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Details of Filing

Document Lodged:	Submissions
File Number:	NSD137/2021
File Title:	CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v PHILIP WALDECK
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 19/08/2021 4:05:49 PM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

No NSD 137 of 2021
No NSD 138 of 2021

CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020)
Applicant

PHILLIP WALDECK
Respondent (NSD 137 of 2021)

MARKET FOODS PTY LIMITED (ABN 48 604 308 581)
Respondent (NSD 138 of 2021)

APPLICANT'S SUBMISSIONS

Introduction

1. The genesis of these proceedings are complaints made by each insured (**Waldeck** and **Market Foods** or **the Insureds**) to the Australian Financial Complaints Authority (**AFCA**) following denials of their insurance claims by the Applicant (**Chubb**).

2. Waldeck is a commercial landlord in Melbourne. Market Foods is the operator of three hospitality venues in Brisbane, one of which is located on the campus of the University of Queensland (**UQ**).

3. The claims arose by reason of the response of the Queensland and Victorian state governments to the COVID-19 pandemic from March 2020, the effect of which is described in common parlance as the first *"lockdown"*. The response to the pandemic by UQ at the same time is also relevant to the claim by Market Foods.

4. These proceedings are attended by two curiosities which should be explained at the outset.

5. The first is that the proceedings have been commenced by Chubb, despite it being the insurer who has declined indemnity.

6. This step was taken in accordance with consent provided by AFCA under a protocol between Chubb, the Insureds and AFCA with both proceedings considered a test case under the relevant AFCA rules[1].

7. In the absence of such consent from AFCA, these proceedings could not be commenced as AFCA would retain the exclusive jurisdiction to determine the complaints by the Insureds.

[1] As that term is used in clause A.7.2(b) the AFCA Complaint Resolution Scheme Rules dated 13 January 2021.

8. This means that Chubb is the moving party and, in effect, seeks negative declaratory relief as to the response of two insurance policies to claims for business interruption arising from the COVID-19 pandemic.

9. The positive cases advanced by each of the Insureds about policy response appear in their respective cross-claims.

10. The significance of this is that Chubb, in the first instance, must anticipate the arguments of the Insureds from the pleadings, agreed facts and statements of issues. It may be that the debate between the parties is more fully exposed by Chubb's submissions in reply after the Insureds have explained their case more fully.

11. The second curiosity is that both proceedings are dealt with together in these submissions, despite the Insureds having entered into separate contracts of insurance.

12. Market Foods actually relies on two policies which span a combined policy period of 31 August 2019 to 31 August 2021 (**the Market Foods Policies**) whereas Waldeck relies on a single policy for the period 28 March 2020 to 28 March 2021 (**the Waldeck Policy**).

13. Both Market Foods and Waldeck rely on extensions to the primary cover provided in respect of business interruption (Section 2).

14. The reason these submissions deal with both proceedings is because Market Foods relies on four clauses in its policy (Extensions B1, B3, B4 and C to Section 2) and Waldeck relies on a single clause (Extension C to Section 2) where Extension C in all policies is in identical form.

Summary of Chubb's position

15. The principal reasons why Chubb says that none of policies respond are as follows.

16. In respect of Extensions B1, B3 and B4 in the Market Foods Policies:

    (a) the preamble to Extensions B1, B3 and B4 requires the existence of physical loss, destruction or damage caused by events insured under those policies to property of the type insured under those policies but at locations which are not insured under those policies;

    (b) COVID-19 does not cause physical loss, destruction or damage to property of any type so Market Foods cannot pass through the gateway required by the policies to allow consideration of the individual integers of each of Extensions B1, B3 and B4; and

    (c) the individual integers of Extensions B1, B3 and B4 are not satisfied in any event.

17. In respect of Extension C in the Waldeck Policy only, cover is excluded entirely by reason of the operation of section 61A of the **Property Law Act**

1958 (Vic) on definition of *"Notifiable Diseases"*, there being no equivalent provision in Queensland.

18. Leaving aside section 61A, Extension C does not respond as:

    (a) there was no occurrence or outbreak of COVID-19 *"at the premises"* within the meaning of those clauses nor was there any discovery of SARS-CoV-2 *"at the premises"*;

    (b) unless this threshold requirement is met, Extension C cannot otherwise be engaged;

    (c) the restriction or denial of use of the Insured Location must be the result of the intervention of a public body and must directly arise from the outbreak or occurrence of COVID-19 or discovery of SARS-CoV-2 at the premises; and

    (d) assuming some occurrence or discovery at the premises can be discerned (there is simply no evidence of this), the interventions relied on by the Insureds lack this direct causal link and, in the case of UQ, did not restrict or deny the use of the Insured Location in any event.

Structure of these submissions

19. The structure of these submissions is as follows.

20. First, the relevant legal principles will be identified. These principles are not expected to be a matter of controversy.

21. Second, the relevant aspects of the policies of the Insureds will be identified.

22. Third, the relevant factual matters on which Chubb relies will be identified, whether by way of evidence or agreed facts.

23. Fourth, Chubb's position will be stated in respect of each of the issues for determination identified in:

    (a) in the case of Waldeck, paragraphs 23 to 26 of the document entitled *"List of Issues for Determination"* filed on 18 July 2021 in all proceedings save for NSD 138/2021 and NSD 308/2021;

    (b) in the case of Market Foods, all paragraphs in the document entitled *"Statement of Agreed Issues"* filed in NSD 138/2021 on 1 July 2021.

Relevant legal principles

24. The issues arising on Chubb's case involve the settled principles of contractual and statutory construction.

25. As noted in the recent decision of **Star Entertainment Group Limited v Chubb Insurance Australia Ltd** [2021] FCA 907 at [138], the process of contractual construction is to be approached by reference to principles derived principally from High Court authority as discussed most recently in

this Court in **Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd** [2021] FCAFC 126 at [151]–[152], [353] and [394]–[395]; **Todd v Alterra at Lloyd's Ltd** [2016] FCAFC 15; 239 FCR 12 at 22–23 [42]; and **Chubb Insurance Company of Australia Ltd v Robinson** [2016] FCAFC 17; 239 FCR 300 at 323–326 [98]–[104].

26. The decision in **Star Entertainment** also emphasises that where, as here, the Court is dealing with policies which provide a variety of covers, often involving composite perils, the constructional exercise must:

    (a) properly identify the insured peril and, just as importantly, the excluded and uninsured perils; and

    (b) in undertaking that process of identification, the policy terms of immediate relevance must be considered against the overall structure and purpose of the policy which necessarily involves considering how the primary covers, exclusions and writebacks interact with each other to delineate the cover available.

27. As to the approach to statutory construction, it *"goes without saying"* that the starting point is the text of the relevant provision, though the text must be considered in its statutory context and having regard to the provision's apparent purpose: **Project Blue Sky v Australian Broadcasting Authority** (1998) 194 CLR 355 at 381 [69]; **Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue** (2009) 239 CLR 27; [2009] HCA 41 at [47]; section 15AA of the **Acts Interpretation Act 1901 (Cth)**; **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19** [2021] FCAFC 133 at [12].

28. The issue in respect of section 61A can be distilled to whether the word *"Act"* in that provision is referring solely to an Act passed by the Parliament of Victoria or, as Chubb contends, is intended to refer to Acts passed by the Parliaments of other States and Territories and the Commonwealth.

29. This requires the displacement of the definition of *"Act"* as it appears in the **Interpretation of Legislation Act 1984 (Vic)** which, unless the contrary intention appears, means an Act passed by the Parliament of Victoria.

30. The relevant legal principles as to when a *"contrary intention"* appears have been conveniently summarised by Bell P in **DRJ v Commissioner of Victims Rights (No 2)** [2020] NSWCA 242 at [9] and [10] in the context of section 5(2) of the **Interpretation Act 1987 (NSW)**:

> *"Contrary legislative intention sufficient to rebut or displace the operation of s 12 of the Interpretation Act may be evinced by any of the following:*
>
> *(i) express words: see, for example, Waller v Freehills (2009) 177 FCR 507; 258 ALR 67; 73 ACSR 101; 73 ACSR 101; [2009] FCAFC 89;*
>
> *(ii) necessary implication: see, for example, Macleod v Attorney-General (NSW) [1891] AC 455 at 457–8 (Macleod);*

(iii) reading the Act as a whole: see, for example, Birmingham University & Epsom College v Federal Commissioner of Taxation (1938) 60 CLR 572; [1938] ALR 494 (Birmingham University);

(iv) if the legislative purpose would otherwise be frustrated: see, for example, Australian Securities Commission v Bank Leumi Le-Israel (1995) 134 ALR 101; 18 ACSR 639; or

(v) if the contrary intention is indicated by "the object, subject matter or history of the enactment": see, for example, Schmidt v Government Insurance Office of New South Wales [1973] 1 NSWLR 59 at 67–8."

31. The reference to the **Acts Interpretation Act 1901 (Cth)** in the judgment of the Full Court referred to in paragraph 27 above does expose what may wrongly be supposed to be a potential jurisdictional issue which should be quickly dealt with.

32. Chubb is asking this Court to construe a provision of a statute passed by the Parliament of Victoria.

33. Chubb says this Court is empowered to do so under section 32 of the **Federal Court of Australia Act 1976** (Cth) as:

    (a) leaving aside section 61A, the jurisdiction of this Court is otherwise invoked – at the very least the claims for interest by the Insureds under section 57 of the **Insurance Contracts Act 1984 (Cth)** are a *"matter"* within the meaning of section 39B(1A)(c) of the **Judiciary Act 1903 (Cth)**;

    (b) this matter includes the proper construction of Extension C, that involving the meaning of the words *"Quarantinable diseases under the Quarantine Act 1908"* as they appear in the definition of *"Notifiable Disease"* which is used in Extension C; and

    (c) even if it is assumed that this Court otherwise lacked jurisdiction, such jurisdiction is conferred by section 22 of the **Federal Court of Australia Act 1976 (Cth)** as the construction of section 61A is associated with the construction of Extension C, that being the core matter.

Relevant policy terms

34. The structure of the policies in question is essentially the same.

35. Each consists of a policy schedule and a wording.

36. As might be expected, the policy schedules reflect the individual bargain between each of Chubb and Market Foods and Waldeck respectively. The schedules are pro-forma documents published in May 2017 which are populated with the details of each Insured to reflect the individual policy terms.

37. The policy wordings are product disclosure statements (**PDS**) required under the **Corporations Act 2001 (Cth)**.

38. The PDS issued in respect of the first of the policy entered into with Market Foods was prepared on 26 July 2017 and published in August 2017[2]. The PDS for the second policy was the same document as for the first policy

39. The PDS issued for the Waldeck Policy was prepared on 27 March 2019 and published in March 2019.[3]

40. As noted above, nothing turns on this as the only common term is Extension C and it is identical in both wordings.

41. Each policy contains a section at pages 2 to 6 which deals with the various regulatory requirements and matters such as the Insureds' disclosure obligations, complaints handling and privacy.

42. At pages 7 to 11 of each policy is a section entitled *"Introduction"*. The relevant provisions for present purposes are the following on page 7:

> *"All parts of this Policy, along with the Schedule and any endorsements should be read together and considered as one contract.*
>
> ***The operative Sections of this Policy are as indicated in the Schedule. Unless a particular Section is identified in the Schedule as being 'Insured', it is of no effect and no cover is granted under it."*** [emphasis added]

43. The first of these paragraphs merely reflects the law of contract. However, the second is significant as it bears upon the cover provided for, that being a relevant consideration when it comes to Market Foods' claim for indemnity under Extensions B1, B3 and B4 which are each conditioned on *"Business Interruption to property of: (a) a type insured by this Policy"*.

44. It should be noted at the outset that each policy potentially provides 12 different forms of cover under Sections 1 to 12 as described in the contents table on page 1.

