any Policyholder. The Agreement provides however that my Award "shall be final and binding on the Parties, and the [P]arties waive irrevocably their right to any form of appeal or review". The Arbitration Agreement provides by clause 8.1 that the Insurer "shall pay its own legal or other costs of the Arbitration, my fees and expenses, other costs and expenses of the Arbitration …., and the reasonable legal or other costs of the Policyholder" and by clause 8.2 that the Policyholders shall not be liable for any costs of the Arbitration.

The Policy

5. The Policy is identified in wording v1.2018 as consisting of "this document" (its various parts being then listed), together with "the *Schedule*, which provides details relating to this Policy, including which Insured Sections are operative, which Optional Extensions with the Insured Sections are operable, the Sums Insured or Limits of Liability and where any *Excess* applies", the Statement of Fact and any Additional Condition(s) and/or Endorsement(s) or clause designed as a 'Special Clause' and specified as attaching to this *Policy"*. The wording v1 2018 goes on to state that all these "together form one document and the agreement between *You* and the *Insurers*".

6. Wording v1.2019 starts with information about the Policy followed by further Sections headed Disclosure Notice, Cancellation, Data Protection, Complaints and Financial Ombudsman Service. There follow a General Insuring Clause and General Definitions, and then thirteen Insured Sections. The wording concludes with General Conditions, Claims Notification and claims procedures and General Exclusions.

7. The initial Section giving information about the Policy provides under the heading Interpretation, that:

> "in the *Policy*
> Words and expressions in *italics* which are given specific meanings in the General Definitions will have the same specific meaning each time they appear in this *Policy* (other than in Insured Section 12 Commercial Legal Protection);
> ….
> The headings are for reference only and shall not be considered when determining the meaning of this *Policy*."

8. Insured Section 1 is headed Property Damage All Risks, while Insured Section 2 is headed Business Interruption All Risks The basic cover provided by Insured Section 2 is:

> "against *Consequential Loss* arising from any *Incident* commencing during the *Period of Insurance* and not otherwise being excluded, subject always to the limits, terms, conditions and exclusions of Insured Section 2 and this *Policy*
> provided that
> at the time the *Incident* occurs insurance covering the interest of the Insured in the property at the premises loss, destroyed or damage is in force ….."

The italicised words are all defined policy terms, and "*Incident*" is in particular defined as meaning "loss of possession of or destruction of or damage to any *Building(s)* or other property or any part thereof used by the *Insured* for the purpose of the *Business*".

9. The Policyholders' claim is made under the first of fourteen Extensions to Insured Section 2. In order to consider the claim, it is necessary to set out this first Extension (headed Denial of Access), the second Extension (headed Disease, Infestation and Defective Sanitation and the eighth Extension (headed Terrorism), as well as General Exclusion 11 (also headed Terrorism). These read as follows:

> "**Extensions to Insured Section 2**
>
> Unless otherwise stated in the Schedule the following Extensions shall apply, subject always to the limits, terms, conditions and exclusions of Insured Section 2 and this *Policy*.
>
> **1 Denial of Access**
>
> Insured Section 2 is extended to include interruption of or interference with the *Business* in consequence of

a *Damage* to property in the vicinity of the *Premises* which prevents or hinders the use of the *Property Insured* or access to the *Premise*s (whether or not the *Property Insured* or the *Premises* suffers similar loss, destruction or damage), provided that the cause of such *Damage* is covered and not excluded under Insured Section 2;

b the closing down or sealing off of the *Premises* 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 *Premise*s competent local authority;

c the actions or advice of the Police or other competent local authority due to an emergency threatening life or property in the vicinity of the *Premises*;

provided that

i in the absence of *Damage* to property in the vicinity of the *Premises* this Extension does not apply to interruption of or interference with the Business lasting less than 24 (twenty four) hours;

ii the Indemnity Period with respect to this Extension will in no event exceed 31 (thirty one) days in the absence of Damage to property in the vicinity of the Premises;

iii the most that the *Insurers* will pay under this Extension is the amount entered in the *Schedule* against Extension 1 (Denial of Access) or £100,000 if no such amount is entered in the *Schedule*."

2 Disease, Infestation and Defective Sanitation

"Insured Section 2 is extended to include interruption of or interference with the *Business* commencing on the first day of any such interruption or interference in consequence of the occurrence at the *Premises*:

a of murder, suicide or food or drink poisoning;

b of a notifiable, human, infectious or contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition;

c of vermin, pests or defective sanitation;

d which causes restrictions on the use of the Premises on the order or advice of the competent local authority; or

e Damage covered and not excluded under Insured Section 2 to the drains or sanitary apparatus at the *Premises* which results in closure of the *Premises* for the *Business*.

The most that the Insurers will pay under this Extension is the amount entered in the Schedule against Extension 2 (Disease, infestation & defective sanitation) or, if no such amount is entered in the *Schedule*, £100,000.

Clarification of Notifiable Human Infectious or Contagious Disease Endorsement

It is hereby understood and agreed that for the purposes of the cover afforded by this Extension, the reference to a notifiable, human, infectious or contagious disease contained in paragraph **b** shall be deemed to mean solely the following diseases:

Diseases notifiable under the Public Health (Control of Disease) Act, 1984 or the Public Health (Infectious Diseases) Regulations, 1988, namely:

Acute encephalitis, Acute poliomyelitis, Anthrax, Cholera, Diphtheria, Dysentery, Food poisoning, Leptospirosis, Malaria, Measles, Meningitis, Meningococcal, Pneumococcal, Haemophilus influenzae, Viral, Other specified, Unspecified, Meningococcal septicaemia (without meningitis), Mumps, Opthalmia *[sic]* neonatorum, Paratyphoid fever, Plague, Rabies, Relapsing fever, Rubella, Scarlet fever, Smallpox, Tetanus, Tuberculosis, Typhoid fever, Typhus fever, Viral haemorrhagic fever, Viral hepatitis, Hepatitis A, Hepatitis B, Hepatitis C, Whooping cough and Yellow fever.
No other disease shall be added to the above list without the prior written consent of the Insurers."

…..

8 Terrorism

"General Exclusion 11 (Terrorism) shall not apply to interruption of or interference with the *Business* in consequence of

a access to the *Premises* being hindered or prevented as a result of
   i the closing down or sealing off of the *Premises*;
   ii the actions or advice of the Police or other competent local authority affecting land or property in the vicinity of the *Premises*

   in response to or to control, prevent or suppress any act of *Terrorism* by any person, other than the Insured or any director or partner of the *Insured* or any *Employee*;

b murder, suicide or food or drink poisoning at the *Premises* in connection with an actual or suspected act of *Terrorism*.

provided that

i this Extension does not apply to interruption of or interference with the *Business* lasting less than 24 (twenty four) hours;

ii the *Indemnity Period* will in no event exceed 31 (thirty one) days with respect to this Extension;

iii the most that the *Insurers* will pay under this Extension is the amount entered in the *Schedule* against Extension 8 (Terrorism) or £100,000 if no such amount is entered in the *Schedule*.

…….

General Exclusions

……

The following General Exclusions shall apply to all Insured Sections of this *Policy* unless stated otherwise.

The Insurers shall not be liable for:

….

11 Terrorism (not applicable to Insured Sections 7, 8 or 9).

"**If Insured Section 6 is included in this *Policy*, this exclusion is not applicable to Insured Sections 1, 2 or 3 and Insurance for *Terrorism* for Insurance Sections 1, 2 and 3 is in accordance with Insured Section 6**

A Loss, damage, injury, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any act of *Terrorism* regardless of any other cause or event contributing concurrently or in any other sequence to the loss; …..

Insured Section 6 (where included) covers a) *Damage* to *Property* caused by an *Act of Terrorism* and b) "*Consequential Loss* as provided for under Insured Section 2 (Business Interruption All Risks) arising or resulting from *Damage* caused by an *Act of Terrorism* … carried out in *Great Britain*". The Policy Schedule states inter alia that the limit of liability under each of Extensions 1, 2 and 8 is £100,000 (which is, I was told, a standard limit for such cover) and, at least in the case of the specimen put before me, that Section 6 Terrorism was "not insured".

The three sub-issues

10. On 5 March 2020 COVID-19 was made a notifiable disease and SARS-CoV-2 made a 'causative agent' in England by amendment to the Health Protection (Notification) Regulations 2010; and on 6 March 2020 the same followed for Wales by amendment of the Health Protection (Notification) (Wales) Regulations 2010. But no like addition was made to the list in Extension 2 for Policy purposes, this being a step which, under the terms of Extension 2, would have required the Insurer's prior written consent. The Policyholders' claim has therefore to be made good, if at all, under Extension 1. But the Policyholders submit that the existence and terms of Extension 2 have a bearing on the interpretation and scope of Extension 1.

11. The Policyholders' case is that Extension 1b) and c) are both capable of covering the present situation. I am not in this arbitration concerned with particular factual issues, but with the Policy's operation as a matter of principle. The Policyholders submit that there was a closing down or sealing off of their premises, that it was in accordance with instructions set out in Annex 1 to this Award and that such instructions were "issued by the Police or other competent local authority" within the meaning of Extension 1b). The same instructions constituted also actions or advice of "the Police or other competent local authority" which were "due to an emergency threatening life or property in the vicinity of the Premises" within Extension 1c). That the matters set

out in Annex 1 gave rise to substantial closing down of Policyholder premises is uncontroversial. That they also involved sealing off of such premises is more arguable, but of no apparent significance, as counsel for the Policyholders accepted. That COVID-19 constitutes in the abstract an emergency is also clear.

12. The three sub-issues between the Parties which are before me are (I) whether Extension 1 applies at all to a notifiable disease such as COVID-19, in circumstances when notifiable disease is one express focus of Extension 2, (II) whether if it applies at all to notifiable disease, it does so in circumstances where the notifiable disease is national, rather than localised, in scope and (III) whether the references to instructions issued by or actions or advice of "the Police or other competent local authority" are capable of embracing measures taken or advice given by central government. The Insurer argues for negative answers on all these three issues.

Principles of construction

13. The principles of contractual construction which govern these issues are not in doubt, although their application to particular contractual language and circumstances can give rise to difficulties and differences of view. The Supreme Court sought in it unanimous judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 to state the legal position authoritatively. It is worth citing extensively from Lord Hodge's judgment:

> "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. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> 11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). 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. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); 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: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

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: Arnold para 77 citing In *re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

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. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14. On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing.

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."

14. The reference to *Arnold* - the prior Supreme Court authority of *Arnold v Britton* [2015] UKSC 36; [2-15] AC 1619 - is relevant because that is an authority frequently relied on by those who, like the Insurer (in some respects) in this arbitration, submit that effect should be given for what they maintain is the natural, obvious or literal meaning of contractual language. In *Arnold v Britton* Lord Neuberger in particular emphasised seven points, the first and fourth of which are much cited. I set these out with some of the others:

"17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

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.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties."

15. These paragraphs from *Arnold v Britton* contain important truths which are however all consistent with and embraced within the overall encapsulation of the position to be found in the single unanimous judgment in *Wood v Capita Insurance Services Ltd*. The only further point that might be made about the first of Lord Neuberger's points in *Arnold v Britton* is that it appears to concentrate on situations of real contractual choice, 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" - even though that can hardly have been the position in *Arnold v Britton* itself. It is also unlikely to have been the position in relation to an insurance policy such as the present entered into on the Insurer's standard, detailed and complex policy wording.

16. In the particular context of business interruption insurance, the Policyholders cite the approach taken in the majority judgment of Lord Hamblen and Lord Leggatt in the *FCA* test case"

"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."

17. The Policyholders are also able to seek to draw assistance from this passage in the judgment of the majority in the *FCA* case:

"In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, para 59). 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."

18. The 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.

19. A reasonable policyholder will however appreciate, from the briefest glance at a wording such as the present, that it is not all one way. There are significant qualifications and much can only be understood and applied by reasonably careful reading. The Policyholders themselves also underline the potential importance for the purposes of the present dispute of "the background knowledge which would reasonably have been available to the parties when they entered into the contract", adding that this

> "will include the legal context and this will be the case irrespective of whether or not the relevant law is actually known to them. It is common ground in the present case that the statutory background and, in particular the various statutory provisions dealing with the closing or sealing off of premises and emergencies, are part of the reasonably available background to the relevant Extensions to Insured Section 2.

A range of legislation, primary and secondary, comes potentially into consideration by virtue of this common ground, and it will be necessary to consider to what extent it can be seen as throwing light on the reasonable person's or reasonable Policyholder's understanding of the scope and meaning of the present Policy.

20. The Parties' submissions also raise the question how far the principle *contra proferentem* might, in any case of real doubt, operate to determine the meaning of the Policy in whatever sense could be identified as most favourable to the Policyholders. Although the principle continues to exist, Lindley LJ stated as long ago as in *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, 456 that

> "this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty"

His words were cited with approval in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57, [6], where the Supreme Court saw no ambiguity justifying invocation of the principle. The relevance or usefulness of guides to construction of this sort has probably also diminished with the explicit development over recent decades of the approach to construction described in *Wood v Capita Insurance Services Ltd* (as well as *Impact Funding* itself). However that may be, *contra proferentem* is a rule of last resort, to be applied only in a case of real ambiguity, and

not one which in the event has in my view any relevance in the present case. I consider that it is possible here to arrive at clear views on the key issues of construction.

The three issues in detail

(I) Does Extension 1 apply at all to disease, in circumstances when this is the or an express focus of Extension 2?

21. The Insurer's submission is that the Parties cannot reasonably be taken to have intended Extension 1b) or c) to afford cover, in circumstances otherwise falling within those clauses, where the instructions, actions or advice leading to the business interference or interruption were given because of a disease notifiable under the legislation identified in Extension 2. The Insurer relies on the fact that Extension 2 only covers any notifiable disease occurring "at" the Premises, and only covers a closed list of notifiable diseases to which any addition for Policy purposes requires the Insurer's prior written consent - not here given in respect of COVID-19. It would, the Insurer submits, considerably widen the intended cover, if a Policyholder could rely under Extension 1b) on an unlisted notifiable disease leading to Police or competent local authority instructions "closing down or sealing off" the Premises or property "in the vicinity of the Premises", or under Extension 1c) on such a disease as an emergency threatening life or property in the vicinity of the Premises when followed by Police or competent local authority actions or advice, leading in each case to business interruption or interference. Extension 2 is, the Insurer submits, a clause specifically addressing notifiable disease. In the light of the carefully crafted wording of Extension 2, the Insurer submits that the parties cannot have intended different and potentially wider cover in respect of notifiable diseases under Extension 1.

22. Extension 1 is, in short, a more general clause which Extension 1 must displace where a notifiable disease is an element of the insured peril. The Insurer cites in this last connection the Irish Supreme Court decision in *Welch v Bowmaker (Ir) Ltd* [1980] 1 IR 251, 254-255, where Henchy J, in a judgment carrying majority approval, held that general words dealing differently with a particular situation "will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the specific situation". That was, he went on: "but a commonsense way of giving effect to the true or primary intention of the draftsman, for the general words may have been used in inadvertence of the fact that the particular situation has already been dealt with". .

23. The Policyholders rely on the discussion of the relevant principle in Sir Kim Lewison's work on The Interpretation of Contracts (7th ed), at para. 7.46 onwards, and in particular on the citation there of David Steel J's dictum in *The Eternity* [2009] 1 Lloyd's Rep 107, to the effect that:

> "Whilst it is correct that in the face of a conflict between provisions the more specific and tailored provision should prevail, such only arises if the conflict is clear and direct".

Sir Kim Lewison's own summary of the principle may go somewhat wider in indicating the "specific provisions will be given greater weight than general provisions" where the facts fall within their scope, and in stating that the one particular application of the principle is where a general or subsidiary clause would, on one reading, significantly detract from a benefit apparently conferred by another principal clause.

24. Here, however, there are 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. The Policyholders also point out that the Insurer's case accepts, necessarily, that there is no express exclusion of any notifiable disease from the scope of the perils embraced by Extension 1; and that it assumes that, read by itself, the wording of Extension 1 would be engaged, at least to some extent, by the circumstances of the Policyholders' claims arising from the COVID-19 pandemic. There are examples in the Divisional Court's judgment showing how easy it would have been to fashion an express exclusion, whether by reference to infectious disease generally (paragraph 354, setting out EIO wording) or specified diseases (paragraph 448, RSA 2.1 wording). There is no certainty which approach might have been adopted. A clause of the former nature could have assisted the Insurer. A clause of the latter nature would almost certainly have not done so - since COVID-19, being largely unforeseen as such, would in practice not have been specified. The Policyholders' case is that the Insurer is, in substance, seeking to introduce a clause of the former nature, without express or implied wording to justify this.

25. The Policyholders also point out that the drafting of Extension 2 is far from perfect. In this regard, for example, sub-paragraph d) is not a further head of cover, but a qualification on the cover afforded by the first three sub-paragraphs. The Policyholders could also have pointed out that the relationship between sub-paragraph e) and the opening three lines of Extension 2 is less than coherent or grammatical. In addition, the list of notifiable diseases includes "Viral. Other specified, Unspecified", which is incoherent, as well as Food poisoning, which duplicates cover afforded under Extension 2a). I do not however find much if any assistance in this on the present issue.

26. When considering both Extensions 1 and 2 and their sub-paragraphs, it is clear that there is a considerable potential for duplication. Closing down or sealing off of premises on the instructions or advice of the Police or other competent local authority may be due to collapse of a neighbouring property and fall within Extension 1a) as well as 1b), or coincide with an emergency and so fall within Extension 1b) as well as 1c). In relation to occurrences at the Premises, there are also situations in which Extensions 1 and 2 may overlap. Thus reason for a closing down or sealing off within Extension 1b) may, on the face of it, also be a murder, suicide, or food or drink poisoning within Extension 2a), which (as already pointed out) overlaps as regards food poisoning with Extension 2b). It is also possible to conceive of a closing down or sealing off of premises by reason of the detection at them of vermin, pests or defective sanitation within Extension 2c). It is somewhat unclear whether the Insurer's case

would mean that any event falling within, or involving a significant element falling within, Extension 2 is by implication excluded from cover under Extension 1. Whatever Insurer's case on that, the position is that the Policy could have made clear the interrelationship between Extensions 1 and 2, by excluding from Extension 1 all or any aspect of the perils to which Extension 2 refers, but it does not do this. In contrast, Extension 1b) does list a number of exclusions - 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 or the Insured's non-compliance with a prior order of the Police or other competent local authority". The absence of any exclusion by reference to notifiable disease or to all or any perils, or elements, identified in Extension 2 is in this light notable.

27. Extensions 1 and 2 therefore stand side by side, addressing, as I have noted, a number of potentially overlapping situations or situations with potentially overlapping elements. It is true, as the Insurer points out, that Extension 2 is strictly limited to occurrences "at the Premises" and to the listed notifiable diseases, while Extension 1b) ranges wider in that the closing down or sealing off may be of the Premises or of property in the vicinity and may not be due to an occurrence at the premises, and Extension 1c) requires only an emergency threatening life or property in the vicinity of the Premises. But closing down, sealing off and an emergency are all specific elements required under Extension 1, but not necessarily required in order for cover to exist under Extension 2 consequent on the occurrence of a notifiable diseases at the Premises. The existence of a potential overlap of some of the elements relevant to cover under the provisions of these two specific and differently worded Extensions factors does not to my mind mean that any particular provision in one such Extension must apply to the exclusion of any other.

28. For all these reasons, I cannot regard Extension 2 as a specific provision which precludes reliance on Extension 1 in circumstances otherwise within that Extension. Both Extension 1 and Extension 2 must be allowed to operate according to their respective terms, whether they contain elements which potentially overlap or not. There is no implied exclusion under Extension 1 even in respect of notifiable diseases covered under Extension 2 (which would not assist the Insurer), still less in respect of COVID-19 which was not specified under Extension 1.

29. I should mention briefly a further argument advanced by the Policyholders by reference to General Exclusion 10 in support of their case that Extension 1 was or must be read as positively including notifiable disease. General Exclusion 10 excludes Pollution or Contamination from Insured Sections 1 to 6 and 10. Pollution is defined to refer to the actual, alleged or threatened discharge, release or escape of or clean up, treatment or costs relating to Pollutants, but "Legionellae bacteria are deemed not to be pollutants for the purposes of this Policy". This, it is submitted, means that the consequences of legionnaire's disease and Pontiac fever must have been intended to be covered, and the only place where such cover may be found is Extension 1. The answer suggested by counsel for the Insurer is that legionellae bacteria only enter water systems and give rise to disease where there is some physical damage to plumbing

systems, in which case Insured Section 1 would apply. The cogency of this answer was not explored, and I do not propose to do so on my own. But the answer does at least suggest one possible (even if not exclusive) situation in which legionnaire's disease could be involved in a claim under the main wording of Insured Section 1, without Extension 1 being involved, and that may be sufficient for the Insurer on this point. In any event, the Policyholders' argument by reference to General Exclusion 10 appears to me to place excessive weight on detailed Policy provisions and remote (albeit if they occur, then for those in the hotel and like business, very important) contingencies far removed from the central area of focus under this Policy. If the Policyholders were (contrary to my view) otherwise wrong on the present sub-issue, I do not think that this particular tail could by itself wag the dog.

30. For the other reasons given, I do however accept the Policyholders' central thesis, namely that it is not possible to read Extension 2 as impliedly controlling and limiting the cover otherwise available under the working of Extension 1. The two Extensions sit side by side, each affording specific cover in different terms in a number of situations involving some potentially overlapping elements.

(II) If Extension 1 can apply in situations of notifiable disease, does it do so where the notifiable disease is national, rather than localised?

(a) General analysis

31. The Insurer submits that the language of both Extensions 1 and 2 demonstrates an intention to provide only "localised" cover. By this, the Insurer means that these Extensions are incapable of responding to a countrywide, let alone an international pandemic, attracting "indiscriminate, ….. central Government action", as opposed to a local event or incidents. As the kind of local event in mind, the Insurer instances a disturbance, unexploded bomb or bomb scare, gas leak or building collapse. The immediate question which the Insurer's case faces is: where is the concept or requirement of a localised peril to be found, if and so far as this is not expressly spelled out in the wording of the Extensions? If and so far as their wording does contain local elements as a requirement of cover, those elements must of course be present before cover can exist. The Insurer's response is that the concept or requirement of localisation is inherent or implicit in the context and wording of the Extensions.

32. Both Extensions 1 and 2 unquestionably refer to and, if cover is to exist, require the existence of certain local elements. Thus, italicising the relevant words: Extension 1a) applies only to "damage to property *in the vicinity of the Premises* which prevents or hinders the use of *the Property Insured or access to the Premises*"; Extension 1b) is limited to "the closing down or sealing off of the Premises or property *in the vicinity of the Premises*" and Extension 1c) is limited to circumstances where there is "an emergency threatening life or property *in the vicinity of the Premises*"; Extension 1b) and 1c) also involve instructions, actions or advice of "the Police or other competent *local* authority" (although under sub-issue (III), it will be necessary to consider whether this means that the relevant body must be local or simply that it must have authority over the locality); as to Extension 2, so far as material, all the perils listed must occur "*at the Premises*"; again, Extension 2a), b) and c) all involve instructions,

actions or advice of "the Police or other competent *local* authority", while Extension 2e) involves "closure *of the Premises* for the Business".

33. The Policyholders accept that on a proper construction of the Policy:

    a. the word "'vicinity' connotes the neighbourhood" - though they deny that it 'implies an immediacy of location'; and
    b. "the entirety of the UK, or of any of the four nations of the UK, cannot be described as in the 'vicinity' of any particular named Premises".

    The distinction between "the neighbourhood" and "immediacy of location" is on any view a very fine one. The Divisional Court in fact said at para 466 that "it seems to us that the undefined term 'vicinity' in itself connotes an immediacy of location". If there is a distinction to be drawn, it is not one which is, I consider, going to dictate the outcome of this case.

34. Save for Extension 1b), all the perils insured involve some form of incident or event at or near the premises, and, although not directly stated, any closing down or sealing off of the Premises or property in the vicinity of the Premises would, at least very commonly, be the result of such an incident or event. The Insurer submits that, despite the omission of any express requirement to that effect, Extension 1b) can and should be read in context as also aimed at and depending on a similar local incident or event. In short, the other provisions of Extensions 1 and 2 colour Extension 1b) it, and limit it by association to localised events. The Insurer cites in this connection the discussion under the heading "Meaning is known by context" of the principle *noscitur a sociis* in Sir Kim Lewison's work on *The Interpretation of Contracts* (7th ed), paras. 7.147 onwards. At para 7.151 there is this passage:

    "It was once thought to be necessary to identify a common characteristic of the surrounding words. As Diplock LJ put it in *Letang v Cooper* [1965] 1 QB 232, 247:

        "The maxm *noscitur a sociis* is always a treacherous one unless you know the *societas* to which the *socii* belong."