45. This table identifies the forms of cover potentially available, not the cover actually agreed to by Chubb and each Insured.

46. To discern the cover actually agreed to, the Court must turn to the schedules to the policies which indicate those which have been selected.

47. Page 4 of these schedules reveal that of the 12 possible forms of cover, Chubb and Market Foods have agreed to six, those being Property Damage, Business Interruption, Theft, Money, Glass and Public and Products Liability.

48. Within cover for Property Damage, there is none available for Buildings, only *"Contents and Stock"*. This is confirmed in the schedule at pages 5 to 6 which set out the cover for each Insured Location.

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[2] Page 2 of the Market Foods Policy for the period 31 August 2019 to 31 August 2020.
[3] Page 2 of the Waldeck Policy.

49. The significance of this will be developed below when Extension B is considered.

50. For the sake of completeness, it should also be noted that Mr Waldeck is only insured for Property Damage, Business Interruption, Glass and Public and Products Liability with the cover for Property Damage including Buildings but not Contents and Stock.[4]

51. There is also an endorsement contained in the schedule to the Market Foods Policies as to the General Definition of *"Stock"* on page 7.

52. Returning to the *"Introduction"* section of the wordings of all policies, on page 7 there is a subsection entitled *"General Policy Conditions"* with a subheading *"Applicable Law"* which provides:

> *"Should any dispute arise concerning this Policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia."*

53. This clause is relevant to the issues concerning section 61A under the **Property Law Act 1958 (Vic)** which arise only in respect of the Waldeck Policy.

54. The next relevant clause is on page 8 and is entitled *"Headings"*:

> *"Headings have been included for ease of reference and it is understood and agreed that the terms and Conditions of this Policy are not to be construed or interpreted by reference to such headings."*

55. The next section of all policies is that entitled *"General Exclusions"* which appear at pages 10 and 11. No General Exclusion is relied upon by Chubb against either of the Insureds.

56. The next section is entitled *"General Definitions"* and they appear at pages 12 to 14.

57. Those definitions of significance for present purposes are as follows.

58. The definition of *"Buildings"* on page 12 which means:

> *"buildings, including landlords' fixtures and fittings, alterations and decorations therein and thereon including fixed glass (including its framework lettering or any intruder alarm foil attached to it), foundations, walls, gates, fences, car parks, yards, pavements, drains, sewers, piping, cabling, wiring and associated control equipment and accessories only to the extent of Your responsibility and liability."*

59. The definition of *"Business"* which appears on page 12 and means *"the Business described in the Schedule"* with a notation that this term has a different meaning under Section 9 – Public and Products Liability.

[4] Pages 4 and 5 of the schedule to the Waldeck Policy.

60. The definition of *"Contents"* on page 12 which means:

> *"all contents of Buildings including:*
>
> *1. machinery, plant, fixtures and fittings other than landlord's fixtures and fittings and trade utensils;*
>
> *2. Valuable Papers;*
>
> *3. patterns, models, moulds, plans and designs;*
>
> *4. Electronic Data Processing Equipment, Electronic Data Processing Media and Mobile Communication Property;*
>
> *5. Fine Art;*
>
> *6. Money up to $500."*

61. There are further definitions of *"Fine Art"*, *"Mobile Communication Property" "Money", Securities"* and *"Stock"* which appear on pages 12 to 14 but which do not need to be set out here.

62. The definition of *"Insured Location"* on page 13 which means *"the Insured Location(s) stated in the Schedule."*

63. The definition of *"Policy Period"* on page 13 which means *"the period of time stated in the Schedule"*.

64. The definition of *"Property Insured"* on page 13 which means *"property as described in the Schedule that belongs to You or is held by You in trust or on commission for which You are responsible."*

65. The definition of *"Schedule"* on page 13 which means *"the Schedule issued with this policy wording."*

66. The definition of *"You"*, *"Your"*, *"Yours"* and *"Insured"* on page 14 which means *"the person(s) or entity/ies identified as Named Insured in the Schedule."*

67. The next section of the policies is entitled *"Section 1 – Property Damage"* and appears at pages 15 to 22.

68. The Definitions sub-section within Section 1 includes a definition of *"Damage or Damaged"* on page 15 which means *"accidental physical damage, destruction or loss"*.

69. The primary cover available under Section 1 appears as part of the subsection entitled *"Cover"* on page 15 and provides:

> *"Provided this Section is shown as insured in the Schedule, We will pay for Damage occurring during the Policy Period and happening at the Insured Location to Property Insured caused by or resulting from a cause not otherwise excluded. How We will settle Your claim is explained in 'How We will pay' within this Section 1."*

70. This is a familiar type of insurance, being first party cover for physical loss, destruction or damage at the Insured Location to Property Insured.

71. The language of this clause also acknowledges that, depending on the type of cover agreed to by the parties, there may be a difference in cover available between the Insured Location and the Property Insured.

72. This arises here in respect of the Market Foods Policies as the Property Insured is the Contents and Stock at the Insured Location but not the Insured Locations themselves as Market Foods has no cover for Buildings.

73. The cover available is also in a traditional *"all risks"* form which means the extent and scope of cover is broadly stated for the purposes of the insuring clause but then removed or restricted by the exclusions which follow.

74. This emphasises the need for the entirety of the policies to be considered and to understand the insured perils and the cover available for them, guarding always against the *"danger of focusing too narrowly on the critical phase"*: **Re Sigma Finance Corporation** [2009] UKSC 2; [2010] 1 All ER 571 at [9] per Lord Mance (Lords Hope, Scott and Collins concurring).

75. The drafting device of *"Extensions"* to cover is introduced in Section 1 by way of Extensions A and B on pages 17 to 19. None are relevant for present purposes.

76. The Exclusions to Section 1 commence on page 21 and apply only to that section. These exclusions include the following on page 21:

> *"Section 1 of this Policy does not cover Damage directly or indirectly caused or occasioned by or arising from:*
>
> *…*
>
> *2. a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould,* ***contamination*** *or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations in temperature, evaporation,* ***disease****, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations;"* [emphasis added]

77. A similar clause was recently considered in **Star Entertainment** and Allsop CJ described its effect at [145]:

> *"The word "disease" is part of a large group of perils that conceivably can cause ("occasioned by or happening through") physical loss or destruction of or damage to property. Its importance is that it reinforces the fundamental nature of the cover directed to physical loss or destruction of and damage to property. Also, it is a clear exclusion of disease (of any kind or qualification)."*

78. Chubb says that Excluded Clause 2a has the same effect here and, to adopt the language of Allsop CJ at [98], the *"relational prepositional phrase"* here is even wider than that in **Star Entertainment** as it also incorporates the terms *"directly or indirectly caused"*.

79. Pausing here, Chubb says that insofar as Section 1 is concerned, there is no cover available for disease of any kind or qualification, that including COVID-19.

80. Section 2 of the policies commences on page 23 and is the immediate focus of the Insureds' respective claims.

81. There are several definitions on pages 23 and 24 which are critical to the determination of the issues in these proceedings.

82. The first is *"Business Interruption"* which appears on page 23 and means:

> *"the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period"*

83. The further definitions referred to in this definition are *"Your Business"* which can be found in the General Definition section at pages 12 to 14 and *"Insured Damage"* which is also found on page 23 and means:

> *"physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections."*

84. The next relevant term within the Definitions subsection of Section 2 is that of *"Notifiable Disease"* which appears in pages 23-24:

> *"means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies."*

85. The next relevant definition is that for *"Trend in the Business"* which appears on page 24 and means:

> *"adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected that Business had the Insured Damage not occurred, so that the figures adjusted will represent as nearly as may be reasonably practicable the results which but for the Insured Damage would have been obtained during the relative period after the Insured Damage."*

86. The cover provided by Section 2 then appears on page 24:

> *"Provided this Section is shown as insured in the Schedule, We will pay the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location that occurs during the Policy Period.*
>
> *Loss will be calculated in accordance with the Basis of Settlement, and subject to the Indemnity Period and applicable Sum Insured."*

87. Pausing here, the cover available for business interruption under section 2 remains tethered to Insured Damage (being physical loss, destruction or damage) to Property Insured at an Insured Location.

88. There are then Extensions A, B and C to this cover at pages 25 to 26.

89. Extensions B are relied upon by Market Foods alone and they provide:

> *Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8.*
> *directly below;*
>
> ***1. Denial of Access***
> *damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location. This extension will not apply to property of any supply undertaking from which You obtain electricity, gas, water or telecommunication services.*
>
> *…*
>
> ***3. Property in a Commercial Complex***
> *property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained which results in cessation or diminution of Your trade or normal business operations due to a falling away of potential custom.*
>
> ***4. Public Authority***
> *any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50*
> *kilometres of any Insured Location."*

90. Extension C on page 26 is also relied upon by Market Foods and is the only indemnifying clause relied on by Waldeck:

> ***"1. Infectious Disease, Murder and Closure Extension***
> *Cover is extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:*
>
> *a) Notifiable Disease, or*
> *b) the discovery of an organism likely to cause Notifiable Disease;*
> *c) the discovery of vermin or pests;*
> *d) an accident causing defects in the drain or other sanitary arrangement;*
> *e) murder or suicide;*
> *f) injury or illness sustained by any person resulting from food or drink poisoning or arising from or traceable to foreign or injurious matter in food or drink provided on premises;*
>
> *leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority.*

Cover under this Extension does not include the costs incurred in cleaning, repair, replacement, and recall or checking of property."

91. The remaining sections of the policies under which Insureds are covered are Theft (Market Foods only) at pages 28 to 30, Money (Market Foods only) at pages 31 to 32, Glass (both) at page 33 and Public and Products Liability (both) at pages 40 to 44.

Facts

92. The Insured Locations are an important factual matter and are not in dispute.

93. The Insured Locations under the Market Foods Policies are:

    (a) 15 Butterfield Street, Herston in Queensland, 4606;

    (b) 1 William Street, Brisbane in Queensland, 4000; and

    (c) Level 2, Room 215 at the University of Queensland Chancellors Place, Saint Lucia Queensland, 4607.

94. Descriptions and photographs of the Market Foods Locations as well as their geographical locations within Brisbane and a 50km radius marked from each appear in paragraphs 3 to 8 of the document entitled *"Statement of Agreed Facts"* filed in proceedings no. NSD 138/2021 on 1 July 2021.

95. The Insured Location under the Waldeck Policy is 1197 Toorak Road, Camberwell, Victoria, 3124.

96. A map showing the location of this Insured Location appears at paragraph 67 of the document entitled *"Statement of Agreed Facts"* filed in proceedings no. NSD 137/2021 on 18 July 2021.

97. The next factual matter which Chubb relies upon is that there was no occurrence or outbreak of COVID-19 (being the disease) or SARS-CoV-2 (being the virus which causes COVID) at the Insured Locations.

98. This is relevant to claims under Extension C.

99. Neither Market Foods nor Mr Waldeck have ever been notified by any organ of the state, such as the health department, that COVID-19 or SARS-CoV-2 has ever been detected at any of the Insured Locations nor in any person who attended the Insured Locations during the Policy Periods.

100. Furthermore, there is no evidence adduced by Market Foods or Waldeck which allows any factual finding, whether directly or by inference, that COVID-19 or SARS-CoV-2 ever subsisted at the Insured Locations during the respective Policy Periods or that any person infected with COVID-19 attended during those times.

101. Insofar as Market Foods is concerned, their principal, Ms Andrea Cherie Harcourt, has affirmed an affidavit dated 16 July 2021.

102. Ms Harcourt deposes as to the financial losses suffered by Market Foods by reason of the first lockdown but makes no mention as to whether she has ever been informed by the State of Queensland or the UQ that COVID-19 or SARS-CoV-2 was ever detected at any of the Insured Locations during the Policy Period nor that any patron during those time was infected.