    But the modern approach to contractual interpretation will always interpret a word or phrase in context, whether or not it forms part of a common class"

35. The Insurer also submits that the context in which the Policy must be understood extends to and includes the summaries of cover afforded contained in Policy Summary and Key Benefits documents. In describing "some of the key benefits of our new Package insurance policy that are not found in most other policies", the Key Benefits document says:

    "**Unable to trade** - there have been many recent examples of retail businesses being unable to trade and unable to claim on their business insurance following an incident nearby. Our new loss of income cover extends to include circumstances where your

business cannot trade due to access being restricted or closed off by the Policy or other competent local authority".

The Policy Summary states under the heading "Key features":

"The following extensions relate to interruption or interference caused by *Damage* away from the *Premises*

1. Denial of Access (where use of the *Premises* is hindered or prevented as a result of an incident at nearby property).
2. Loss of attraction ….
3. ...Property stored …., [etc]

Additional extensions relate to interruption or interference at the Insured's *Premises* whether or not loss, destruction or damage is the cause

1. Disease, Infestation and Defective Sanitation
2. Public Utilities ….."

36. The Key Benefits document states that "Full details on the cover provided are available in our Policy Wording which is issued with every quotation or available upon request", while the Policy Summary states at its outset that:

"This document is a summary only and does not set out the full terms and conditions of the contract of insurance. For full terms and conditions of this Package Insurance Policy, please refer to the policy document, a copy of which is available on request."

Neither the Key Benefits nor the Policy Summary document constitutes part of the Policy as defined at its outset (see paragraph 5 above).

37. The Insurer's submission is that, although not part of the contract, these documents are part of the available context, and "would have affected the way in which the language of the document would have been understood by a reasonable man" (citing Lord Hoffmann's language in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913). This assumes that the Key Benefits and/or Policy Summary document were actually made available to individual Policyholders, which is not admitted and not before me for decision. But, even assuming that one or both were, their weight as part of the background context appears to me negligible. Both point to the Policy as the definitive statement of cover. The (different) points which each highlight are only briefly, incompletely and to some extent inaccurately stated. So much so that, even if regard is had to them, they cannot, in my opinion, safely be relied upon as illuminating the genesis, aim or significance of the detailed wording of the Extensions, which wording is what actually binds the Parties contractually. Thus, for example, the statement in the Key Benefits document, set out in paragraph 35 above, conflates the cover afforded by Extension 1a), b) and c), refers only to circumstances of "Police or other competent local authority" intervention, upon which cover under Extension 1a) does not depend, and introduces the concept of "access being restricted", which does not fit under Extension 1b) with

the need for "closing down or sealing". Similarly, in the Policy Summary Key Feature no. 1, Denial of Access, also set out in paragraph 35 above, only comes anywhere near reflecting the actual language of Extension 1a), while the reference to an Additional extension relating to Disease, Infestation and Defective Sanitation comes nowhere near reflecting the language of Extension 2, except for its heading, which the Policy states "shall not be considered when determining the meaning of this *Policy*".

38. The Insurer's further citation of Riley on *Business Interruption Insurance* (10th ed), para 10.34 is, to my mind, of no real assistance in the exercise of construction of the present Policy. Riley cites a clause covering business interruption or interference in consequence of access to property being hindered or denied due to its being occupied by terrorists, or unlawfully occupied by third parties, or "closed down or sealed off in accordance with instructions issued by the Police or any other statutory body …." or being "thought to contain or actually containing an explosive device". Riley says that "Whilst this extension was initially a reaction of the market to the issue of bomb hoaxes, it is not difficult to see that other events could activate cover under the extension." That is clearly so, and I find the passage is of no assistance in the construction of the present different Extensions.

(b) Particular wordings

39. Real impetus to the Insurer's case regarding "localised" cover comes however from the Divisional Court's judgment in the *FCA* test case, on policy provisions not directly appealed to the Supreme Court, as well as from the even more recent Irish High Court judgment of McDonald J in *Brushfield Limited (t/a The Clarence Hotel) v Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company* [2020] No 4034 P.

(i) Hiscox

40. The Divisional Court addressed at paragraphs 390 to 502 various non-damage denial of access ("NDDA") clauses which it held to confer only "localised" cover. The first wording, a Hiscox wording, considered by the Court provided cover only in respect of "an incident occurring …. within a one mile radius of the insured premises". The Court regarded an incident as equivalent to an event, and not synonymous with "emergency" or "danger". It held that it was "a misuse of language both generally and on the correct construction of the NDDA clause to describe the pandemic as 'an incident' let along 'an incident occurring …. within a one mile radius of the premises'" (paras 404-405) .

(ii) MSA

41. The Court went on (paras 419 et seq) to consider three MSA policy wordings. The first (MSA 1) provided interruption or interference cover "following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises where access will be prevented". The second (MSA 2) provided such cover for interruption "caused by an incident within a one mile radius of your premises which results in a denial of access or hindrance in access to your premises". The third (MSA 3) provided such cover for interruption or interference because of (a) damage to property in the vicinity of the premises which will prevent or hinder the use of the premises or access thereto, and (b) action by a competent public

authority following threat or risk of damage or injury in the vicinity of the premises or access to them". The Court held all these wordings to involve narrow localised cover. It read the conjunction of "danger or disturbance" in MSA 1 as demonstrating this in the case of the first: paragraph 436. It read the word "incident" in MSA 2 as having the same limited meaning as under the Hiscox wording already considered: paragraph 438. In relation to MSA 3, it said with reference to the words "in the vicinity of the premises" that:

> "444 …. Although 'vicinity' is an elastic concept, in ordinary usage it connotes neighbourhood and, contrary to the FCA submissions the entire UK is not in the vicinity of any insured premises. This is narrow, localised cover and, even if an insured could demonstrate that the government advice or Regulations had caused a hindrance of use of the insured premises, there could only be cover if the insured could also demonstrate that it was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to the country as a whole, which led to the action of the government in giving the advice and imposing the Regulations. As with the AOCA clause, it is highly unlikely that that could be demonstrated in any particular case. Also, as with that clause, since this is narrow localised cover, the wider issues of causation and counterfactuals which arise in other contexts, do not arise."

However, the Divisional Court's reasoning in relation to the Hiscox and MSA wordings was closely focused on their actual language ("danger or disturbance in the vicinity"; "incident within a one mile radius"). That language is, self-evidently, different and is in my opinion distinguishable without difficulty from the Policy wording before me.

(iii) RSA 1 and RSA 2

42. This is not so obviously the case with the next three two wordings (RSA 2.1, 2.2 and 2.4) considered in this context by the Divisional Court at paragraphs 445 et seq. RSA 2.1 covered

> "the actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders access to the Premises".

There was an exclusion of any loss as a result of specified diseases (COVID-19 not being so specified). RSA 2.2 was similar, save that the exception read "as a result of any infectious or contagious disease any amount in excess of £10,000". The insurer RSA accepted that the government's actions or advice were by a "competent Public Authority" and also that "the COVID-19 pandemic was a general public health 'emergency'" (paragraph 456). But the Court, in this context also, treated "the requirement that the 'emergency' ('danger' in the MSA 1 AOCA clause) be 'in the vicinity of the Premises'" as "a clear indicator that this is a narrow, localised form of cover, the paradigm example of which would be the police cordoning off an area in

which the insured premises are located because of intelligence that materials for bomb-making were located in that area ….” (paragraph 466). The Court continued:

> “466 …. It does not seem to us that the fact that, unlike the MSA 1 AOCA clause, this clause also encompasses hindrance and use, in any sense requires an expansion of the geographical limitation on its scope. As we have already said, however elastic the concept of "vicinity" it connotes neighbourhood, the area surrounding the premises. The FCA submitted in relation to the insurers' submissions on the meaning of "in the vicinity" generally that they involved reading in the word "immediate" before "vicinity" but we do not accept that criticism, as it seems to us that the undefined term "vicinity" in itself connotes an immediacy of location. What "in the vicinity" means in any particular case may depend upon the nature of the "emergency" and the facts of the case. However, contrary to Mr Edelman QC's submissions, and at least in the absence of a special definition of the term, as in RSA 4, we do not consider that the entire country can be described as in the vicinity of the insured premises on the wording of this policy. It follows that the government action and advice in response to the national pandemic cannot be said to be due to an emergency in the vicinity, in the sense of in the neighbourhood, of the insured premises.
>
> 467. There could only be cover under this wording if the insured could also demonstrate that it was an emergency by reason of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to the country as a whole, which led to the actions or advice of the government. As with the AOCA clause and the MSA 3 wording, it is highly unlikely that that could be demonstrated in any particular case. Also, as with that clause, since this is narrow localised cover, the wider issues of causation and counterfactuals which arise in other contexts, do not arise.”

I note that, under the language of RSA 2.1 and 2.2, it was the emergency that was identified as having to occur in the vicinity of the Premises, whereas under Extension 1b) it is only the Premises or property in their Vicinity that have to be closed down or sealed off (in accordance with Police or competent local authority instructions).

(iv) RSA 4

43. Under the language of RSA 4 (differently worded from RSA 2.1 and 2.2) it was likewise only “the actions or advice of…governmental authority” that had to occur “in the Vicinity of the Insured Locations” and so to prevent or hinder the use of or access to Insured Locations during the Period of Insurance. This language was, therefore, capable of giving rise to cover in some scenarios: see the Divisional Court judgment at paragraphs 468-472. More particularly, RSA 4, in language set out by the Court in paras 451-452, gave cover as follows:

> “In the event of interruption or interference to the Insured's Business as a result of:…
> …

xii. Prevention of Access – Non Damage during the Period of Insurance where such interruption or interference is for more than eight (8) consecutive hours…
within the Territorial Limits, the Insurer agrees to pay the Insured the resulting Business Interruption Loss."

The term "Prevention of Access-Non Damage" is defined in Definition 87:

"i. the discovery of a bomb or similar suspect device or the threat, hoax or deceptive information of a bomb or similar suspect device … in the Vicinity of the Insured Locations;
ii. the actions or advice of the police, other law enforcement agency… governmental authority or agency in the Vicinity of the Insured Locations; … and/or
iii. the unlawful occupation of … other property in the Vicinity of the Insured Locations by any individuals …
which prevents or hinders the use of or access to Insured Locations during the Period of Insurance."

"Vicinity" was defined very extensively to mean
"an area surrounding or adjacent to an Insured Location in which events that occur within such area would be reasonably expected to have an impact on an Insured or the Insured's Business."

44. Earlier in its judgment, at paragraphs 137 and 304, the Divisional Court had accepted that, in contrast with its effect in other wordings, this definition of "Vicinity" meant that "in relation to a disease such as COVID-19, an extensive area, possibly embracing the whole country, can be regarded as the relevant Vicinity for the purposes of this wording": paragraphs 137 and 304. But this was not critical to the Court's judgment regarding the scope of the Prevention of Access cover, as appears from the italicised words in the Court's following reasoning:

"471 …. [The insured peril] involves three interlinked elements: (i) "interruption or interference to the Insured's Business as a result of (ii) the actions or advice of…governmental authority…in the Vicinity of the Insured Locations (iii) which prevents or hinders the use of or access to Insured Locations during the Period of Insurance." In other words, as in the case of many of the other wordings we are considering, this is a composite peril. However, what is strikingly different about this wording is that it does not require that the actions or advice of the government are "following" or "due to" an "emergency" or "danger" in the vicinity of or within a particular radius of the insured premises. All that it requires in entirely general terms is that the actions or advice of the government are "in the Vicinity of the Insured Locations." *Even without the extended definition of "Vicinity" in the RSA wording*, we consider that the actions or advice of the government, taken nationally and affecting all insured businesses will inevitably be in the vicinity of the insured premises if they lead to prevention or hindrance of use or access of the insured premises. It is no answer for RSA to say that the actions or advice also affected a

substantial number of other insured premises elsewhere. Nowhere in this wording is there any limitation of qualifying actions or advice of government to such actions or advice specific to the insured premises or their vicinity.

472 Accordingly, we consider that in principle there will be cover available under this wording in a number of scenarios. Where insured premises closed in response either to government advice from 20 March onwards or to the Regulations, there will be a prevention of access and/or use from the moment of closure. What RSA describes as the Social Distancing Measures, beginning with the Prime Minister's advice on 16 March, could also be said to amount to hindrance of use of insured premises. ….".

(v) Zurich

45. The final wording in this sequence considered by the Divisional Court was the Zurich wording, which echoed that of MSA 1, and led to observations by the Court similar to those made in relation to MSA 1. In short:

"500 … the overall phrase "a danger or disturbance in the vicinity of the Premises" contemplates an incident specific to the locality of the premises rather than a continuing countrywide state of affairs.

501 Accordingly, on the true construction of the Zurich AOCA clause, the government action in imposing the Regulations in response to the national pandemic cannot be said to be following a danger in the vicinity, in the sense of in the neighbourhood, of the insured premises.

502 Even if there were a total closure of insured premises pursuant to the Regulations, there could only be cover if the insured could demonstrate that it was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to in the country as a whole, which led to the action of the government in imposing the Regulations. It is highly unlikely that that could be demonstrated in any particular case. The narrow, localised nature of this cover means that the wider issues of causation and counterfactuals, such as we have discussed in relation to the Arch, EIO and RSA 4 wordings above and such as we discussed earlier in relation to the so-called "disease clauses" do not arise."

(vi) Brushfield

46. In the Irish case of *Brushfield*, McDonald J reached a similar conclusion in respect of a NDDA clause affording cover in respect of business interruption or interference

"where access to your premises is restricted or hindered for more than 24 hours arising directly from

1. The actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises
2. The unlawful occupation of your premises by third parties".

McDonald J held that central governmental actions were not covered.

(c) The Divisional Court's reasoning

47. In relation to each of the wordings in paragraphs 40 to 45 above on which the Divisional Court gave rulings not appealed to the Supreme Court, as well as in *Brushfield* (paragraph 46 above), the Court focussed closely on the precise wording of the relevant policy, and drew from its specific terms a conclusion as to whether or not the cover afforded related to local risks or extended to a countrywide pandemic. The words "incident", danger or disturbance" and "emergency in the vicinity of the Premises" were all read as indicating that cover was in respect of some localised development. It was otherwise where "vicinity" was effectively defined to embrace the country at large, and, even without that consideration, where the peril insured related to "the actions or advice of a governmental authority or agency in the Vicinity of the Insured Locations", without indication that there need be any danger, disturbance or emergency in that Vicinity: see paragraph 471 of the judgment, cited in paragraph 44 above. It was" no answer" for the insurer "to say that the actions or advice also affected a substantial number of other insured premises elsewhere": see paragraph 471. It is noticeable that the Court reached this conclusion under clause ii of the Definition of Prevention of Access-Non Damage (see paragraph 44 above), even though clauses i and iii of the Definition did identify perils of that sort (discovery of a bomb or unlawful occupation) within the Vicinity of the Premises.

(d) The position under Extension 1b)

48. Appling the same methodology as the Divisional Court to the present Policy wording, I am unable to see any basis for reading Extension 1b) down generally so that it only operates in respect of a localised danger, disturbance or other peril leading to the closing down or sealing off of the Premises or property in the vicinity of the Premises in accordance with instructions issued by the Police or other competent local authority. No doubt such a closure or sealing off will often be because of a localised peril, but there is nothing in Extension 1b) to require or imply this to be so, or to exclude cover when the Police or other competent local authority take action in response to a countrywide pandemic. If the cover afforded by Extension 1b) is in any sense "localised", this must be not because the danger, disturbance or other like peril involved has to be local, but because this is a very likely, though not inevitable consequence of the requirement that the instructions given to address it are "issued by the Police or other competent local authority". That is a different, though associated, point to which I will come as sub-issue (III).

(e) The position under Extension 1c)

(i) The rival cases

49. The position in relation to Extension 1c) is more complex. The Policyholders and the Insurer analyse the cover provided by Extension 1c) very differently. The Policyholders' primary case, as put in oral submissions, is that Extension 1c) covers business interruption loss in consequence of actions or advice of the Police or other competent local authority due to an emergency, which emergency must also have the

characteristic that it threatens life or property in the vicinity of the insured premises (but may also threaten life or property more widely) (Day 1/116-117). The Insurer's case is that the relevant actions or advice must be due to an emergency in the vicinity of the Premises threatening life or property in the vicinity (although the Insurer accepts that there may at the same time be an emergency of the same kind outside the vicinity threatening life and property there) (Day 2/84-95). While it would be possible in fact for an emergency outside the vicinity to threaten life or property within the vicinity, the Insurer submits that the Divisional Court has ruled out such a construction (Day 2/92).

50. In this light the Insurer developed two particular propositions: First, the mere existence of a national pandemic does not itself mean that there was an emergency in every locality. The Insurer stresses that its case does not involve the proposition that the emergency must *only* be in the vicinity. But the Policyholder has to prove an actual emergency in the actual locality by reference to which its claim arose. In response, the Policyholders accept that it might be going too far to suggest that, merely because there was a national pandemic, there was an emergency or threat to life in every locality - while describing it as a pretty unpromising question of fact for the insurer in the light of the COVID-19 pandemic (Day2/171-172).

51. The Insurer's second proposition is that, even given an emergency in the vicinity, the Policyholder insured still has to prove that any business interruption loss flowed from the emergency in the vicinity, rather than from, for example, the more widespread consequences of a national pandemic. The Insurer submits that it is important in this connection to distinguish business interruption insurance under Disease or Hybrid clauses from business interruption insurance under NDDA and like clauses. The nature of disease means that outbreaks are likely to elicit a response which is more widespread than local. The scope of cover and the operation of causation under Disease and Hybrid clauses both need to be seen in that light.. Clauses, like Extension 1b), expressed to relate to local occurrences and not specifically directed at disease, do not involve that consideration.

(ii) Insurer's reliance on the Divisional Court reasoning

52. Both the Insurer's propositions rely heavily on and correspond closely with reasoning and the decision of the Divisional Court on policies RSA 2.1 and 2.2 (see paragraph 42 above). Apart from the use of the different phrase "a competent Public Authority", the wording of policies RSA 2.1 and 2.2 appears, effectively, the same as that of Extension 1c). If I take, without more, the Divisional Court's approach in paragraphs 466 and 467 of its judgment to wordings RSA 2.1 and 2.2, the Policyholders' claim under Extension 1c) would therefore appear to face very considerable difficulty. The cover in policies RSA 2.1 and 2.2 was in respect of "actions or advice …. due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders access to the Premises" (paragraph 42 above). Its limitation as "a narrow, localised form of cover", as held by the Divisional Court, cannot have derived from the source of the actions or advice: in contrast with the present Policy, the wording of RSA 2.1 and 2.2 covered these if issued by "a competent Public Authority";

and it was, understandably, accepted by RSA that action or advice by the government on matters of public health satisfied this requirement: paragraph 456. On the Divisional Court's approach, the Policyholders would have therefore to demonstrate that it was

> "an emergency by reason of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to the country as a whole, which led to the actions of the government".

The Divisional Court thought it "highly unlikely" that this could be shown.

53. Every contract has its own background and terms, but the key wording in Extension 1c) of the present Policy appears, as stated, to be effectively indistinguishable for present purposes from that of RSA 2.1 and 2.2. It is also difficult to see any material distinction in background considerations. Sitting as an arbitrator, I must regard the Divisional Court's approach to the NDDA clauses as being, at the very least, highly persuasive, in so far as it does not appear to have been questioned or challenged on appeal. On the basis that construction is a matter of law, and there is no discernible difference in wording or context, it may even, on the face of it, bind me.

54. That is subject to, first, the relevant point having been squarely argued and decided in the Divisional Court and, second, the Supreme Court's judgment. As to the first point, it is clear from the second sentence of paragraph 466 of the Divisional Court's judgment (set out in paragraph 42 above) that counsel for RSA relied heavily on the phrase "in the vicinity of the Premises" as an indication of narrow, localised cover. The Divisional Court's reasoning for accepting this submission is worth close examination. In the first sentence of paragraph 466, the Divisional Court treated the wording of RSA 2.1 and 2.2 as analogous to that of MSA 1. The wording of MSA 1 covered police or other intervention "following a danger or disturbance in the vicinity of the premises". The relevant danger is thereby expressly required to be in the vicinity of the premises. The wording of RSA 2.1 and 2.2 was not identical. It spoke of "an emergency likely to endanger life or property in the vicinity of the Premises". Likewise, Extension 1c) requires the relevant intervention to be "due to an emergency threatening life or property in the vicinity of the premises".

55. On the face of it, the wording of RSA 2.1 and 2.2 and of Extension 1c) leaves open for consideration whether cover extends to an emergency outside the vicinity threatening life or property within the vicinity. Against the relevant statutory background, one might expect it to do so. The duties on local authorities under, for example, the Civil Contingencies Act 2004 (see paragraph 79 below) would appear to require them to take such steps as they could to advise and to counter adverse effects within their locality, even if, the emergency being outside their locality, they could not be expected to prevent it. It is unclear how far the RSA argued this point before the Divisional Court, and this was not investigated before me. A requirement that the emergency be in the vicinity of the premises was however central to the Divisional Court's reasoning at the end of paragraph 466 and in paragraph 467.

(iii) The Supreme Court's reasoning

56. Second, although there was no appeal in respect of RSA 2.1 and 2.2, I find the Supreme Court's analysis of the operation of other wordings, and particularly its analysis of the correct approach to causation, hard to reconcile with the analysis of RSA 2.1 and 2.2 adopted by the Divisional Court in paragraphs 466 and 467. The Insurer accepted that the Insurer's second proposition is one of causation, which is in this context and as the Supreme Court emphasised a matter of construction (Day 2/97-102). Paragraphs 466 and 467 of the Divisional Court's judgment indicate that it was the Court's view of the causation required that ultimately dictated the likelihood of recovery under the relevant wordings. The Supreme Court held that the Divisional Court had erred in significant respects in its understanding of the operation of causation under other policy wordings before it. As I read its judgement, the Supreme Court also thought that its understanding would, at least prima facie, carry through generally into other wordings.

57. The starting point is the Disease clause in RSA 3 on which, in Section V of its judgment (paragraph 48 et seq) the Supreme Court focused initially (and the analysis of which informed the Court's construction of other sample Disease clauses). Extension vii(a) of RSA 3 afforded cover in respect of business interruption or interference "following a) any i) occurrence of a Notifiable Disease (as defined below) at the Premises …; iii) occurrence of a Notifiable Disease within a radius of 25 miles of the Premises". The Divisional Court interpreted this clause as providing cover for the business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance, within the specified radius, from the time of that occurrence (paragraph 102 of its judgment; and see paragraph 55 of the Supreme Court majority judgment). The Supreme Court rejected this interpretation at paragraph 58, seeing no way in which "the words 'any … occurrence of a Notifiable Disease within a radius of 25 miles of the Premises' can be read as meaning 'a Notifiable Disease of which there is any occurrence within a radius of 25 miles of the Premises'" (Supreme Court's emphasis). The Supreme Court interpreted the clause as providing cover only for business interruption caused by any cases of illness resulting from COVID-19 that occur within a radius of 25 miles of the insured's business premises. The Supreme Court had thus to address the question whether it could be said that the cases within the radius caused the loss, in circumstances when this also flowed from countrywide restrictions, which (a) followed from the national pandemic, (b) not depend on any particular cases and (c) would very likely have been put in place independently of any such particular cases in any particular area.

58. The Court resolved this difficulty in Section VII of its judgment (paragraph 160 et seq) by holding, as a matter of contractual construction, that the situation was one in which a "but for" test of causation was inapplicable: paragraphs 190-191 and 196). It was (paragraph 194):

> "obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a

radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision.":

59. All the cases of COVID-19 countrywide were concurrent causes of any business interruption loss; and there was no requirement that the business interruption "has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere": paragraph 196 (and see also paragraph 211). The Court also rejected a submission that some form of weighing was required of the causal impact on the relevant governmental restrictions of cases within and outside the policy scope (a weighing of competing causes, which again would have made recovery most unlikely in the case of a 25 miles radius under the policy and a national pandemic): see paragraph 198.

60. For present purposes, what may be relevant is that the Court went on to say under the heading *Prevention of access and hybrid clauses*:

> "213. The above analysis is also applicable to those hybrid clauses which contain, as one element, an occurrence of an infectious disease within a specified distance of the insured premises. For example, the relevant clause in RSA 1 covers "loss as a result of … closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises". In order to show that business interruption loss is covered by this clause, it will be sufficient to prove that the interruption was a result of closure or restrictions placed on the premises in response to cases of COVID-19 which included at least one case manifesting itself within a radius of 25 miles of the premises."