103. Chubb says Ms Harcourt's evidence being silent on this matter allows a submission consistent with paragraph 99 to be made without there being any need for it to be put to her in cross-examination.

104. If Market Foods suggests this would offend the rule in **Browne v Dunn** (1893) 6 R 67, they should make that plain in their written submissions and the reasons why it says this matter should be put to Ms Harcourt.

105. Insofar as Waldeck is concerned, the issue of notice not having ever been received from the relevant state or authority of an occurrence or outbreak at the premises is an agreed fact. Paragraph 69 of the Statement of Agreed Facts in NSD 137/2021 provides:

> *"At no time was Mr Waldeck aware, nor was he ever made aware by either his tenant or any relevant public body or health authority, of the occurrence or outbreak at the Insured Location of either a Notifiable Disease or the discovery of an organism likely to cause Notifiable Disease."*

106. The relevance of this proposition is challenged by Mr Waldeck but not its truth.

107. Indeed, it is consistent with what Mr Waldeck told Chubb when he first sought indemnity under the Waldeck Policy.

108. On 23 April 2020, Chubb issued a request for information (**RFI**) to assist its assessment of the claim under Extension C. Among the information requested in the RFI was:

    (a) whether there had been an outbreak of COVID-19 at the insured's premises; and

    (b) if so, the details of the premises and any closure orders from a relevant authority; and

    (c) the cause of the loss claimed.

109. On 21 May 2020, Waldeck provided to Chubb the following information in response to the RFIs set out above:

    (a) whether there had been an outbreak of COVID-19 at the insured's premises – "*There has not been an outbreak of the COVID-19 disease at the insured's premises that I'm aware of*";

    (b) if so, the details of the premises and any closure orders from a relevant authority – "*Partial closure of cafe by National Cabinet*"; and

    (c) the cause of the loss claimed – *"The cause of loss is an interruption of rental income to the Landlord due to the recent act 'COVID-19*

Omnibus (Commercial Leases and Licences) Regulations 2020 SR312020'."

110. Mr Waldeck has not sworn an affidavit at all so can make no suggestion that his responses to the RFI were in any way inaccurate or incorrect at the time they were made or have been shown to be incorrect by subsequent events.

111. The only other fact which is relied upon by Chubb as part of its case is the evidence of Dr John Scheirs in his affidavit affirmed 16 July 2021 and filed in proceedings no. NSD 138/2021 on the same date.

112. Dr Scheirs is a materials expert and was asked to address specific questions in respect of whether the virus causing COVID-19 (namely SARS-CoV-2), if it is assumed to subsist on items of tangible property, was capable of causing physical damage to that property.

113. Dr Scheirs' conclusion on page 5 of his report is:

> *"COVID-19 virus particles are chemically inert protein-based organic material that will have no detrimental effects to any surface at the trace levels that may be present in a contaminated environment. Outside a contaminated environment such as a hospital ward, the published studies indicate the level of COVID-19 virus on a surface will be negligible to nondetectable.*
>
> *In my opinion, together with the absence of any literature data or evidence, COVID-19 particles (if present) would not cause any damage to property, that is, a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged" or "physical injury to property"."*

114. The specific questions put to Dr Scheirs and his answers appear at page 6 of his report:

> ***"Does the assumed subsistence of SARS-CoV-2 virus on an object or property, whether a fixture or moveable, cause:***
>
> ***(a) physical alteration or change, not necessarily permanent or irreparable?*** *No - as there will be no physical alteration of materials by the COVID-19 virus as the virus does not have the capability to cause chemical reactions that could lead to physical or chemical alteration of materials by degradation or modification.*
>
> ***(b) physical injury to such objects or property?*** *No - as there will be no physical injury to such objects or property by COVID-19 virus as the virus does not have the capability to cause chemical reactions that could lead to physical or chemical alteration of materials by degradation or modification.*
>
> ***(c) physical loss, destruction or damage to such objects or property?*** *There will be no physical loss, destruction or damage to such objects or property by COVID-19 as the virus does not have the capability to cause chemical reactions that could lead to physical or chemical alteration of materials by degradation or modification."*

115. As at the time of writing of these submissions, the evidence of Dr Scheirs is unchallenged.

WALDECK STATEMENT OF ISSUES

116. The issues for determination in NSD 137/2021 are as set out in paragraphs 23 to 26 of the List of Issues for Determination filed 18 July 2021.

117. These are reproduced below and renumbered as Issue 1, Issue 2 etc.

118. One issue which does not appear in that List of Issues for Determination is the effect of section 61A of the **Property Law Act 1958 (Vic)** on the Waldeck Policy.

119. The explanation for this is that the agitation of this issue in NSD 137/2021 required the prior consent of AFCA and such consent was only provided after the filing of the List of Issues for Determination.

120. As at the date of the writing of these submissions, Chubb has amended its Statement of Claim to raise section 61A but a Defence has not yet been filed by Mr Waldeck.

121. This issue will be dealt with first due to its potentially dispositive effect on the claim under the Waldeck Policy.

Section 61A

122. Section 61A bears upon the claim under Extension C of the Waldeck Policy.

123. That extension is relevantly conditioned on *"occurrence or outbreak at the premises"* of a *Notifiable Disease"* or *"the discovery of an organism likely to cause a Notifiable Disease"*.

124. This requires consideration of the definition of *"Notifiable Disease"* which relevantly contains the following exclusionary language:

> *"Notifiable Disease does not include any occurrence of any prescribed infectious disease or contagious diseases to which the Quarantine Act 1908 as amended applies."*

125. As at the date of inception of the Waldeck Policy, the **Quarantine Act 1908 (Cth)** had been repealed for some years.

126. The recent legislative history of that statute is as follows.

127. The **Biosecurity Act 2015 (Cth)** replaced the **Quarantine Act 1908 (Cth)**, albeit with a more extensive reach in terms of its subject matter.[5] This is also apparent from the Explanatory Memorandum to the **Biosecurity Bill 2014**, the relevant extract of which is set out at [113] in **Wonkana**.

128. The term *"Quarantinable disease"* was defined in the **Quarantine Act** as:

[5] **HDI Global Specialty SE v Wonkana No. 3 Pty Ltd** [2020] NSWCA 296 at [106] per Hammerschlag J, Bathurst CJ and Bell P agreeing.

> *"any disease declared by the Governor-General, by proclamation, to be a quarantinable disease."*

129. Such a declaration was made under section 13(1)(ca) of the **Quarantine Act**.

130. Quarantinable diseases declared under the **Quarantine Act** formerly appeared in the **Quarantine Proclamation 1998** and that proclamation was repealed on 16 June 2016 by way of the **Quarantine Repeal Proclamation 2016**.

131. This statutory mechanism was not preserved under the **Biosecurity Act** and was replaced by the listing of human diseases following a determination under section 42 of that Act.

132. Section 42 of the **Biosecurity Act** defines the term *"listed human disease"* as a *"human disease"* that the Director of Human Biosecurity considers may be: (a) communicable; and (b) cause significant harm to human health, with a determination made accordingly.

133. Once determined under section 42, such diseases are listed in the **Biosecurity (Listed Human Diseases) Determination 2016** as amended from time to time. This determination has the force of a legislative instrument under section 42(3) of the **Biosecurity Act**.

134. On 21 January 2020, the **Biosecurity (Listed Human Diseases) Amendment Determination 2020** amended the **Biosecurity (Listed Human Diseases) Determination 2016** to include Listed Human Disease 4(h):

> *"human coronavirus with pandemic potential"*

135. This plainly includes what has become known as COVID-19, that being the name of the disease caused by the virus known as SARS-CoV-2.

136. The decision in **HDI Global Specialty SE v Wonkana No. 3 Pty Ltd** [2020] NSWCA 296 made clear there is no capacity for the reference to the *"Quarantine Act 1908"* in Extension C to be read as a reference to the *"Biosecurity Act 2015"* as a matter of construction.

137. Chubb accepts that is the end of the matter save where there is a provision such as 61A. It provides:

> *"Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any deed, contract, will, order or other instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision."*

138. Chubb submits this provision applies to the Waldeck Policy and amends the reference to *"Quarantine Act 1908"* to read *"Biosecurity Act 2015"*.

139. This assumes the proper law of the Waldeck Policy is that of Victoria which means the initial enquiry is whether the parties have selected a law of the contract for themselves.

140. They have but it does not answer the question arising in respect of section 61A as the Applicable Law in the Introduction on page 7 says that any dispute concerning the Waldeck Policy *"will be determined in accordance with the laws of Australia"*.

141. The parties have made no express or implied choice as to the laws of which State or Territory will apply.

142. Chubb says the proper law of the Waldeck Policy is Victoria as that is the system to which the contract has the closest and most real connection.[6]

143. Chubb says this because at all relevant times:

(a) the Insured Location was located in Victoria;

(b) the Property Insured was located in Victoria;

(c) the risks insured, including by way of the Extensions, were located solely in Victoria;[7] and

(d) the Named Insured, Mr Waldeck, was a resident of Victoria.

144. That being so, the application of section 61A turns on whether the *"the Act"* to which that section refers is confined to Acts passed by the State of Victoria or extends to Acts passed by the Commonwealth of Australia.

145. This is because the term *"Act"* as it appears in section 61A is itself defined under section 38 of the **Interpretation of Legislation 1984 (Vic)**:

> *"In all Acts and subordinate instruments, unless the contrary intention appears—*
>
> *"Act" means an Act passed by the Parliament of Victoria."*

146. This means that, as matter of statutory construction, Chubb must demonstrate that a *"contrary intention"* appears in the **Property Law Act 1958 (Vic)**.

147. There is little assistance to be gained from the extrinsic material.

148. Section 61A was introduced into the **Property Law Act 1958 (Vic)** by the **Interpretation of Legislation 1984 (Vic)**.

149. The Explanatory Notes for the **Interpretation of Legislation Bill 1984** state:

> *"Clause 2 of the Schedule amends the Property Law Act 1958 by making provision with respect to the construction of references in deeds, contracts, wills, orders and other instruments to Acts that have been repealed and re-*

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[6] **Bonython v The Commonwealth** (1950) 81 CLR 486 at 498; [1951] AC 201 at 219 per Lord Simmonds; **Akai Pty Ltd v People's Insurance Co Ltd** (19996) 188 CLR 418 at 437 and 440.

[7] As to the importance of this: **Carillion Construction Ltd v AIG Australia Ltd** [2016] NSWSC 495 at [86] and [87].

enacted. The provision is similar to that made by clause 16(a) with respect to Acts and subordinate instruments. Section 7(1) of the Acts Interpretation Act 1958 contained a similar provision with respect to all documents."

150. The reference to clause 16(a) is of significance. It appeared in the **Interpretation of Legislation Bill 1984** in the following terms:

> *"Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears-*
> *(a) any reference in any Act or subordinate instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision."*

151. The Explanatory Notes provided as follows on page 3:

> *"Clause 16 provides that where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any Act or subordinate instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision and any subordinate instrument made or other thing done under the repealed Act or provision shall have effect as if made or done under the re-enacted Act or provision insofar as it could have been made or done under that Act or provision.*
>
> *This clause will render it unnecessary to include general saving provisions in repealing enactments designed, for example, to continue subordinate legislation in force notwithstanding the repeal of the provisions under which that legislation was made. The common law rule is that subordinate legislation lapses on the repeal of the provisions under which it is made unless its operation is saved by the repealing enactment."*

152. The statutory intent in respect of section 61A was that it have a similar function to section 16(a) of the **Interpretation of Legislation Act 1984 (Vic)** in that it meant that general savings provisions would be unnecessary in the case of repealing statutes.

153. A contract is obviously a different concept to a statute but the overall intent is easily enough understood – just as the Victorian legislature wished to allow the repeal of legislation without unintended consequences in terms of subordinate legislation, so too did it wish for such repeal to not have unintended consequences for deeds, contracts, wills, orders and other instruments.

154. This would obviously be to the benefit of the parties to those instruments as their intention would not miscarry by reason of legislative repeal after the date of creation of the instrument because the parties had not stayed abreast of the status of the legislation referred to in their contract or deed.

155. Equally, it would prevent precisely the type of dispute which was litigated in **Wonkana**.

156. The Parliament of Victoria has deployed a mechanism through section 61A which deems amendments to such instruments where the parties have not

been aware of the relevant legislative change or have not acted to amend their instrument if they were aware of such change.

157. This would be of particular benefit in respect of instruments entered into in respect of real property transactions which may have terms that last for decades (such as a long term lease with multiple options) or instruments that may not be enlivened for decades (such as a will drawn well before the death of the testator).

158. This may explain why section 61A was inserted into the **Real Property Act 1958 (Vic)** rather than remain in the **Interpretation of Legislation Act 1984 (Vic)**.

159. This beneficial operation of section 61A would be constrained if it was to refer only to Acts passed by the Parliament of Victoria because deeds, contracts, wills, orders and other instruments can refer to Acts passed by any State or Territory in Australia, the Commonwealth of the Australia or even of the legislature of a foreign country.

160. In passing section 61A, the Parliament of Victoria can be taken to have known that it operated as part of a federal system of government with legislation of the other states and territories as well as the Commonwealth necessarily having some effect or operation on contracts whose proper law was that of Victoria.

161. When dealing with beneficial legislation, the Court is free to depart from literalism to secure the intent of the relevant legislature. This is a recognised canon of construction:

162. As was stated by Isaacs J in **George Hudson Ltd v Australian Timber Workers' Union** (1923) 32 CLR 413 at 436-7:

> *"For the purpose of giving effect to the manifest intention of Parliament in a remedial statute, even the literalism of the Act may be departed from."*

163. The construction urged by Chubb does not go so far as departing from the literal words of the definition of *"Act"* as it appears in the **Interpretation of Legislation Act 1984 (Vic)** as that definition is not prescriptive and allows that term to have a different meaning where a contrary intention appears.

164. To give full effect to the beneficial intent which underlies section 61A, the term *"Act"* should be read as a reference to those passed by the Commonwealth and the other States and Territories of Australia. Such contrary intent is necessarily implied having regard to the legislative purpose of that provision.

165. This is consistent with the approach to the construction of beneficial legislation described in **Eichmann v Commissioner of Taxation** [2020] FCAFC 155 at [40]:

> *"It follows that because s 152–40(1)(a) is beneficial in nature, "its language should be construed so as to give the most complete remedy which is consistent "with the actual language employed" and to which its words "are*

> *fairly open"": Khoury v Government Insurance Office of New South Wales (1984) 165 C.L.R. 622 at 638 per Mason, Brennan, Deane and Dawson JJ In that respect, a beneficial construction of legislation may, in our view, legitimately influence constructional choices in a given case which arise from the use of generalised language to describe a necessary connection between two things; here those two things are the use of an asset and the carrying on of a business."*

166. Chubb submits that section 61A permits this Court to construe the reference to the **Quarantine Act 1908 (Cth)** in Extension C as being a reference to the **Biosecurity Act 2015 (Cth)**.

167. It then follows that there can be no cover under Extension C of the Waldeck Policy if COVID-19 is a contagious disease to which the **Biosecurity Act 2015 (Cth)** applies.

168. As explained above, COVID-19 is both a contagious disease and a listed human disease under section 42 of the **Biosecurity Act 2015** so there can be no sensible debate that it meets the description of the exclusionary language in Extension C.

169. That being so, there is no cover available for the claim made by Mr Waldeck under Extension C.

170. As Extension C is the only basis on which Mr Waldeck seeks cover, it follows that the Waldeck Policy does not respond and Chubb is entitled to the declaration that the Waldeck Policy does not respond sought in prayer 1 of the Originating Application.

171. In the event these submissions are not accepted, Chubb has addressed the issues for determination as agreed between the parties in respect of the Waldeck Policy below.

Issue 1: Was there an occurrence or outbreak at the premises of COVID-19?

172. This question comprises two constructional sub-issues and one factual sub-issue.

173. The constructional sub-issues are:

(a) what is the proper construction of the words *"occurrence or outbreak"* as they appear in Extension C?

(b) what is the proper construction of the words *"at the premises"*?

174. The factual sub-issue is that, depending on how the constructional issues are resolved, was there a such an occurrence or outbreak at the premises?

175. This issue is most easily disposed of by firstly considering the proper construction of *"at the premises"*.

176. Chubb submits that phrase is referring to the same location as that nominated as the Insured Location in the schedule to the Waldeck Policy, namely 1197 Toorak Road in Camberwell.

177. In his Defence at paragraph 13(d), Mr Waldeck says the word "*premises*" means "*the vicinity of the premises*".

178. The argument anticipated by Chubb is that had the parties intended the cover available under Extension C to be limited to the Insured Location, they could have used that term but the use of the different term *"at the premises"* indicates that a wider area than the Insured Location was intended.

179. There are several difficulties with Mr Waldeck's construction.

180. Firstly, if the parties had wished to use those words, they could have done so. They did not.

181. Secondly, they introduce a level of uncertainty and arbitrariness to the geographical location which is the subject of cover.

182. As was made clear in **The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd & Ors** [2020] EWHC 2448 (Comm) (**the FCA Decision**) at [406], [430], [442], [444], [466], the undefined term *"vicinity"* when given its ordinary meaning is an *"elastic"* concept.

183. Bearing in mind the focus of the Waldeck Policy is the insurance of property at a designated location (the Insured Location), the suggestion that the parties would have regulated this fundamental aspect of their bargain by reference to an undefined and elastic concept seems most unlikely.

184. Thirdly, as an undefined term, the ordinary meaning of the term *"premises"* is at least a starting point in ascertaining the proper construction of that term as it appears in Extension C.

185. Dixon J in **Turner v York Motors Pty Ltd** (1951) 85 CLR 55 at 75 stated that the word *"premises"* in popular language is applied to *"buildings"*. It follows that concept of *"premises"* does not, as a matter of ordinary usage, extend some undefined distance beyond that building.

186. In the case of Waldeck Policy, the building constituting the premises is easily identified – it is 1197 Toorak Road, Camberwell.

187. Fourthly, on Chubb's construction, the terms *"Insured Location"* and *"at the premises"* are read interchangeably as they appear in Extension C.

188. Chubb submits a slight grammatical lacuna (if it is one) provides no sound basis to reject this construction which is otherwise consistent with the obvious intent of the Waldeck Policy in terms of the geographical limit to be placed on the cover available under Extension C.

189. This accords with the approach taken by Allsop CJ in **Star Entertainment** at [164], [166] and [168] that the construction of a policy such as the Waldeck Policy should not be approached on the basis of refined precision or fine

textual exactitude and the business sense given by businesspeople to business documents in their ordinary dealings is likely to be a reasonably straightforward sense.

190. If Chubb's construction is accepted then the constructional issue as to the proper meaning of *"outbreak or occurrence"* of COVID-19 at the premises does not arise as there is simply no evidence of such an outbreak or occurrence at the Insured Location.

191. Indeed, Mr Waldeck himself says there was no such occurrence or outbreak at the premises that he is aware of.

192. To the extent Mr Waldeck relies on the published health data, it has obvious and fatal limitations for his claim. These limitations are set out in paragraphs 38 to 40 of the Statement of Agreed Facts:

> *"The Victorian government publishes data (generated in a spreadsheet format) of confirmed COVID-19 cases by date, postcode, local government area and acquired source. A confirmed case is defined as "a person who has a positive laboratory test for coronavirus (COVID-19)".*
>
> ***Residential location postcode is the address provided by a person during contact tracing. This is not where they were infected. It may not be where the case currently resides (for example they might be in a hospital). The postcode of the case does not reflect where a person was infected.*** *The published data includes as the "diagnosis date" for each confirmed case the date of the laboratory test for COVID-19.*
>
> *The data is sourced through contact tracing and management of the COVID-19 outbreak. The following data sources are also used:*
>
> *(a) Australian Bureau of Statistics (**ABS**) data is used to calculate a rate by population for postcodes and local government areas;*
>
> *(b) local government area population data is sourced from the ABS Estimated Resident Population (ERP) for 2019; and*
>
> *(c) postcode population data is sourced from the ABS 2016 census figures."* [emphasis added]

193. This obviates the need to determine the proper construction of the phrase *"occurrence or outbreak"* as it appears in Extension C.

194. Leaving that aside, the term *"occurrence"* in an insurance context should be given the same meaning as it was in **Star Entertainment** at [174] in that it is synonymous with an event and has the ordinary meaning of something which happens at a particular time, at a particular place and in a particular way.

195. The term *"outbreak"* should be given the same meaning as it appears that term is used in conjunction with *"occurrence"* having regard to the circumstances described in a) to f) of Extension C.

196. For example, there can be an occurrence or outbreak of a Notifiable Disease (referred to in (a)) but, as a matter of language, there cannot be outbreak of murder or suicide (referred to in (e)).

197. What amounts to an outbreak as a factual proposition is a more difficult issue and one which would be informed by expert evidence.

198. As at the time of writing these submissions, no such evidence had been served by Mr Waldeck.

Issue 2: Was there an occurrence or outbreak at the premises of illness sustained resulting from COVID-19?

199. The answer to this question is 'no' for the reasons set out in respect of Issue 1 and Chubb repeats its submissions at paragraphs 172 to 198 above.

200. The issue is resolved at a threshold level by the absence of any evidence of an occurrence or outbreak of COVID-19 at the Insured Location at any time during the Policy Period.

Issue 3: Was there an occurrence or outbreak at the premises of the discovery of SARS-CoV-2?

201. The answer to this question is 'no' for the reasons set out in respect of Issue 1 and Chubb repeats its submissions at paragraphs 172 to 198 above.

202. The issue is resolved at a threshold level by the absence of any evidence of COVID-19 or SARS-CoV-2 at the Insured Location at any time during the Policy Period.

Issue 4: In relation to Issues 1, 2 and 3 did the occurrence or outbreak have to occur at the Insured Location or could it have occurred elsewhere and, if so, where?

203. The answer to this question is that the occurrence or outbreak must occur at the Insured Location for the reasons already submitted at paragraphs 172 to 198 above.

Issue 5: If the answer to Issues 1, 2 or 3 is 'yes', was there an intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from such occurrence or outbreak at the premises?

204. This question does not arise if Chubb's construction of the words *"at the premises"* is accepted as there was no occurrence or outbreak at the Insured Location nor any discovery of SARS-CoV-2 as a question of fact.

205. In any event, there was no intervention of a public body directly arising from any assumed occurrence or outbreak of COVID-19 or discovery of SARS-CoV-2 at the Insured Location.

206. The critical words here are *"directly arising from"* as they appear in Extension C and this gives rise to a further constructional sub-issue.

207. In an insurance context, the use of the words *"arising out of"* require a less proximate relationship than *"caused by"* or *"resulting from"*: **Government Insurance Office of NSW v RJ Green & Lloyd Pty Ltd** (1966) 114 CLR 437 at 443 (Barwick CJ).

208. However, Extension C prefaces these words with *"directly"* which, unaided by authority, would appear to restore the causal relationship needed to one of proximate or direct cause.

209. These issues were considered by the New South Wales Court of Appeal at some length in **Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited** (2005) 13 ANZ Ins Cas 61-643; [2005] NSWCA 66 at [49] to [100] per McColl JA (Ipp and Tobias JJA agreeing).