61. The Supreme Court then addressed the fact that the hybrid and prevention of access clauses specify more than one condition which must be satisfied in order to establish business interruption loss caused by an insured peril. The peril they insure is, as the Court said, "a composite one requiring a series of elements to be established": paragraph 218. It was therefore only for the consequences of all these elements occurring that the insured was covered: paragraphs 219-220. But equally it was no answer for the insurer to rely on a "but for" test and to require the insurer to show that these elements had "no other concurrent proximate cause", or that other aspects of the pandemic would have been sufficient to cause business interruption loss even in the absence of the insured peril: paragraphs 228-229 and 237.

62. At paragraphs 245-247 the Court addressed the position under a clause covering Prevention of access "due to the actions or advice or a government or local authority due to an emergency which is likely to endanger life or property". It recorded that

"245 ….As Arch correctly submits, under this clause the policyholder is only entitled to recover those business interruption losses which are the product of the specified causal sequence: that is to say, losses which are caused by (i) prevention of access to the premises, which is caused by (ii) the actions or advice of a government or local authority, which in turn is caused by (iii) an emergency which is likely to endanger life (or property)."

63. But it rejected Arch's submission that the loss claimed was not covered because the same business interruption loss would have been suffered even if the insured premises had not been required to close. The Court said:

"247. In our view, this contention involves the same error as the case put forward by Hiscox. It incorrectly treats the indemnity as confined to loss which would not have occurred but for the operation of the insured peril. In the restaurant example discussed earlier, it may very well be true that, if the premises had not been forced to close, turnover would have been reduced in any event as a result of other effects of the emergency, including Government actions and advice. But it is also true that, if there had been no other effects of the emergency, or of Government actions and advice, this turnover would still have been lost as a result of the premises being forced to close. To this extent, there were concurrent causes of loss, each sufficient to cause loss without the other. Furthermore, these concurrent causes arose out of the same underlying or originating cause, namely the COVID-19 pandemic. As with the Hiscox policies, on the correct interpretation of the Arch wording, such loss is in our view covered by the policy."

64. The Court concluded this section of its judgment by saying:

"250. It is unnecessary to address other hybrid and prevention of access clauses in relation to which, as noted earlier, this issue does not affect the outcome of the proceedings. In principle, however, a similar analysis must apply to those clauses as to the clauses which we have specifically addressed."

(iv) Conclusions regarding Extension 1c)

65. Three points follow from the above discussion. First, although the causation required under an insurance is, in the last analysis, a matter of construction, the Supreme Court was, contrary to the Insurer's submission, prepared to state quite generally that its general approach to causation was applicable across the whole range of wordings, ranging from Disease clauses to Hybrid clauses to NDDA clauses. Second, there appears to be nothing in the language of Extension 1c) which on the face of it precludes the application of such reasoning. This is particularly so, if the emergency may be outside the vicinity, so long as it threatens life or property within the vicinity. But it is also so if the both the emergency and the threat must be in the vicinity. Once it is accepted that the emergency may at the same time be elsewhere and threaten life or property elsewhere, the Supreme Court's analysis of the relevant elements of cover and its conclusion that a "but for" test of causation was inappropriate would seem

readily transposable to a NDDA clause like Extension 1c) - as the Supreme Court appears itself to have thought: see paragraphs 63 and 64 above. Third, I therefore doubt whether the Divisional Court could or would have approached the matter as it did in paragraphs 466 and 467 had it had the benefit of the Supreme Court's analysis. The Supreme Court did not see any basis for any such limitation in relation to the Arch wording considered at paragraph 248: see paragraph 62 above. The absence in the Arch wording of the words "in the vicinity" in relation to the emergency appears an inadequate basis on which to distinguish the Supreme Court's approach in relation to that Arch wording from the present.

66. This is however, as I have indicated, a complex area, not all aspects of which were perhaps as fully argued before me as might have been. In the light of my decision below on sub-issue (III), it is unnecessary finally to resolve it for the purposes of resolving the present arbitration. In the circumstances, and because my Award will, I understand be published and the issue may arise in other contexts, I consider that I should say nothing more definite about it.

(III) Are the references to instructions issued by or actions or advice of "the Police or other competent local authority" capable of embracing measures taken or advice given by central government?

67. In the light of my above conclusions, this is the critical sub-issue. The Insurer's primary case is straightforward. The Police are generally understood to be local in their constitution and organisation. The concept of a competent local authority brings immediately to mind a body with local authority, not the government or a minister. The requirement that any instructions, actions or advice be issued by or come from the Police or other competent local authority thus establishes clearly and unequivocally a local or localised element which is not here present in any of the restrictions set out in Annex A. The Insurer has a secondary case to the effect that, if its primary case is rejected, then governmental directions, actions or advice are only relevant if targeted locally

68. The Policyholders' case is that, "while the Insurer's interpretation may on first impression appear plausible", once the relevant background and commercial purpose of the Extensions is considered it is obvious that that cannot be the objective meaning of the phrase", and that the Insurer's second interpretation suffers from the same faults, but is in addition thoroughly implausible even at face value. Any distinction in this context between a local authority and central governmental authority, is, the Policyholders submit, uncertain and untenable. In their submission, the phrase "the Police or other competent local authority" is simply referring to the Police or any other authority with competence in the relevant locality, and can readily embrace central governmental as well as other authority.

69. The parties, in the course of their rival submissions, identified numerous considerations as relevant to or during the "iterative" exercise involved in the construction of the key phrase to which sub-issue (III) relates. The most obvious of these considerations is (a) whatever is the "natural" meaning of the phrase. But no phrase can or should be detached from its context, and context itself has different aspects, among them: (b)

other Policy language; (c) the legislative background to the Policy; (d) any relevant caselaw authority; and (e) the "logic", "artificiality" and/or commerciality of each party's suggested construction. As Lord Hodge noted in *Wood v Capita* at [12] (paragraph 13 above), it should not matter where one starts, as long as one combines and balances all these factors, before arriving ultimately at a conclusion as to the appropriate construction.

(a) A "natural" meaning?

70. If one starts with the key phrase itself - "the Police or other competent local authority", the Insurer is, in my view, correct that what these suggest most naturally is the Police as a local body and other competent local authority in the conventional sense of a local (as opposed to central) body taking action or issuing instructions or advice in relation to the locality within its jurisdiction or in relation to property within such locality. On the alternative construction advanced by the Policyholders, the word "local" is detached from its natural association with the word "authority" and it is difficult to see that it adds anything to the word "competent".

71. In response, the Policyholders submitted that the word "local" serves the purpose of confirming that business interruption cover in respect of loss consequent upon advice issued by a local body in general terms

> "would only be available in relation to the locality over which that local body had competence. So if council A issues advice, insured in the locality of council B cannot rely on that advice from council A as giving rise to insured loss.

Two points arise on this. First, it is an explanation which postulates a situation of local, as opposed to central governmental, advice. It has no relevance to central governmental advice, and does nothing to suggest that central governmental advice was envisaged. Second, even in relation to a local body's intervention or advice, it does not really explain why the word "local" was used as well as competent. Competence in the case of a local authority is necessarily confined by reference to the relevant local authority's area.

72. One factor which the Policyholders can deploy is that not all Police are in fact local. The British Transport Police ("BTP") and Civil Nuclear Constabulary ("CNC") are national bodies, albeit no doubt with local branches. That is true, but I regard it as a factor that is unlikely to have been in the forefront of the parties', the Policyholders' or the drafter's mind. The word "other" can, on Insurer's construction, be read as indicating that the Police were seen, generally and quite naturally I would consider, as a local authority. That is not to say that action, instructions or advice by the BTP or CNC could not fall within Extension 1b) or 1c). But the invocation of their existence seems to me more esoteric than powerful as an aid to construction. In normal parlance, the whole of the key phrase "the Police or other competent local authority" suggests to my mind that what was in mind was actions, instructions or advice by a local, rather than national, body, although the conjunction of "the Police" and "other competent

local authority" suggests that this need not necessarily be a local *governmental* body, as opposed for example to a local body with executive or judicial authority.

73. Another associated factor prayed in aid by the Policyholders is that, on the Insurer's case, the concept of a "local authority" is relatively undefined, whereas on the Policyholders' case it answers itself. If the relevant body has competence to act in the locality, it is a competent local authority. It is true that, on the Insurer's case, there is no statutory or other definition which can apply across the board to define what is meant by a "local authority". But many of the relevant statutes authorising local authority action, to which reference is made below, do contain specific definitions, which would afford assistance to any court or tribunal. Courts and tribunals are also used to drawing lines, to give effect to the general aim of contractual language. The intervention of a local authority may in turn lead to proceedings before a justice of the peace or magistrate, and, on appeal, to the Crown Court: see e.g; the Policyholders' summary (in paragraph 76.4 of their pre-hearing submissions as set out in paragraph 68 below of this Award) and the Insurer's summary (in paragraph 104.2 of their pre-hearing submissions as set out in paragraph 73e) below) of the effect of Public Health (Control of Disease) Act 1984. I do not envisage that any court or tribunal would have difficulty in deciding whether (and indeed in deciding that) such intervention, even if carried on appeal to the Crown Court, was by a competent local authority.

(b) Other Policy language

74. The phrase "the Police or other competent local authority" appears in both Extensions 1, 2 and 8. It is not a defined expression, hence not within the Policy provision that "Words and expressions in italics which are given specific meanings in the General Definitions will have the same specific meaning each time they appear in this Policy (other than in Insured Section 12 Commercial Legal Protction". Nevertheless, one might ordinarily expect it to mean the same thing at least where it appears in closely placed or related provisions. The Policyholders submit that I should start by identifying the potential width of the phrase "the Police of other competent local authority" in the specified Disease cover provided by Extension 2 and then recognise the phrase as having the same width in Extension 1b) and 1c). They point in this regard to the approach of the Divisional Court in relating to Ecclesiastical Insurance Office ("EIO") wording, with which I deal in detail in paragraphs 89 to 101 below. The Divisional Court there worked back from its interpretation of the phrase "competent local authority" in the specified disease clause (Extension Clause 8) to find its meaning in the Prevention of access clause. For my part, I accept that the phrase has in all likelihood the same meaning in both Extensions. The specified Disease cover included in Extension 2 is however here noticeably more confined than that provided under Extension Clause 8 in the *EIO* policy. The context in which and basis on which the issue of construction arose in the *EIO* case were also very different from the context and basis of the issue of construction in the present case. In my view, what is necessary is to seek to identify the meaning of the key phrase, looking at the language of both Policy Extensions and the present Policy as a whole.

75. The Policyholders develop in this connection an argument based on Extension 8 (the Terrorism Extension). The argument is that Extension 8 operates as a carve back in under Extensions 1 and 2 of some, limited Terrorism cover which would otherwise be excluded by General Exclusion 11 in circumstances when an insured has not purchased general Terrorism cover under Insured Section 6. The phrase "actions and advice of the Police or other competent local authority" which appears in Extension 8 and in the cover under Extensions 1 and 2 which Extension 8 restores by carve back in is relied on as reinforcing a conclusion that the phrase means the same wherever it appears. The existence of such Terrorism cover is said also to reinforce the likelihood that central governmental, and not merely local authority, responses would be covered. The Insurer's response is that Insured Section 8 is entitled, as well as referred to internally as, an Extension and operates in its own terms which do not precisely follow or mirror those of Extensions 1 and 2. The Policyholders accept the last point, in that, for example, Extension 8(a)(ii) does not track Extension 1c), and involves, as counsel said, a carve-out in relation to Extension 1c) that is "very narrow indeed". There is in Extension 8 also no precise homologue of Extension 1(a).

76. The difference of view about whether and how far Extension 8 operates by way of true carve back in is not therefore an easy one, and I do not find it necessary to resolve it conclusively. My present reaction is that the Policyholders may not be correct on it, but that it does not matter. Whether or not they are right, I am ready to approach the critical phrase on the basis that it is likely to mean the same wherever it occurs in Extensions 1, 2 and 8. The important point for issue (III) is, in my view, that, although it is dealing with terrorism, the express terms of Extension 8 cover limited localised situations - focused closely in each case on the Premises - in relation to which it is entirely plausible to think of a response by the "Police or other competent local authority" rather that central government. Even if that were not so, and such situations might in some circumstances be sufficiently serious to give rise to a central governmental, rather than local, response, it does not follow that Policy cover extends to central governmental as well as local responses.