210. Allowing always that the terms of the policy in question may demand a different result, Chubb submits that the proper construction of the words *"directly arising"* requires the occurrence or outbreak of COVID-19 or the discovery of SARS-CoV-2 at the premises to be the proximate or direct cause of the intervention of the public body.

211. This requires Mr Waldeck to establish:

    (a) that knowledge was held by the relevant public body of the occurrence or outbreak or discovery at the premises; and

    (b) such knowledge formed part of the decision(s) which led to the interventions relied upon by Mr Waldeck.

212. The interventions relied upon by Mr Waldeck are those set out in his Outline Document and comprise:

    (a) **Non-essential Business Closure Direction**;

    (b) **Non-Essential Activity Directions; Non-Essential Activity Directions (No 2)**;

    (c) **Restricted Activity Directions; Restricted Activity Directions (No 2) to (No 9)**;

    (d) **Restricted Activity Directions (No 9) to (11)**;

    (e) **Restricted Activity Directions (Restricted Areas); Area Directions (No 3)**;

    (f) **Restricted Activity Directions (Restricted Areas)**;

(g) **Restricted Activity Directions (Restricted Areas) (No 2) to (No 14)**;

(h) **Area Directions (No 3) to (No 9)**;

(i) **Restricted Activity Directions (Melbourne)**; and

(j) **Workplace Directions (No 8)**.

213. All of those directions were made by the relevant delegate under the **Public Health and Wellbeing Act 2008 (Vic)**.

214. In addition, Mr Waldeck also relies upon the ***COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*** **(Vic)**.

215. Whilst it may be accepted that these measures were taken by a public body in response to the occurrence or outbreak of COVID-19 in Victoria generally, there is no evidence that they were taken directly in response to an occurrence or outbreak of COVID-19 or the discovery of SARS-CoV-2 *"at the premises"* referred to in Extension C irrespective of how narrowly or broadly the term *"at the premises"* is construed.

Issue 6: If the answer to Issue 5 is 'yes', did such intervention lead to the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority?

216. The answer to Issue 5 must be 'no' on the case of either Chubb or Mr Waldeck so Issue 6 does not arise.

217. If Mr Waldeck's case proceeds this far, it is accepted that the public health directions caused the restriction or denial of the use of the ground floor of the Insured Location by the Mr Waldeck's tenant, Going Ventures Pty Limited, in the operation of their cafe.

218. It is not accepted that the ***COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*** **(Vic)** (**the Regulations)** caused any restriction or denial of the use of the Insured Location as that Regulation only affected the contractual relationship between Mr Waldeck and Going Venture as landlord and tenant.

Issue 7: If the answer to Issue 6 is 'yes', was there interruption of or interference with the Insured Location in direct consequence of the intervention referred to in (e)?

219. The answer to Issue is 6 must be 'no' on the case of either Chubb or Mr Waldeck so Issue 7 does not arise.

220. If Mr Waldeck's case proceeds this far, it is accepted that there was interruption or interference with the Insured Location in direct consequence of the public health directions but not by reason of the Regulations.

221. The interruption or interference with the Insured Location that is the subject of cover under Extension C is that which is the direct consequence of the intervention of a public body which leads to the restriction or denial of the use of the Insured Location.

222. The Regulations did not cause such restriction or denial of use of the Insured Location.

Issue 8: What is required for there to be an "occurrence" of COVID-19?

223. In light of the complete lack of evidence as to COVID-19 ever having been detected at the Insured Location or having been contracted by any patron of the cafe, Chubb says this question does not arise and to answer it would amount to an advisory opinion.

Issue 9: What is required for there to be the "discovery" of SARS-CoV-2?

224. In light of the complete lack of evidence as to SARS-CoV-2 ever having been detected at the Insured Location or having been contracted by any patron of the cafe, Chubb says this question does not arise and to answer it would amount to an advisory opinion.

Issue 10: If the answer to Issue 7 is 'yes', was there any loss resulting from such interruption of or interference with the Insured Location?

225. The answer to Issue 7 must be 'no' so this Issue does not arise.

226. If it is assumed that the answer to Issue 7 is 'yes', Mr Waldeck's claim is based on the alteration of the contractual relationship between him and his tenant by reason of the Regulations and the eventual loss of that tenant under a deed of surrender.

227. However, the Regulations did not interrupt or interfere with the Insured Location in the relevant sense as they did not restrict or deny the use of the Insured Location.

228. Mr Waldeck's complaint is that his rights as a landlord under the lease were altered by the Regulations.

229. Whilst this may be accepted, the loss he suffered did not result from any interruption of or interference with the Insured Location but by a decision by the State of Victoria to intrude on the private contractual relationship between Mr Waldeck and his tenant.

230. This alteration of contractual rights does not meet the description of *"interruption of or interference with the Insured Location"*.

231. The eventual loss by Mr Waldeck of his tenant under a deed of surrender is not a form of interruption of or interference with the Insured Location and was not in direct consequence of the interventions relied upon by Mr Waldeck.

Issue 11: If the answer to Issue 10 is 'yes', does this loss include:

(a) any relief from rent payments and outgoings provided to Going Venture in respect of the Insured Location by reason of the Regulations?

(b) the loss of rent following the surrender of the lease of the Insured Location by Going Venture on 22 October 2020?

(c) are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

(d) Should any adjustment be made to Waldeck's loss otherwise covered by Extension C, clause 1 by reason of the operation of the adjustment clause at page 24 of the policy?

232. These issues do not arise by reason of the answers to Issues 1 to 10. If they do, then Chubb says the following.

233. As to (a), Chubb says the answer is 'no' as the Regulations did not lead to the restriction or denial of use of the Insured Location.

234. As to (b), Chubb the answer is 'no' as this loss was not in direct consequence of the interventions of a public body relied upon by Mr Waldeck.

235. As to (c), this issue does not arise as there is no suggestion that Mr Waldeck received, or was entitled to receive, any JobKeeper payments which may have offset the loss of rental he now claims.

236. As to (d), this issue goes principally to quantum which the parties have agreed is beyond the scope of this hearing.

237. An issue which arises from (d) which is amenable to determination is a constructional question concerning the proper counter-factual to be adopted in the application of Trends in the Business Clause.

238. This issue is dealt with in addressing the final issue for determination in proceedings NSD138/2021 at paragraph 414 to 464 below.

Issue 12: If it is found that the policy responds and Chubb is liable to pay an amount to Waldeck, from what date is interest under section 57 of the ICA payable?

239. If the Waldeck Policy responds, then Mr Waldeck will be entitled to an award of interest under section 57.

240. This is an issue which awaits an indication from Mr Waldeck as to the date on which he says it became unreasonable for Chubb not to have indemnified him.

MARKET FOODS STATEMENT OF ISSUES

241. The issues for determination in NSD 138/2021 are as set out in Statement of Agreed Issues filed on 1 July 2021.

242. These are reproduced below and renumbered as Issue 1, Issue 2 etc.

GENERAL ISSUES

Issue 1: Are Extensions B1, B3, B4 or C of the policy, or any of the components or elements thereof, patently uncertain, ambiguous or flawed?

243. This issue is one which Market Foods says arises, apparently in anticipation of Issue 2.

244. Chubb's position is that this issue does not arise as there is no aspect of Extensions B1, B3, B4 or C the Market Foods Policies which cannot be resolved as part of an orthodox constructional exercise.

245. Chubb says the epithets *"patently uncertain, ambiguous or flawed"* add nothing to that exercise.

246. It appears Market Foods pursues this issue as the platform on which to invoke sections 13, 14 and 37 of the **Insurance Contracts Act 1984 (Cth) (the ICA)**.

247. As will be explained below, the presence of a broker acting on behalf of Market Foods means that these provisions are simply not engaged or have no application.

Issue 2: If the answer to Issue 1 is 'yes':

(a) how, and to what extent, does such patent uncertainty, ambiguity or flaw affect the construction of Extensions B1, B3, B4 or C of the policy?

(b) does s 37 of the *Insurance Contracts Act 1984* (Cth) have any application having regard to s 71 and, if so, is s 37 enlivened factually?

(c) is Chubb precluded from relying on the parts of the policy affected by such patent uncertainty, ambiguity or flaw by virtue of ss 13, 14 or 37 of the *Insurance Contracts Act 1984* (Cth)?

248. Market Foods raises in paragraphs 68 and 69 its Defence the issues of *contra proferentem* and sections 13 (utmost food faith), 14 (reliance on provisions in utmost good faith), 35 (notification of prescribed provisions) and 37 (notification of unusual terms) of the ICA.

249. It appears reliance on section 35 has now been abandoned as there is no reference to it in the List of Issues for Determination.

250. Section 13 provides:

"A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."

251. Section 14 provides:

> *"(1) If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.*
>
> *(2) Subsection (1) does not limit the operation of section 13.*
>
> *(3) In deciding whether reliance by an insurer on a provision of the contract of insurance would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the insured, whether a notification of a kind mentioned in section 37 or otherwise."*

252. Section 37 provides:

> *"An insurer may not rely on a provision included in a contract of insurance (not being a prescribed contract) of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer clearly informed the insured in writing of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise)."*

253. To this should be added section 71 of the ICA which provides:

> *"(1) A provision of this Act (other than subsection 58(2)) for or with respect to the giving of a notice or other document or information to an insured before a contract of insurance is entered into does not apply where the contract was arranged by an insurance broker, not being an insurance broker acting under a binder, as agent of the insured."*

254. The first point to be made is that Market Foods has not established that Extensions B1, B3, B4 and C are terms *"not usually included in contracts of insurance that provide similar insurance cover"*.

255. That being so, section 37 is not engaged even if it applied here.

256. However, section 37 does not apply by reason of section 71.

257. Market Foods was represented by an insurance broker at all relevant times.

258. The broker in question was General Security Australia Insurance Brokers Pty Limited, as disclosed in the schedule to the Market Foods Policies.

259. Furthermore, at the time of writing these submissions, it is understood that Market Foods is prepared to agree a fact to the effect that, at all relevant times, it was represented and advised by General Security in relation to the placement of the Market Foods Policies on its behalf.

260. These matters mean that no issue of *contra proferentem* can arise, nor can sections 14 or 37 of the ICA be relied upon by Market Foods as section 14(3) defeats any suggestion that any clause of the Market Foods Policies is being relied upon other than in good faith and section 37 has no application by reason of section 71.

261. The allegation as to a lack of good faith in breach of the implied term under section 13 of the ICA is embarrassing and should be withdrawn by Market Foods.

262. It is not particularised at all, much less to the extent necessary for such a serious allegation and is simply unsupported by evidence, noting the presence and involvement of an insurance broker who has not been called by Market Foods.

263. Chubb says that to require the Court to consider Issues 1 and 2 would simply be a waste of the Court's resources in the context of a hearing which must determine numerous complex issues across ten different proceedings over eight days ahead of a judgment which must be delivered in time for a presumptive appeal to be heard later this year.

264. Chubb invites the withdrawal of these matters in Market Foods' responsive written submissions.

EXTENSION B1

Issue 3: Was there "*Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in"* Extension B1?

265. This focuses upon the preamble to Extensions B.

266. The definition of the term *"Business Interruption"* is set out in paragraph 82 above, and requires interference of or interruption with the Market Foods Business:

(a) *"in consequence of Insured Damage"*;

(b) where *"Insured Damage"* means *"physical loss, destruction or damage occurring during the Policy Period caused by* ***an event insured*** *under the Property Damage, Theft, Money, Glass or General Property Sections"*. [emphasis added]

267. The word *"event"* is undefined.

268. The meaning of that word in an insurance context was recently considered in **Star Entertainment** at [118] and [174]:

> *"Just as when the words "occurrence" or "event" are used in an insurance policy, they mean something which happens at a time, and place, and in a particular way: Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1; 2 WLR 123 at [67].*
>
> *…*

An occurrence in an insurance context, as the Insurers submitted, is synonymous with an event and has the ordinary meaning of something which happens at a particular time, at a particular place and in a particular way: Axa Reinsurance [1996] 1 WLR at 1035; Kuwait Airways Corporation [1996] 1 Lloyd's Rep at 683–686; Mann [2001] 1 Lloyd's Rep at 5–6 [15]–[21]; all referred to with approval and applied by the majority of the Supreme Court (Lord Hamblen and Lord Leggatt JJSC with whom Lord Reed PSC agreed) in Arch Insurance [2021] 2 WLR at 145 [67]."

269. Chubb submits that the term *"event"* as it appears in the definition of Insured Damage should be given the same meaning.

270. The relevant events *"insured"* are those insured under each of the Property Damage, Theft, Money, Glass or General Property sections.

271. The Market Foods Policy does not provide cover under the General Property section as explained above at paragraphs 47 to 49 above.

272. Insofar as Market Foods relies on the Property Damage section, it also contains an exclusion for Damage directly or indirectly caused or occasioned or arising from contamination and disease as explained in paragraph 76 above.

273. This means there can be no event insured under the Property Damage section which involves physical loss, destruction to Contents and Stock caused in any way by COVID-19 or SARS-CoV-2.

274. The consequence is that Market Foods must rely on physical loss, destruction or damage caused by an event insured under the Theft, Money or Glass sections in satisfying the definition of Insured Damage.

275. No such event has been pleaded nor proven and, unsurprisingly, none of these sections insures damage to property caused by disease of any type as:

    (a) cover under the Theft Section is for loss or damage occurring during the Policy Period to Property Insured at the Insured Location caused by theft, that is theft of Stock and Contents;

    (b) cover under the Money section is for loss during the Policy Period of Money belonging to Market Foods and connected with its Business and from certain locations; and

    (c) cover under the Glass section is for glass damaged during the Policy Period at the Insured Location due to any sudden or accidental cause.

276. On that basis alone, Market Foods has failed to satisfy the definition of Insured Damage and, by extension, has failed to demonstrate that there was Business Interruption.

277. Hence, the claim by Market Foods under Extension B1 does not make its way out of the preamble to that extension.

278. Continuing through the preamble sees two further requirements, the first being that the Business Interruption was to property of a type insured by the

Market Foods Policies and the second being that such property be located with 50 kilometres of any Insured Location.

279. This means that there must be physical damage to Contents and Stock, Money or Glass within 50 kilometres of any Insured Location.

280. These matters have also not been pleaded nor proven.

Sub-issue 3(a): Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*physical loss, destruction or damage… to property*" (Property Damage)?

281. This sub-issue addresses the requirements of the definition of Insured Damage, that forming part of the definition of Business Interruption. It raises the anterior constructional questions as to the proper meaning of the undefined composite expression *"physical loss, destruction or damage"*.

282. Subject always to matters of context, the ordinary meaning of *"damage"* as it appears in a policy insuring against property damage is that formulated in **Ranicar v Frigmobile Pty Ltd; Ranicar v Royal Insurance Pty Ltd** [1983] Tas R 113; (1983) 2 ANZ Ins Cas 60-525 at 116:

> *"In my view, the ordinary meaning, and therefore the meaning which I should prima facie give to the phrase "damage to" when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged. It follows that not every physical change to goods would amount to damage. What amounts to damage will depend upon the nature of the goods"*

283. This definition has been consistently applied or cited with apparent approval by intermediate appellate Courts: **Axa Global Risks (UK) Ltd v Haskins Contractors Pty Ltd** [2004] NSWCA 138 at [41], [42] and [49]; **Switzerland Insurance Australia Ltd (formerly Federation Insurance Ltd) v Dundean Distributors Pty Ltd** (1998) 10 ANZ Ins Cas 61-388; [1998] 4 VR 692 at 703-4 per Ormiston JA (Callaway JA agreeing); **Prime Infrastructure (DBCT) Management P/L v Vero Insurance Ltd and Ors** [2005] QCA 369 at [31] per McMurdo JA (Mullin J agreeing).

284. In this Court, there was comprehensive survey of the authorities by Allsop CJ at first instance in **R&B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2)** (2019) 369 ALR 137 at [76] to [133] in the context of whether a loss of use was caused by construction defects or physical injury to property, the difference between those two concepts being the critical issue.

285. The approach taken by Allsop CJ was entirely consistent with **Ranicar**. The need for a change of physical state was referred to at [97].

286. One relevant distinction which emerged from that analysis is that functional inutility does not amount to physical damage.

287. This proposition emerges from the decision of New South Wales Court of Appeal in **Transfield Construction Pty Ltd v GIO Australia Holdings Pty Ltd** (1997) 9 ANZ Insurance Cases 61-336; [1996] NSWCA 538 at [1] to [2].

288. In **R&B Directional**, Allsop CJ approached that decision with some caution at [96] before noting the support for it in other jurisdictions at [97] and ultimately agreeing with the characterisation of the facts in **Transfield** as functional inutility by Meagher JA.

289. The Full Court referred to **Transfield** with apparent approval or at least without criticism in **Vero Insurance Ltd v Australian Prestressing Services Pty Ltd** [2013] NSWCA 181 at [35]; **Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd** (2013) 305 ALR 412 [2013] FCAFC 130 at [162].

290. A further, more contemporary, application of **Transfield** outside of the insurance sphere was that of Ball J in **Bettergrow Pty Limited v NSW Electricity Networks Operations Pty Ltd as trustee for NSW Electricity Networks Operations Trust t/as TransGrid (No 2)** [2018] NSWSC 514 at [77] in the context of mud at a processing facility which was contaminated with asbestos and prevented the use of that facility.

291. Returning to the definition of Insured Damage, Chubb submits that the Court need go no further than the express language of that definition to be easily satisfied that it requires physical change or alteration caused by an event insured under the nominated sections of the Market Foods Policies.

292. If more be needed, the authorities cited above make that plain and do so drawing a useful distinction between property which is physically damaged and that which cannot be used but has not been physically damaged.

293. The remaining issue is one of fact, namely whether COVID-19 or SARS-CoV-2 can cause physical loss, destruction or damage to property.

294. The evidence of Dr Scheirs is that the presence of COVID-19 and SARS-CoV-2 on property is incapable of causing physical damage to it.

295. Dr Scheirs' evidence on this issue (and generally) is unchallenged and should be accepted.

296. It is apprehended that Market Foods will seek to argue functional inutility falls within the definition of Insured Damage as a constructional matter and the response to COVID-19 by the Queensland government and UQ satisfy that definition as a factual matter.

297. This is based on a letter sent by the solicitors for Market Foods sent on 15 July 2021.

298. As a matter of construction, Chubb says such a proposition is completely untenable having regard to the legal principles just stated but will respond in more detail after understanding precisely how the argument is put by Market Foods in its written submissions.

299. Even if Market Foods were correct about this, as a factual matter it has neither pleaded nor proven the property of a type insured under the Theft, Money or Glass sections within 50 kilometres of an Insured Location which has suffered such functional inutility by reason of COVID-19 or SARS-CoV-2.

Sub-issue 3(b): **If the answer to Sub-Issue 3(a) is 'yes', did the Property Damage "*occur… during the Policy Period*"?**

300. The answer to Sub-Issue 3(a) is 'no' on the basis of the proper construction of the definition and as a factual matter, regardless of which construction is preferred.

Sub-issue 3(c): **If the answer to Sub-Issue 3(b) is 'yes', was the Property Damage "*caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]*" or is it excluded by Excluded Cause 2(a)?**

301. Chubb repeats what is says above at paragraph 265 to 299.

302. This question does not arise as there was no Property Damage caused by COVID-19 or SARS-CoV-2 because that is a scientific impossibility based on the evidence of Dr Scheirs.

303. Assuming there could be Property Damage caused by COVID-19 and SARS-CoV-2 for the purposes of this issue, such Property Damage is not insured under the Property Damage Section of the Market Foods Policies by reason of Excluded Cause 2(a).

304. Such assumed Property Damage caused by COVID-19 and SARS-CoV-2 is also not insured under the Theft, Money or Glass Sections.

Sub-issue 3(d): **If the answer to Sub-Issue 3(c) is 'yes', was the Property Damage "*at the location… described in"* Extension B1?**

305. Again this issue does not arise as the answer to Sub-Issue 3(c) must be 'no' but assuming for present purposes the answer was 'yes', such Property Damage must occur within 50 kilometres of any Insured Location.

306. As explained above, Buildings are not insured by the Market Foods Policies and there has been no attempt by Market Foods to plead or prove the Contents and Stock, Money or Glass which has suffered Property Damage and is within 50 kilometres of any Insured Location.

Issue 4: **If the answer to Issue 3 is 'yes', does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*damage to any property*"?**

307. Again this issue does not arise as the answer to Sub-Issue 3(c) must be 'no' but assuming for present purposes the answer was 'yes', the subsistence of SARS-Cov-2 on property cannot constitute *"damage to any property"* for the reasons already advanced above at paragraphs 265 to 299.

308. In short, the proper meaning of the term *"damage to property"* is physical loss, destruction or damage to that property, that not including functional inutility, and SARS-CoV-2 is incapable of causing such physical loss, destruction or damage.

Issue 5: **If the answer to Issue 4 is 'yes', was there damage to any property "*within 50 kilometres of any Insured Location*" during the Policy Period?**

309. This issue does not arise as the answer to Issue 4 must be 'no' for the reasons already advanced above at paragraphs 265 to 299.

310. There was no physical damage to any property caused by COVID-19 or SARS-CoV-2 at any location as that is a scientific impossibility so there cannot have been any damage to property within 50 kilometres of any Insured Location.

Issue 6: **If the answer to Issue 6 is 'yes', did such damage "*prevent or hinder the access to or use of the Insured Location*"?**

311. This issue does not arise as the answer to Issue 5 must be 'no'.

Sub-issue 6(a): **Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions and/or the UQ Direction - which, in turn, "*prevent[ed] or hinder[ed] the access to or use of the Insured Location*". If this can be established, is this element of the insuring clause satisfied or must the damage to property prevent or hinder the access to or use of the Insured Location as opposed to the response to such damage by the Queensland Government and/or UQ?**

312. This sub-issue never arises because as:

(a) there has been no physical, loss destruction of damage during the Policy Period as COVID-19 and SARS-CoV-2 cannot cause such damage;

(b) even if there was, it was not caused by an event insured under the Property Damage, Theft, Money or Glass sections as disease is excluded from the Property Damage section and loss from disease is not insured under the remaining sections;

(c) by reason of (a) and (b), there has been no Insured Damage;

(d) by reason of (c), there has been no Business Interruption;

(e) there was no Business Interruption to property at all and obviously not to any Contents and Stock, Money or Glass (those being the types of property insured under the Market Foods Policies) within 50 kilometres of any Insured Location; and

(f) by reason of (e), neither the first nor the second requirements of the preamble to Extension B have been satisfied.

313. This contention also misunderstands the requirements of Extension B1 which are concerned with the prevention and hindrance of physical access to or use of the Insured Location by reason of physical damage to any property within

50 kilometres of any Insured Location rather than a restriction or hindrance of use or access by reason of government action.

314. An example would be the collapse of a building across a road within the 50 kilometre radius which then blocks the only means of access to and from the Insured Location.

315. At a more localised level, the debris from the collapsed building immediately adjacent to the Insured Location may physically prevent access to the Insured Location.

316. Such construction is necessarily arrived at when Extension B4 is considered - it deals with the prevention or restriction of access to an Insured Location by reason of a *"legal authority"*.