77. The Insurer in its submissions directs attention to another aspect of the Policy language, which is, I consider, of more significance. That is that the Policy elsewhere recognises the concept of a local authority in what I can describe as a day to day sense as distinct from other central governmental or public authority. I take four examples:

    a. A "Principal", to whom employer's liability cover may be extended under Insured Section 7, is defined to mean "any person (which expression includes any employer, firm, company, ministry or public or local authority) who has, by a contract made with the Insured, engaged the Insured to perform work for them."

    b. Under Additional Condition 8 in Insured Section 1, requiring protection by intruder alarm of premises left unattended, the Policyholder is required to advise the Insurer of any "notice from a Local Authority or Magistrate imposing any requirement for abatement of nuisance". The responsibility for taking action in respect of any such

nuisance rests under Part 3 of the Environmental Protection Act 1990 on the local authority and magistrates.

c. In Insured Section 11 covering loss of licence, the "Responsible Authority/Authorities" are defined to mean: "the licensing authority, the chief officer of police, the fire authority, the enforcing authority within the meaning given by section 18 of the Health and Safety at Work etc. Act 1974, the local planning authority, the local authority by which statutory functions are exercisable in relation to minimising or preventing the risk of pollution of the environment or of harm to human health, and any body representing those responsible for or interested in matters relating to the protection of children from harm and recognised by the licensing authority as competent to advise it on such matters".

d. General Exclusion 11, paragraph 9f), relating to Radioactive Contamination, War, Sonic Boom and Confiscation, excludes any loss caused by "confiscation, nationalisation, requisition, seizure or destruction by or under the order of any government or any public or local authority…"

The Insurer can, therefore, say with some force that, elsewhere in this Policy, the language used demonstrates a commonplace understanding of "local authority" and of the distinction between such a local authority and a minister or other central governmental or public authority. Against this, it is a fair point that there is no direct association between these other uses of the concept of "local authority" and the Extensions presently under consideration, and that insurance policy language may not always be developed coherently over a whole policy, but may be inspired by or culled separately from different sources.

(c) The legislative background

78. The rival submissions before me focus heavily on the legislative background to potential forms of official intervention in respect of perils such as those identified in Extensions 1, 2 and 8. These cover a very wide range, corresponding to the width and diversity of such perils. There is legislation enabling central governmental intervention and legislation enabling local intervention. It is wrong to concentrate on either, and the fact that there are both, in some contexts in the same statute, does not mean that both were intended to be covered by this Policy wording.

79. The Policyholders take as the "key relevant statutes", first, the Public Health (Control of Disease) Act 1984, which was amended by the Health and Social Care Act 2008 and under sections 45C, 45F and 45P of which the Regulations set out in Annex A were made by the Secretary of State in respect of the COVID-19 pandemic and, second, the Civil Contingencies Act 2004.

80. The Policyholders' analysis of and developed submissions in relation to 1984 Act read as follows:

"76.1 Section 45C confers powers on the appropriate minister to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales. Among other things:

(a) By section 45C(2)(b), the powers may be exercised so as to make provision of a general nature, or contingent provision, or to make specific provision in response to a particular set of circumstances.

(b) By section 45C(3)(b) and (c), regulations made under section 45C may confer on local authorities (as defined in section 1 of the Act) functions in relation to the monitoring of public health risks, and may impose or enable the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of or in response to a threat to public health.

(c) By section 45C(4) the restrictions or requirements referred to in section 45C(3)(c) include a requirement that a child is to be kept away from school, a prohibition or restriction relating to the holding of an event or gathering, and a "special restriction or requirement". The latter phrase is defined in section 45C(6)(a) as a restriction or requirement which can be imposed by a justice of the peace by virtue of sections 45G, 45H or 45I.

76.2 Section 45D contains certain restrictions on the power to make regulations under section 45C, including (by section 45D(2) and (5)) that where regulations made under the section enable the imposition of a restriction or requirement, a decision by "the appropriate Minister, a local authority or other person" to impose such a restriction or requirement may only be taken where the person taking the decision considers the measure to be proportionate.

76.3 Section 45F makes further provision about regulations under section 45C, including that:

(a) By sections 45F(2)(a) and (d), such regulations may confer functions on local authorities and other persons, and may provide for the execution and enforcement of restrictions and requirements imposed by or under the regulations.

(b) By section 45F(6), such regulations must provide for a right of appeal to magistrates' court against any decision taken under the regulations by virtue of which a special restriction or requirement is imposed on or in relation to a person, thing or premises.

76.4 Sections 45G, 45H, and 45I, of the 1984 Act confer powers on a justice of the peace to make orders imposing health measures in relation to persons, things and premises (and, by section 45J, in relation to a group of persons, things or premises). By section 45I(2) the orders which may be made in relation to premises includes an order that they be closed, disinfected or decontaminated, or destroyed.

By section 45K(2) an order made by a justice of the peace may include such other restrictions or requirements as the justice considers necessary for the purpose of reducing or removing the risk in question. By section 45M(1), the power of a justice of the peace to make orders under Part 2A of the 1984 Act is exercisable on the application of a local authority. By section 45M(5) such orders may be varied or revoked by the justice on the application of an affected person, a local authority, or any other authority with the function of executing or enforcing the order in question. Section 67 gives a right of appeal to the Crown Court against any order, determination or other decision of a magistrates' court under the Act.

77. The following points are made in relation to these provisions:

77.1 The Act plainly contemplates the powers conferred on the Secretary of State under section 45C being used to take action locally, regionally or nationally, as circumstances require.

77.2 Regulations made by the Secretary of State may make provisions of a general nature, which may have local effect in multiple localities (for example, prohibiting or placing restrictions on the opening of schools in a district, county, region or nationwide). Equally, they may make specific provision in relation to a particular set of circumstances and so as to effect only a single locality (for example, prohibiting or placing restrictions on the holding of a particular event or gathering, as envisaged in section 45C(4)(b)).

77.3 Rather than making regulations imposing prohibitions or restrictions in a locality, the Secretary of State may choose instead to make regulations empowering a local authority or some other person to impose the prohibitions or restrictions. Which of these two approaches is chosen may be largely arbitrary, depending for example on the Secretary of State's (or the government's) appetite for delegation, or on the state of relations between the local authority and central government, or any number of other factors which bear little or no relation to the nature or extent of the public health threat.

77.4 Whilst the orders provided for under sections 45G, 45H, and 45I are made on the application of the local authority, the power to make the orders rests not with the local authority but with magistrates' courts. If, on appeal from an order of the magistrate the Crown Court makes a different order, that order will be the operative order.

78. As will be apparent from this legislative background, the authorities with competence to act in relation to any serious civil contingency or public health emergency in any locality in England include Her Majesty in Council, the Secretary of State and other government ministers. Authorities competent to make relevant orders in respect of any locality include magistrates and the Crown Court."

81. In the light of this analysis and these points, the Policyholders submit that the Policy language cannot reasonably have been intended or understood as covering only situations where a local, rather than other public, authority was active. The Policyholders point out that the Policy contains no definition of a local as distinct from other public authority, and suggest, as indicated in paragraph 77.3 of their submissions that whether action is taken at central government or at local level "may be largely arbitrary". As to that last point, there appears to me, however, considerable force in the Insurer's response, that decisions whether to respond at a national or local level are very likely to be tailored to the circumstances, reflecting the general nature and extent of the issue and of the required response, rather than be "largely arbitrary".

82. As to the Civil Contingencies Act 2004 Act, Part 2 (Emergency Powers) sets out the powers of Her Majesty by Order in Council and senior Ministers of the Crown to make emergency regulations for the purposes of preventing, controlling or mitigating an aspect or effect of an "emergency". The Policyholders summarise its relevance as follows:

"74.1 Pursuant to section 19(1), the definition of "emergency" includes: an event or situation which threatens serious damage to human welfare or the environment in the United Kingdom, or a country or region of the United Kingdom; and terrorism which threatens serious damage to the security of the United Kingdom. By section 19(2), a threat of damage to human welfare includes an event or situation which causes or may cause loss of human life, human illness or injury, or damage to property.

74.2 Pursuant to section 22(1), emergency regulations may include any provisions which the person making them considers appropriate for the purposes of preventing, controlling or mitigating the emergency. Pursuant to section 22(2) that includes, among other things, provision for the purposes of protecting human life, health or safety, treating human illness or injury, protecting or restoring property or a system of communication or facilities for transport, and preventing, containing or reducing the contamination of land, water or air.

74.3 Pursuant to section 22(3), the regulations may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative, including among other things:

(a) By sub-section (a), conferring a power or duty to exercise a discretion, and a power to give directions or orders, on (among others) a Minister of the Crown, a Regional Nominated Co-ordinator appointed pursuant to section 24, or any other specified person;
(b) By sub-section (d), prohibiting or enabling the prohibition of movement to or from a specified place;
(c) By sub-section (f), prohibiting or enabling the prohibition of assemblies of specified kinds, at specified places or at specified times.

(d) By sub-section (g), prohibiting or enabling the prohibition of travel at specified times;
(e) By sub-section (h), prohibiting or enabling the prohibition of other specified activities,
(f) By sub-sections (p) and (q), making provision which applies generally or only in specified circumstances or for a specified purpose, and making different provision for different circumstances or purposes.

75 Thus, under the 2004 Act, Her Majesty by Order in Council and senior Ministers of the Crown are empowered to deal with a range of serious emergencies (including those involving threats to life or property, or a public health emergency, or terrorism) by creating emergency regulations containing any appropriate provision. In any given case, that may include conferring powers to issue instructions, advice or guidance, or to take other actions, on a government minister, a Regional Nominated Co-Ordinator, a local authority, or any other person or body. Moreover, in any given case the event or situation giving rise to the emergency may be local to a part or region of the United Kingdom, or may apply to one of the nations of the UK, or be UK-wide."

83. The Insurer does not take any substantial issue with the Policyholders' analysis of the scope of the 1984 and 2004 statutes, but submits that reference to powers which are or may conferred under them on central and local government is of no real assistance in understanding the aim and scope of the Policy. The Insurer does however point out that both statutes contain provisions assigning powers to classes of body, including as a separate defined class in each case, "local authority" or "local authorities"[2]. Section 2 of the Civil Contingencies 2004 Act imposes wide-ranging duties on persons or bodies specified in 1, 2 or 2A of Schedule 1 to the Act as "responders" required to assess, plan, advise and react in respect of emergencies.[3] The primary categories so

[2] A local authority being defined for this purpose in section 1(1) of the 1984 Act as "a district council, a county council for an area for which there is no district council, a London borough council, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under Treasurer of the Middle Temple and the Council of the Isles of Scilly, and in paragraphs 1 and 1A of Schedule 1 of the 2004 Act as a county council, a district council, a London borough council, the Common Council of the City of London, the Council of the Isles of Scilly and the Greater London Authority.

[3] More particularly, section 2 provides that they:
"… shall
(a) from time to time assess the risk of an emergency occurring,
(b) from time to time assess the risk of an emergency making it necessary or expedient for the person or body to perform any of his or its functions,
(c) maintain plans for the purpose of ensuring, so far as is reasonably practicable, that if an emergency occurs the person or body is able to continue to perform his or its functions,
(d) maintain plans for the purpose of ensuring that if an emergency occurs or is likely to occur the person or body is able to perform his or its functions so far as necessary or desirable for the purpose of—
(i) preventing the emergency,
(ii) reducing, controlling or mitigating its effects, or
(iii) taking other action in connection with it,
(e) consider whether an assessment carried out under paragraph (a) or (b) makes it necessary or expedient for the person or body to add to or modify plans maintained under paragraph (c) or (d),
(f) arrange for the publication of all or part of assessments made and plans maintained under paragraphs (a) to (d) in so far as publication is necessary or desirable for the purpose of—
(i) preventing an emergency,

specified are local authorities[4] and chief officers of police. The Secretary of State is also a responder for specified purposes, the most general being the duty under section 2 of the National Health Service Act 2006 "to take such steps as the Secretary of State considers appropriate for the purpose of protecting the public in England from disease or other dangers to health". Various other bodies are specified such as a port health authority and the Environment Agency.

84. The recognition under these statutes of distinctions between the roles and duties, in relation to health crises or other emergencies, of the police and local bodies on the one hand and other authorities, including Ministers, on the other hand seems to me to lend positive support to the likelihood that a parallel distinction between local bodies and central governmental authority was recognised by the use of the language "or other competent local authority" in Extensions 1 and 2.