317. This means that there are two clauses within Extensions B that deal with physical damage occurring not at any Insured Location but within a 50 kilometre radius of an Insured Location.

318. A businesslike construction suggests that each clause would deal with different circumstances otherwise issues of surplusage would arise.

319. This is avoided if:

(a) Extension B1 is construed as dealing with physical damage to property within the 50 kilometre radius which, in turn, physically prevents or hinders access to or use of the Insured Location; and

(b) Extension B4 deals with prevention or restricting access to an Insured Location by any legal authority where physical access to the Insured Location may still be physically possible but it is forbidden by the legal authority as a result of the physical damage or the risk such damage poses to other property or persons.

320. Extension B4 still requires physical damage caused by an event insured under the Market Foods Policies and to property of type insured by the Market Foods Policies within 50 kilometres of an Insured Location in the first instance but is conditioned on the response of the legal authority to the risks posed by that physical damage.

321. The operation of Extension B4 is addressed more comprehensively below.

Sub-issue 6(b): If the answer to Sub-Issue 6(a) above is 'yes', did the subsistence of the SARS-CoV-2 virus on property, if proven, cause the Queensland Government Directions and/or UQ Direction?

322. This sub-issue does not arise as the answer to Sub-Issue 6(a) is 'no'.

323. On the assumption the answer is 'yes', the subsistence of SARS-CoV-2 virus on any property within 50 kilometres of any Insured Location:

(a) has not been proven by Market Foods as the property which SARS-CoV-2 must be shown to subsist on must be of a type insured by the Market Foods Policies, namely Contents and Stock, Money or Glass; and

(b) did not cause the Queensland Government Directions and/or the UQ Direction as Market Foods has placed no evidence before the Court which allows any finding that SARS-CoV-2 subsisting on any presently unidentified Contents and Stock, Money or Glass within 50 kilometres of any Insured Location was a matter known to those who issued the Queensland Government Directions and the UQ Direction, much less that such assumed subsistence played any role in those decisions.

Sub-issue 6(c): If the answer to Sub-Issue 6(b) above is 'yes', did the Queensland Government Directions and the UQ Direction "*prevent or hinder the access to or use of the Insured Location*"?

324. This sub-issue does not arise as the answer to Sub-Issue 6(b) is 'no'.

325. On the assumption the answer to Sub-Issue 6(b) is 'yes' and Extension B4 is otherwise enlivened by Market Foods' claim it may be accepted that the Queensland Government Directions prevented or hindered the access to or use of the Insured Location.

326. However, Chubb does not accept that the UQ Direction had the same effect.

327. The UQ Direction is pleaded at paragraph 35 of the Market Foods Statement of Cross-Claim and was issued on 15 March 2020 by the Professor Peter Høj AC, the Vice Chancellor and President of the University of Queensland.

328. The text of that announcement was as follows:

> *"I apologise for the lateness of this notification. You are likely to have heard the new measures announced by the Government this afternoon to slow the speed of community transmission of COVID-19 and, most importantly, protect those most vulnerable in our community.*
>
> *In response to this, I have made the decision to pause all coursework teaching at the University, including lectures and tutorials in person and online, at the University from Monday 16 March for **one week only**. Teaching will resume on Monday 23 March.*
>
> *We are using the week to accelerate a number of activities to facilitate students completing their studies this academic year. The work underway aims to:*
>
> - *Ensure the vast majority of lectures and tutorials are available online from Monday 23 March*
> - *Amend course delivery to meet the new social distancing guidelines*
> - *Assess if practicals and lab sessions need to be amended or rescheduled*
> - *Make adjustments to the academic calendar, which may include rescheduling graduation ceremonies and assessments*

Students studying in an external mode program, HDR students and students on placement or internships should not be impacted by this pause.

*I want to be clear, **our campuses remain open**. Our facilities, including libraries, study spaces and eating areas, are all operating as normal and our staff will be working.*

The potential rescheduling of July graduation ceremonies will allow us to extend the semester, if required, for a few weeks. This buffer will help students complete their course requirements to UQ standards should the unprecedented global COVID-19 situation further disrupt our normal program delivery.

This is a big call, and one I have not taken lightly. We offer more than 300 programs and around 3300 courses, and the scale and complexity of achieving these changes are significant.

With the confirmation this afternoon from Queensland Health that another student has been confirmed with COVID-19, I encourage you to adhere to the Government guidelines on social distancing and healthy hygiene habits. We understand Queensland Health are commencing contact tracing.

I believe the decision to pause teaching for one week will ensure our students continue to receive a world-class education from Australia's best teachers and secure your academic success this year."

329. Whether by its express language or substantive effect, this announcement did not, and did not seek to, physically prevent or hinder access to or the use of the Insured Location in question, being that located in the UQ food court (see paragraph 5 of the Statement of Agreed Facts filed on 2 July 2021).

330. Indeed, there was no prevention or hindrance of access to or the use of the Insured Location in any respect.

331. The announcement stressed that the UQ campus would remain open and that its facilities, including *"eating areas"*, would all be operating as normal.

Issue 7: If the answer to Issue 6 is 'yes', was there "*loss resulting from*" the Business Interruption?

332. Chubb says this does not arise as the answer to Issue 6 is 'no'.

333. If the answer is 'yes', the determination of this issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

334. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

EXTENSION B3

Issue 8: Was there "*Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in*" Extension B3?

335. Chubb repeats its submissions at paragraphs 265 to 299 above and says the answer to question posed by this issue is 'no'.

Sub-issue 8(a): **Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*physical loss, destruction or damage… to property*" (Property Damage)?**

336. Chubb repeats its submissions at paragraphs 265 to 299 above and says the answer to question posed by this sub-issue is 'no'.

Sub-Issue 8(b): **If the answer to Sub-Issue 8(a) is 'yes', did the Property Damage "*occur… during the policy Period*"?**

337. Chubb says this sub-issue does not arise as the answer to Sub-Issue 8(a) should be 'no'.

Sub-issue 8(c): **If the answer to Sub-Issue 8(b) is 'yes', was the Property Damage "*caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]*" or is it excluded by Excluded Cause 2(a)?**

338. Chubb says this sub-issue does not arise as the answer to Sub-Issue 8(b) should be 'no'.

Sub-Issue 8(d): **If the answer to Sub-Issue 8(c) is 'yes', was the Property Damage "*at the location… described in*" Extension B3?**

339. Chubb says this sub-issue does not arise as the answer to Sub-Issue 8(c) should be 'no'.

Issue 9: **If the answer to Issue 8 is 'yes', does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*[damage to] property*"?**

340. Chubb says this issue does not arise as the answer to Issue 8 should be 'no'.

Issue 10: **If the answer to Issue 9 is 'yes', was there "*damage to property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained…*"?**

341. Chubb says this issue does not arise as the answer to Issue 9 should be 'no'.

342. Chubb repeats what it says at paragraphs 265 to 299 above and says the damage to property contemplated by this extension must be physical damage to property of a type insured by the Market Foods Policies and which is located in a commercial complex.

343. This means that Market Foods must first identify the Contents and Stock, Money or Glass at the commercial complexes relied upon by it, being the Herston Building, the William Street Building and UQ campus or, at least, the food court at the UQ campus.

344. Market Foods has neither pleaded nor sought to prove any property of this type *"in any commercial complex"* which is said to have been damaged.

345. Chubb also says that the three Insured Locations are not contained in, or form part of, a commercial complex as the term *"commercial complex"* connotes a shopping precinct or commercial estate whereas the Insured Locations are situated in government buildings and on a university campus.

Issue 11: If the answer to Issue 10 is 'yes', did the damage "*result in cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*"?

346. Chubb says this issue does not arise as the answer to Issue 10 should be 'no'.

347. If the answer is 'yes', the determination of this issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

348. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

Sub-Issue 11(a): Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions and/or UQ Direction - which, in turn, "*result[ed] in [the] cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom"*. If this can be established, is this element of the insuring clause satisfied or must the resultant *"cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*" be caused by the damage to property as opposed to the response to such damage by the Queensland Government and/or UQ?

349. Chubb repeats its submissions above at paragraphs 265 to 299 and 341 to 345 and says that the *"cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*" must be caused by physical damage to property only.

350. Similarly to Extension B1, there is no aspect of Extension B3 which is conditioned on the regulatory response to Business Interruption to property of a type insured by the Market Foods Policies in any commercial complex.

351. This is made clear when by the preamble to Extensions B and the absence in Extension B3 of any reference to a legal authority or its response and the inclusion of a reference to a legal authority and its response in Extension B4.

Sub-Issue 11(b): If the answer to Sub-Issue 11(a) above is 'yes', did the subsistence of the SARS-CoV-2 virus on property cause

the Queensland Government Directions and/or the UQ Direction?

352. The answer to this sub-issue does not arise as the answer to Sub-Issue 11(a) must be 'no'.

Sub-Issue 11(c): If the answer to Sub-Issue 11(b) above is 'yes', did the Queensland Government Directions and the UQ Direction "*result in [the] cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*"?

353. The question raised by this sub-issue does not arise as the answer to Sub-Issue 11(b) must be 'no'.

354. If the answer is 'yes', the determination of this sub-issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

355. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

Issue 12: If the answer to Issue 11 is 'yes', was there "*loss resulting from*" the Business Interruption?

356. The question raised by this issue does not arise as the answer to Issue 11 must be 'no'.

357. If the answer is 'yes', the determination of this issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

358. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

EXTENSION B4

Issue 13: Was there "*Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in"* Extension B4?

359. The language of Extension B4 requires closer analysis in terms of identifying the *"location"* described in that Extension.

360. Chubb say that Extension B4, when read with the preamble to Extensions B, requires:

(a) a nominated location within 50 kilometres of any Insured Location;

(b) at that location there must be Contents and Stock, Money or Glass;

(c) that Contents and Stock, Money or Glass must have suffered physical damage;

(d) that physical damage is the *"damage"* first mentioned in Extension B4;

(e) that physical damage must bring with it the threat of additional or further damage to different property or the threat of damage to persons; and

(f) due to that physical damage or the threat of damage to other property or persons it causes, the legal authority has prevented or restricted access to the Insured Location.

361. The claim by Market Foods satisfies none of these integers as:

(a) it has neither pleaded nor proven any Contents and Stock, Money or Glass within 50 kilometres of any Insured Location which has suffered physical damage;

(b) it follows that it has not pleaded nor proven what threat was created by that initial physical damage to other property or to persons; and

(c) the Queensland Government Directions and the UQ Direction could not have been in response to that initial physical damage to the Contents and Stock, Money or Glass or the threats it created as COVID-19 and SARS-CoV-2 cannot cause any physical damage to property under any circumstances so cannot have caused the initial physical damage contemplated by Extension B4.

Sub-Issue 13(a): Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*physical loss, destruction or damage… to property*" (Property Damage)?

362. Chubb says the answer to this question is 'no' for the reasons set out in paragraphs 265 to 299 above.

Sub-Issue 13(b): If the answer to Sub-Issue 13(a) is 'yes', did the Property Damage "*occur… during the Policy Period*"?

363. This sub-issue does not arise as the answer to Sub-Issue 13(a) is 'no' as there was no Property Damage during the Policy Period or at all.

Sub-Issue 13(c): If the answer to Sub-Issue 13(c) is 'yes', was the Property Damage "*caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]*" or is it excluded by Excluded Cause 2(a)?

364. This issue does not arise as the answer to Sub-Issue 13(b) is 'no' as there was no Property Damage during the Policy Period or at all.

Sub-issue 13(d): If the answer to Sub-Issue 13(c) is 'yes', was the Property Damage "*at the location… described in"* Extension B4?

365. This issue does not arise as the answer to Sub-Issue 13(c) is 'no' as there was no Property Damage during the Policy Period or at all.