85. The Insurer is, in my opinion, also correct to draw attention to the wide range of other statutory provisions which can be regarded as part of the general statutory background against the backdrop of which Extensions 1 and 2 may come into play. In paragraph 77 of its pre-hearing submissions, the Insurer draws attention in the context of Extensions 1b) and 1c) to the following powers which, it is common ground, are enjoyed by local bodies within a local jurisdiction or area:

    a. The power of police officers and local authorities to issue closure notices pursuant to sections 76-77 of the Anti-social Behaviour, Crime and Policing Act 2014, and the power of magistrates' courts – which are local in their jurisdiction – to make closure orders in accordance with section 80 of the same Act;
    b. The power of "fire and rescue authorities" as defined in section 1 of the Fire and Rescue Services Act 2004 (viz. a non-metropolitan county or district council, the London Fire Commissioner, a metropolitan county fire and rescue authority, the Council of the Isles of Scilly) inter alia, (i) to do anything they consider appropriate for the purposes of carrying out their functions, which include taking measures to extinguish fires, and protect life and property in the event of fires, in their respective areas (see sections 5A and 7); and (ii) to restrict the access of persons to premises or a place during emergencies such as fires and road traffic accidents for the purposes of protecting life or property (see section 44;
    c. The power of police officers and local authorities pursuant to section 19 of the Criminal Justice and Police Act 2001 to issue closure notices where satisfied that any premises are being, or within the last 24 hours have been, used for the unauthorised sale of alcohol for consumption on, or in the vicinity of, the premises, and the power of the magistrates' courts to make a closure order pursuant to sections 20 and 21 of the same Act for the same reasons following the service of a closure notice;

(ii) reducing, controlling or mitigating the effects of an emergency, or
(iii) enabling other action to be taken in connection with an emergency, and
(g) maintain arrangements to warn the public, and to provide information and advice to the public, if an emergency is likely to occur or has occurred."
[4] Defined in relation to England as "(a) a county council, (b) a district council, (c) a London borough council, (d) the Common Council of the City of London, and (e)the Council of the Isles of Scilly.

d. The power of local authorities as the relevant "traffic authority" under the Road Traffic Regulation Act 1984 to restrict or prohibit temporarily the use of a road, or of any part of it, by vehicles or by pedestrians because, among other things, of the likelihood of danger to the public (see sections 14, 121A); and the power of police officers to close roads or divert or prohibit traffic, including to address emergencies (see section 67);
e. The power of local authorities pursuant to the 2004 Act (i) to provide advice and assistance to the public in connection with the making of arrangements for the continuance of commercial activities by the public in the event of an emergency (as defined in section 1 of the 2004 Act); and (ii) to perform a function to prevent the occurrence of an emergency, to reduce, control or mitigate the effects of an emergency or to take other action in connection with an emergency on the order or direction of a Minister of the Crown (see sections 4, 5 and 7 of the 2004 Act;
f. The emergency power of local authorities pursuant to sections 78 and 126 of the Building Act 1984 to take such steps as may be necessary to remove danger where it appears to them that a building or structure or part of a building or structure is in such a state, or is used to carry such loads, as to be dangerous, and the power of a magistrates' court to make an order for the purposes of obviating or removing the danger pursuant to section 77 of the same Act;
g. The common law power of police officers to cordon off an area, among other things, to protect public safety, prevent an actual or anticipated breach of the peace and protect a crime scene.

86. In paragraph 104.2 of its pre-hearing submissions, the Insurer draws similar attention to the range of local powers available in respect of the subject-matters of Extension 2, as follows:

a. "murder, suicide". As held in *DPP v Morrison* [2003] EWHC 683 (Admin), the police may temporarily close off a public right of way over private premises and prevent unauthorised persons from entering therein, where necessary "to preserve and examine the scene where a crime is alleged to have been committed,". A murder or a suicide could lead the local police service to use this common law power to erect a cordon in order to restrict access to and use of the premises to preserve the crime scene and/or undertake and facilitate investigation.
b. Further, under Reg. 10 of the Health Protection (Local Authority Powers) Regulations 2010, a local authority, if satisfied that a dead body is or may be infected or contaminated so as to present significant harm to human health, may serve a notice requiring a person controlling the premises to prohibit any person from entering the room in which the dead body is located.
c. "food or drink poisoning". The primary enforcement authority under the Food Safety Act 1990, sections 5 and 6 and Food Safety and Hygiene (England) Regulations 2013, regulation 5 is a local authority, defined in relation to England as the council of each London borough, country or non-metropolitan county, the Common Council of the City of London, the Treasurer of the Middle or Inner Temple, and the Council of the Scilly Isles. Such an authority may in case of or drink poisoning caused by consumption of food or drink on the insured Premises

could, if satisfied that the construction or state or condition of premises used by the business involved a risk of injury to health, serve an emergency prohibition notice imposing a prohibition on "the use of the premises…for the purposes of any food business", knowing contravention of which is an offence. This notice could in turn lead to the (local) magistrates' court imposing an emergency prohibition order confirming the prohibition imposed by the notice. It is true, as the Policyholders point out, that under section 6(3) of the Food Safety Act 1990 the Secretary of State may direct, in relation to cases of a particular description or a particular case, that any duty imposed on food authorities shall be discharged by the Secretary of State or the Food Standards Agency and not by any local authority. But there is also force in the Insurer's riposte that in many, indeed almost all, cases the response to food poisoning, vermin, pests or defective sanitation will, under this legislation, be by a local authority.

d. "vermin, pests". Under the Prevention of Damage by Pests Act 1949, sections 2, 4 and 5 duties and powers are imposed and conferred on every local authority with respect of keeping their district free from rats and mice, and under the Public Health Act 1936, sections 83-84 a local authority has further duties and powers with regards to premises which are in such a filthy or unwholesome condition as to be prejudicial to health or are verminous. Thus, a local authority may serve a notice requiring that reasonable steps be taken to destroy mice/rats or to remedy the condition of the premises by cleansing and disinfecting it, failing which it may take such action itself and recover the costs of doing so from the person served. Under the Public Health Act 1961, a local authority may also require that the premises be vacated during fumigation for the purpose of destroying vermin on the premises. Following a notice by the local authority, a magistrate's court may issue a prohibition order requiring, inter alia, closure of premises, if necessary on an emergency basis: see the Public Health Act 1984, s.45I and The Protection (Part 2A Orders) Regulations 2010 made thereunder. It is true that under section 12 of the Prevention of Damage by Pests Act 1949 a Minister "may by order empower any person named in the order to exercise… functions on behalf of the authority" where he is satisfied "on complaint or otherwise, that any of the functions of a local authority under this Part of this Act are not being satisfactorily performed by the authority". In practice, the imposition of restrictions on the use of premises because of vermin and pests will be likely to be by a local authority.

e. "defective sanitation". Under the Public Health Act 1936, ss. 45, 48 and 50, the Public Health Act 1961, s. 17 and the Building Act 1984, ss. 59 and 99, a local authority which considers that a drain is not sufficiently maintained and kept in good repair and/or that a building has not been provided with satisfactory drainage and/or that sanitary arrangements are in such a state as to be prejudicial to health or a nuisance, may take action to ensure that the necessary works are carried out, including carrying out the necessary works itself. Again, defective sanitary arrangements in a food business could also pose the kind of risk to health that would lead to the issue of an emergency prohibition notice by a local enforcement authority and an emergency prohibition order by the local magistrates' court.;

87. Finally, the Insurer points out that, not only is this possible under inter alia section 45C of the 1984 Act, but examples do exist of the Secretary of State conferring local powers on local authorities under the 1984 Act. Thus

    a. On 9 March 2010, the Secretary of State made The Health Protection (Local Authority Powers) Regulations 2010 which, inter alia, give a local authority the power to serve notice on any person or group of persons requesting that the person or group of persons do, or refrain from doing, anything for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination which presents or could present significant harm to human health (see regulation 8); and

    b. On 16 July 2020, the Secretary of State made The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 which grant local authorities the power, inter alia, to give directions closing individual premises and restricting entry to the premises provided that the conditions specified in section 2 of those Regulations are met (including that

88. There is, therefore, a great range of duties and powers imposed or conferred on local authorities to address the sort of situations with which Extensions 1 and 2 are concerned. But the central government also has certain powers which it can use to address such situations, when intervention at a countrywide or broader than local basis is or is deemed appropriate. The COVID-19 pandemic constituted such a situation. The Policy cannot however be construed with the benefit of hindsight: see *Arnold v Britton*, paragraphs 19 and 21. The express language of Extensions 1 and 2 is heavily focused on localised incidents, likely to attract a response from the Police or a local authority or body with local competence, even though there is nothing in it as such to exclude the responses of such an authority or body to a national or countrywide event or emergency. There is no reason however to assume that its language was designed or is in terms apt to cover all types or levels of executive or other intervention. The Policy to be construed against the background which existed when it was made and in the way in which it would then reasonably have been understood.

(d) Caselaw

89. The Policyholders rely for assistance in resolving the present issue of construction on the approach taken by the Divisional Court in relation to two quite similar types of policies (Types 1.1 and 1.2) issued by the Ecclesiastical Insurance Office ("EIO"). It will be sufficient to set out the business interruption cover in respect of Prevention of Access as stated in Type 1.2. The relevant Prevention of Access provision read as follows:

    " 1 Prevention of access
    Access to or use of the premises being prevented or hindered by
        (a) damage to neighbouring property by any of the insured events
        (b) any action of Government Police or Local Authority due to an emergency which could endanger human life or neighbouring property

Excluding

(i) any restriction of use of less than four hours

(ii) any period when access to the premises was not prevented or hindered

(iii) closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements or vermin or pests

Provided that

our liability in respect of any one occurrence shall not exceed the sum insured by the items or any limit of liability shown in the schedule"

90. The policies each also contained a separate Extension Clause (Extension Clause 8 in the Type 1.2 wording) which included cover in respect of specified diseases, among which was not COVID-19. Extension Clause 8 read:

> ""What is covered
> (a) any occurrence of a specified disease being contracted by a person at the premises or within a radius of 25 miles of the premises;
> (b) any discovery of an organism at the premises likely to result in the occurrence of a specified disease being contracted by a person at the premises;
> (c) any injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided at the premises;
> (d) any accident causing defects in drains or other sanitary arrangements at the premises;
> which causes restrictions in the use of the premises on the order or advice of the competent local authority.
> (e) any discovery of vermin at the premises;
> (f) murder, rape or suicide at the premises.
> Special conditions
> (i) We shall only be liable for the loss arising at those premises which are directly affected by the occurrence, discovery or accident. In the event that the policy includes an extension which deems damage at other locations to be damage at the premises such extension shall not apply to this Extension.
> (ii) Indemnity period shall mean the period during which your results shall be affected in consequence of the occurrence, discovery or accident beginning with the date from which the restrictions on the premises are applied (or in the case of (f) above with the date of occurrence) and ending not later than three months thereafter.
> (iii) In respect of (e) you must obtain our consent before you restrict the use of the premises.
> What is not covered
> Costs incurred in the cleaning, repair, replacement, recall or checking of property."

91. In the *EIO* case, the basic issue for present purposes was whether, as the FCA argued, exclusion (iii) in the Prevention of Access provision only excluded closure or restriction in use due to the order or advice of a competent local authority, as opposed

to central government authority, or whether it should be read as embracing "any action of Government, Police or Local Authority" due to an emergency, i.e. as covering the whole width of clause (b) of the Prevention of Access clause. The EIO (represented by the same counsel as now appear before me for the Insurer) successfully argued for the latter interpretation. The Insurer submits that its Policy language is distinguishable and that in the present context central governmental directions, actions or advice are not within the primary cover afforded by Extension 1 (and would not, had it been relevant, fall within any cover afforded under Extension 2 or 8).

92. The Divisional Court recited the rival submissions in the *EIO* case at length. Counsel's submissions for the EIO were that the infectious disease carve-out from the Prevention of Access provision defined the scope of coverage and had to be construed in context, particularly the context of the specified disease cover. The specified disease cover, with its 25 mile radius limit and against the background of the relevant legislation, particularly the 1984 and 2004 Acts, was not confined in terms to local outbreaks. It was to be understood as embracing situations of more widely spread disease, where central governmental intervention would be expected. These were covered by the phrase "competent local Authority" which referred to whatever authority was competent to take the relevant action of issue the relevant order or advice in the locality. That construction of the phrase in the specified disease cover carried through into the exclusion in the Prevention of Access cover.

93. The Divisional Court essentially accepted these submissions, saying:

> "373 Whilst the policy wordings are not exactly a model of clarity in terms of drafting, we agree with Mr Kealey QC that the question of the construction of the infectious disease carve-out has to be approached on the basis that it is a provision delineating the scope of cover, not in any sense an exemption clause. The applicable principles are as summarised by the judge in *Crowden* and there is no place for the application of the principle of contra proferentem, to the extent that principle has any application in the modern law of construction of contracts.
>
> 374 We also agree with Mr Kealey QC that the phrase "competent local authority" must mean the same in the carve-out as it does in the specified disease clause. In the latter, given the legislative background which can legitimately be taken into account in construing the phrase, we consider it inherently unlikely that the parties intended the scope of cover provided by the clause to be limited to local outbreaks of a specified disease for which only the local district council or other local authority as defined in section 1 of the 1984 Act issues orders or advice. A number of the specified diseases are, as counsel for the Insurer pointed out, on the list of notifiable diseases under the 2010 Regulations, no doubt at least in part because of their capacity to lead to more widespread infection or contagion than in a particular locality. Many of those diseases, at least historically, have been widespread, not just the plague or diphtheria or tuberculosis but in more recent times, measles, mumps and rubella.

375 The point can be tested by reference to the Leicester Regulations. If one assumes for the purpose of the argument that COVID-19 was a specified disease in the list, if "competent local authority" had the narrow meaning of the local district council or other local authority as defined in section 1 of the 1984 Act for which the FCA contends, then there would not be cover in relation to the restrictions on the use of premises imposed by central government in bringing into force the Leicester Regulations. However, there would be cover if the same restrictions were imposed by Leicester City Council or if the Secretary of State asked the Council to impose the restrictions. The narrow meaning for which the FCA contends leads to an artificial and illogical result. In our judgment, Mr Kealey QC is right that the phrase "competent local authority" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government.

375 Given that the phrase has that meaning in the specified disease clause, as we have said it must have the same meaning in the infectious disease carve-out. The order or advice contained in the 20 and 23 March government advice and in the 21 and 26 March Regulations was the order or advice of the competent local authority, and was as a result of an occurrence (in fact many occurrences) of an infectious disease. Accordingly, the carve-out applies and there is no cover under either EIO wording in respect of the closure of or restriction in the use of the premises."

94. The issue and the wording in the *EIO* case were different in potentially material respects from the present case. First, the first relevant phrase there related to "any action of Government Police or Local Authority", and was counter-balanced by the second relevant phrase. The second phrase not pick up exactly all or any of the concepts used in the first phrase, but spoke instead of "the order or advice of the competent local authority". That opened the question whether the second phrase was meant to cover the whole width of the first phrase in the context of infectious disease, or to be read in a limited sense excluding only intervention by a local authority (save where covered under Extension Clause 8) and preserving cover for intervention by in particular central governmental authority.

95. Second, the specified disease clause, which also deployed the second phrase, indicated the former, rather than the latter. construction. The Court saw the legislative background of the 1984 and 2004 Acts in particular and the capacity of some of the specified diseases to spread outside any particular locality, as making it "inherently unlikely" that the parties intended the latter construction. The Court mentioned the capacity of the specified diseases to lead to "more widespread infection or contagion than in a particular locality", and must also have had in mind the 25 mile radius in the specified disease clause, which was, as Counsel submitted, itself indicative of a potentially widespread outbreak being in mind.

96. Thirdly, the Court said that it would give rise to "an illogical and artificial result", if central government was not in context within the phrase ""competent local authority". If COVID-19 had been specified under Extension Clause 8, it would mean that there

would be no cover for the local Leicester restrictions which the Secretary of State introduced on 4 July 2020 (Annex A, paragraph 49), but would have been cover, had the Secretary of State asked the local council to introduce such restrictions.

97. Turning to the present Policy, first, in its wording, there is no first phrase, such as "any action of Government, Police or Local Authority", against which to measure the effect of the three phrase "the Police or other competent local authority". In all three Policy Extensions where it is mentioned the key phrase stands alone as a measure of primary cover.

98. Second, the notifiable disease cover in Extension 2 does not simply appear among clauses limited to occurrences "at the Premises", it is itself confined to diseases occurring "at the Premises". This is in marked contrast with the position in the *EIO* case, where the disease cover in Extension 2 was extensively stated, to cover a specified disease occurring at or within a 25 mile radius of the premises, opening the likelihood that a central governmental response was in contemplation.

99. Third, the Financial Services Authority's submissions in the *EIO* case led to a result whereby local authority intervention was only covered in relation to diseases specified under Extension Clause 8, whereas central governmental intervention in relation to any infectious disease was covered under the Prevention of Access clause, on the basis that the terms of the clause only excluded local authority intervention. That would on any view have been a very surprising scheme for parties to intend, counter-intuitive in so far as it offered unlimited central governmental cover in respect of all infectious disease, but local authority cover carefully confined to specified disease,

100. Fourthly, and in contrast, it does not appear "inherently" or at all unlikely in the overall context that the parties would have agreed or understood the cover afforded by Extensions 1, 2 and 8 to be limited by reference to intervention by body with local, as opposed to central governmental, authority: see further paragraph 102 et seq below. This applies whether one looks at the presumed intentions objectively ascertained of both parties as reasonable persons or simply of the Policyholders alone,

101. Fifth, this might no doubt give rise in some circumstances to relatively narrow distinctions, but the example of the Leicester order of 4 July 2021 does not seem to me even to fall within that category. If the central government was addressing Leicester specifically, that was in fact - and would be likely only to be - because the position in the locality was seen more widely in relation to the country at large as involving an actual or potential epidemic or other large-scale emergency calling for central government intervention.

(e) Logic, artificiality and/or commerciality

102. These are factors featuring strongly in the Policyholders' submissions. The Policyholders stress what they identify as the uncertain, inadequate and uncommercial nature of insurance cover by reference and limited to intervention of a local, as opposed to central governmental, authority. They stigmatise the Insurer's construction as being

not merely "illogical and artificial" but as giving rise to absurdities, for example where an emergency arises which is initially addressed at a local level, but develops so as to call for central governmental intervention.

103. As to these factors, and uncommerciality in particular, even in negotiated contracts, one must, as Lord Hodge said in *Wood v Capita Insurance Services Ltd*, paragraph 10, citing *Arnold v Britton*, "be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest". Lord Neuberger made a similar point in *Arnold v Britton:*

> "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."

The COVID-19 pandemic has been a sad disaster for many including, as I appreciate, very probably many of the present Policyholders. But it would seem unfair and inaccurate to suggest that, if the Insurer's case is accepted, the present Policy will have worked out badly, still disastrously, for the Policyholders. I doubt whether it was actually entered into with any specific thought to, or to the insurance position in relation to, a national pandemic.

104. Contrary to the Policyholders' case, a limitation of cover by reference to the actions, instructions or advice of a local, as opposed to central governmental, authority also appears to me both to have an understandable aim and to be readily conceivable. The relevant legislative background stretches far wider than the provisions of the 1984 and 2004 Acts contemplating central governmental action: see paragraphs 78 to 88 above. It is also worth noting that the Divisional Court itself identified a number of policies where, it held, the intention of the parties, objectively ascertained, was that the cover should be localised: see at paragraphs 40 to 45 above, the discussion relating to Hiscox policies, MSA 1 to MSA 3, RSA 2.1 and 2.2 and Zurich. The decision in *Brushfield* is also in point. Indeed, counsel for the Policyholders was prepared to

> "accept that, prior to the present pandemic, the claims which typically may have been made under [Extensions 1b) and 1c) are likely to have resulted from matters that were narrow and localised in nature and will, in addition to damage to property in the vicinity, have included matters such as gas leaks, bomb scares, fires a structure such as a crane, at risk of collapse, a serious road traffic accident". (Day 1, Tr. pp 55-56).

These are all matters most unlikely to attract the intervention of any central governmental body, or anyone other than the Police or other competent local authority. In my opinion, there is no difficulty about seeing a limitation of cover to instructions, actions or advice of the Police or other local, as opposed to central, governmental authority as a comprehensible as well as pragmatic way of defining "localised" cover.

105. As to the sense of such a limitation, viewed generally, there is likely to be a great difference between circumstances and emergencies which call for no more than a local response and countrywide circumstances and a countrywide emergency which calls for central governmental intervention. The greatly increased potential for accumulation of exposure in the latter case is obvious, and is one which I consider that reasonable parties and Policyholders must be taken to understand.

106. As to the definitional issue which such a limitation may raise, almost inevitably contractual language involves drawing lines or distinctions, which may have significant consequences according to which side of the line a situation falls. Sometimes it may be a fine question which side of the line it does fall. That is no reason for ignoring the lines which have been drawn. As I have stated in paragraph 73 above, I do not consider that a court or tribunal would have any real difficulty in understanding and giving effect to the general aim of what the Insurer submits is the definitional category identified by the language. In the present case, therefore, the Policy appears to me to have drawn a line or defined a closed category which makes sense, and cannot fairly be stigmatised as absurd or uncommercial.

(f) Weighing the factors in the balance

107. Weighing all these factors in the balance, in my view the Insurer's construction of the key phrase is the correct one. The critical Extensions 1 and 2 were on their face always limited in significant respects; and the more natural reading of the requirement of instructions, actions or advice by or of "the Police or any other competent local authority" is and has always been to define cover by reference to bodies with local, rather than countrywide or central governmental, authority. There is, as McDonald J said in *Brushfield* in relation to the limitation of cover there to "action of the police or a statutory body" "nothing 'strict' about giving the ordinary meaning of 'statutory body' to that term[5]. While superfluidity or duplication of language are considerations on which too much weight should not be put when considering the meaning of standard wording, it is in fact also the case, as the Insurer points out, that it is difficult to see that the word "local" adds anything to the word "competent" on the Policyholders' interpretation of the Policy. Elsewhere in the Policy, and in relevant legislation, various provisions show a positive recognition of the distinction between on the one hand local authorities or bodies and on the other hand central governmental authorities or bodies. A limitation of cover to local, as opposed to central governmental, activity, instructions or advice is, contrary to the Policyholders' case, a limitation with a coherent and understandable basis, comprehensible to all concerned, including the reasonable Policyholder. The fact that, with hindsight, there will be no insurance cover for the unforeseen pandemic which has afflicted national and international life is not a reason to interpret the key Policy wording in a sense which would distort its natural and objectively intended effect.

[5] Although he left over for future argument in that case a point that had not been raised before him, to the effect that the Minister making the relevant regulations might be considered "a statutory body" having regard to the Ministers and Secretaries Act 1924, establishing each Minister as a corporation sole with perpetual succession capable of suing and being sued as such.

108. I conclude for all these reasons that the Policy covers only directions, actions or advice of the Police and other competent local authority in the sense of a local as opposed to central or countrywide authority.

Declaration

109. In the light of the above, I will declare that, in so far as the Policyholders claim to have suffered recoverable loss in consequence of the alleged instructions, actions or advice set out in Annex A, such claim fails in that the instructions, actions or advice alleged were not issued by or of "the Police or other competent local authority" within the meaning of either Extension 1b) or Extension 1c).

Other points

110. This conclusion makes it unnecessary for me to consider or form a concluded view on other points raised, regarding the extent to which the Policyholders' claims by reference to the matters set out in Annex A fall outside Extension 1b) and/or 1c) for other reasons. In summary, it would, on the hypothesis (which I have rejected) that there were any instructions, actions or advice of "the Police or other competent local authority", have been necessary to decide

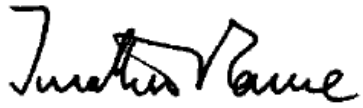
a. Whether, under Extension 1b), all the matters set out in Annex could be said to have given rise to any "closing down" of premises. In issue in that regard would have been (a) the 4 July 2020 Regulations, by which the first March 2020 lockdown was ended and by which restaurants, cafes, bars and pubs were permitted to re-open (see paragraph 5 of Amended Schedule to the Policyholders' Statement of Case and Annex A, paragraph 48); and (b) the restriction on the hours of operation of restaurants, cafes, bars and pubs for on the premises consumption of food and drink imposed pursuant to various Regulations made in and in the months from September 2020 on (see paragraphs 8.1, 9.1, 11.1, 12.1 and 14.1(a) of the same Amended Schedule);

b. potentially, whether the circumstances involved any "sealing off" of premises, although counsel for the Policyholders did not elaborate on this aspect orally, and it appears that it might add nothing to any claims for closing down.

c. whether, under Extension 1c), any such actions or advice were "due to" an emergency threatening life or property in the vicinity of the insured Premises. The Insurer denies any such causal link, relying on the approach to the bulk of the Prevention of Access clauses taken by the Divisional Court. I have already indicated that I would have found this a difficult area, but one where I doubt whether the Divisional Court could or would have taken the approach it did, had it had the benefit of the Supreme Court's reasoning on causation. I say no more, since the point does not, in the event, require decision in the light of paragraph 109 above.

Costs

111. In the light of clause 8.1 and 8.2 of the Arbitration Agreement, this Award is released against payment by the Insurer of my fees and expenses, with no further order in that regard being required.



The Rt Hon Lord Mance
London, the 10th September 2021