Issue 14: If the answer to Issue 13 is 'yes', was there "*any legal authority preventing or restricting access to an Insured Location*"?

366. This issue does not arise as the answer to Issue 13 is 'no' as there was no Property Damage during the Policy Period or at all.

Sub-Issue 14(a): Were the Queensland Government Directions and the UQ Direction actions of a "*legal authority*"?

367. Chubb accepts that the Queensland Government Directions and the UQ Direction were actions of a legal authority.

Sub-Issue 14(b): If the answer to Sub-Issue (a) is 'yes', did the Queensland Government Directions and the UQ Direction "*prevent… or restrict… access to an Insured Location*"?

368. Chubb repeats its submissions at paragraphs 325 to 331 above and says Queensland Government Directions did prevent or restrict access to an Insured Location but the UQ Direction did not.

Issue 15: If the answer to Issue 14 is 'yes', were the Queensland Government Directions and the UQ Direction "*due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location…*"?

369. This issue does not arise as there was no Property Damage during the Policy Period or at all and, consequently, no threat of damage to other property or persons could have been created in the absence of such Property Damage.

Sub-Issue 15(a)(i): Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "*damage… to property*"?

370. The answer to this sub-issue is 'no' and Chubb repeats its submissions at paragraph 265 to 299 above.

Sub-issue 15(a)(ii): Does the risk of the SARS-CoV-2 virus subsisting on property, if proven, constitute "*a threat of damage to property*"?

371. The answer to this sub-issue is 'no' because even if it is assumed that SARS-CoV-2 subsisted on presently unidentified Contents and Stock, Money or Glass it:

(a) did not cause any damage to that property in the first place as SARS-COV-2 cannot cause damage to property; and

(b) there was no initial physical damage which then caused the threat of damage to other property.

Sub-issue 15(a)(iii): Does a person having contracted the COVID-19 disease constitute "*damage to… persons*"?

372. The framing of this sub-issue misunderstands the requirements of Extension B4.

373. It may be accepted, as a general proposition, that persons having contracted COVID-19 is a form of damage to them in that they may fall ill temporarily or develop permanent health conditions or even die by reason of that disease.

374. However, on its proper construction, Extension B4 does not cover personal injury caused by disease.

375. What is required is a threat of damage to a person created by physical damage caused by an event insured under the Market Foods Policies to property of a type insured by the Market Foods Policies.

376. This cannot occur here as COVID-19 is not capable of causing that initial physical damage and did not, in fact, cause any physical damage.

Sub-issue 15(a)(iv): Does the risk of a person contracting the COVID-19 disease constitute "*a threat of damage… to persons"?*

377. The same analysis applies in answering this question as in respect of Sub-Issue 15(a)(iii).

378. It may be accepted, as a general proposition, that a person having contracted COVID-19 represents a threat of damage to others in that those other persons, if they contract COVID-19 may fall ill temporarily or develop permanent health conditions or even die by reason of that disease.

379. However, on its proper construction, Extension B4 does not cover the threat of personal injury by disease.

380. What is required is a threat of damage to a person created by the occurrence of physical damage caused by an event insured under the Market Foods Policies to property of a type insured by the Market Foods Policies.

381. This cannot occur here as COVID-19 is not capable of causing that initial physical damage and did not, in fact, cause any physical damage.

Sub-Issue 15(b): If the answer to any of the issues in Sub-Issue 15(a)(i) to (iv) is 'yes', were the Queensland Government Directions and the UQ Direction due to such damage or threat of damage within 50 kilometres of any Insured Location?

382. This sub-issue does not arise as the answer to all of Sub-Issues 15(a)(i) to (iv) are 'no' and, in any event, the Queensland Government Directions and

the UQ Direction were not in response to any physical damage within 50 kilometres of any Insured Location.

Issue 16: If the answer to Issue 15 is 'yes', was there "*loss resulting from*" the Business Interruption?

383. This issue does not arise as the answer to Issue 15 is 'no'.

384. If the answer is 'yes', the determination of this issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

385. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

EXTENSION C

Issue 17: Was there "*an occurrence or outbreak [of a Notifiable Disease] at the premises*" during the policy period?

386. Chubb says the answer to this question is 'no' for the same reasons as submitted in respect of the Waldeck Policy.

387. There is simply no evidence that COVID-19 was ever detected in any form in any of the Market Foods Insured Locations.

Sub-Issue 17(a): Does the term "*premises*" mean "*Insured Location*"? If not, what were the relevant "*premises*"?

388. Chubb says the term *"premises"* means Insured Location for the same reasons as submitted in respect of the Waldeck Policy.

Sub-Issue 17(b): In order for there to be an occurrence of the COVID-19 disease at the premises, can this be established:

(i) absent a person infected with the COVID-19 disease attending on the premises; or

(ii) by the premises being part of, or in an area where, there has been an occurrence of the COVID-19 disease?

389. The answer to Sub-Issue 17(b)(i) is hypothetical or advisory in nature and should not be answered in the absence of the facts which have been proven and are said to establish the occurrence of COVID-19 at the premises.

390. The answer to Sub-Issue 17(b)(ii) is 'no'.

391. This sub-issue anticipates Market Foods seeking to establish there was an occurrence of COVID-19 in some broader area than the premises referred to in Extension C.

392. Chubb accepts there were occurrences of COVID-19 in Brisbane during the Policy Period and some possibly may have been quite close to the Insured Locations.

393. However, Extension C is clearly conditioned on such an occurrence being *"at the premises"* not *"near the premises"* or *"in the same city as the premises"*.

394. As was recently observed in COVID test cases in the United Kingdom[8] and New South Wales,[9] the cautionary words of Lord Mustill in **Charter Reinsurance Co Ltd v Fagan** [1997] AC 313, 388 remain apt:

> *"There comes a point at which the court should remind itself that … to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."*

Sub-Issue 17(c): In order for there to be an outbreak of the COVID-19 disease at the premises, can this be established:

(i) absent a person infected with the COVID-19 disease attending on the premises; or

(ii) by the premises being part of, or in an area where, there has been an outbreak of the COVID-19 disease?

395. As to Sub-Issue 17(c)(i), Chubb repeats its submissions at paragraph 389 above that the question posed is hypothetical or advisory in nature and should not be answered in the absence of the facts which have been proven and are said to establish the occurrence of COVID-19 at the premises.

396. As to Sub-Issue 17(c)(ii), the issue of what an outbreak is as well as its geographical limits is properly a matter for expert evidence and none has been served by Market Foods.

397. That being so, even if it is assumed for present purposes that a single case of community transmitted COVID-19 in an uncontrolled environment[10] can amount to an outbreak and there is such a case of COVID-19 in the geographical centre of Brisbane, that will not assist Market Foods.

398. Is that single case an outbreak in:

(a) the Brisbane central business district;

(b) the Brisbane metropolitan area;

(c) South-East Queensland;

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[8] The **FCA Decision** at [62].
[9] **Wonkana** at [46].
[10] Chubb should make clear that, as a factual matter, it does not accept a single case of COVID-19 in a given situation amounts to an *"outbreak"* and says this is an issue which is the subject of contest in other test case proceedings.

(d) Queensland;

(e) Australia; or

(f) all of (a) to (e)?

399. Regardless as to how that debate may resolve, Chubb says the answer to the question posed must be 'no' for the reasons submitted at paragraphs 389 to 394 above, namely Extension C is clearly conditioned on such an occurrence being *"at the premises"* not *"near the premises"* or *"in the same city as the premises"*.

Sub-Issue 17(d): Having regard to the conclusions reached in respect of Sub-Issues 17(a) to (c) above, was there "*an occurrence or outbreak [of the COVID-19 disease] at the premises*" during the Policy Period?

400. The answer to this question is 'no' as such an occurrence or outbreak had to be at the Market Foods Insured Locations and there is no evidence of this whether directly or by inference.

Issue 18: If the answer to Issue 17 is 'yes', was there an "*intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from*" such occurrence or outbreak at the premises?

401. This issue does not arise as the answer to Issue 17 is 'no'.

402. If it does, there is no evidence that the interventions of public bodies relied upon directly arose from any assumed occurrence or outbreak at the premises as there is no evidence at all that the public bodies were aware of such an occurrence or outbreak, much less acted directly in response to them.

Sub-Issue 18(a): Were the Queensland Government Directions and the UQ Direction "*intervention[s] of … public bod[ies] authorised to restrict or deny access to the Insured Location*"?

403. Chubb says this issue does not arise but repeats what it says at paragraphs 367 to 368 above and accepts that the Queensland Government Directions operated to restrict or deny access to the Insured Location but that the UQ Direction did not.

Sub-Issue 18(b) If the answer to Sub-Issue 18(a) is 'yes', did such interventions "*directly aris[e] from*" the occurrence or outbreak at the premises?

404. The answer to this sub-issue is 'no' as there was no occurrence or outbreak at the premises and, even if there was, the interventions did not directly arise from the occurrence or outbreak for reasons similar to those submitted in respect of the Waldeck Policy namely that there would need to be some evidence that an assumed occurrence or outbreak at the premises was within

the knowledge of the Queensland government and UQ and led to the Queensland Government Directions and the UQ Direction.

405. The requirement for such knowledge is imposed by Extension C requiring the interventions arise directly from the occurrence or outbreak.

406. There is no evidence that the interventions relied upon by Market Foods arose directly from any event at the Insured Locations during the Policy Period.

Issue 19: If the answer to Issue 18 is 'yes', did such interventions "*lead to the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority*"?

407. Chubb says the answer to this issue is 'no' as the answer to Issue 18 is 'no' but repeats what it says at paragraphs 403 to 406 above and accepts that the Queensland Government Directions operated to restrict or deny access to the Insured Location but that the UQ Direction did not.

Sub-Issue 19(a): Did the Queensland Government Directions and UQ Direction "*lead to the restriction or denial of the use of the Insured Location*"?

408. Chubb says the answer to this issue is 'no' but repeats what it says at paragraphs 325 to 331 above and accepts that the Queensland Government Directions operated to restrict or deny access to the Insured Location but that the UQ Direction did not.

Sub-Issue 19(b): If the answer to Sub-Issue 19(a) is 'yes', did the Queensland Government Directions and UQ Direction constitute the "*order[s] or advice of the local health authority or other competent authority*"?

409. If it arises, Chubb accepts the answer to this sub-issue is 'yes'.

Issue 20: If the answer to Issue 19 is 'yes', was there "*interruption of or interference with the Insured Location in direct consequence of the [Queensland Government Directions and the UQ Direction]*"?

410. If it arises, Chubb repeats what it says at paragraphs 325 to 331 above and accepts that the Queensland Government Directions operated to restrict or deny access to the Insured Location but says the UQ Direction did not.

Issue 21: If the answer to Issue 20 is 'yes', was there any "*loss resulting from such interruption of or interference with the Insured Location*"?

411. This issue does not arise as the answer to Issue 20 is 'no'.

412. If the answer is 'yes', the determination of this issue involves complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing.

413. For example, the proper counter-factual must be secured as part of this analysis and it may be posited by Chubb that any loss suffered by Market Foods would have been suffered even in the absence of the Queensland Government Directions and the UQ Direction.

TREND CLAUSE

Issue 22: If Market Foods is entitled to indemnity under the policy, does the counter-factual required under the Trend Clause only ignore the Insured Damage and permit account to be taken of the presence and effect of COVID-19 other than in respect of the Insured Damage?

414. This issue is directed towards whether this Court will follow the approach taken in the **FCA Decision** at [251] to [288] to the construction of the so-called *"trends clauses"*.

415. This necessarily involves consideration of the decision in **Orient-Express Hotels Ltd v Assicurazioni Generali SpA** [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531(**the OEH Case**) which was overruled by the Supreme Court at [297] to [312].

416. It is worth returning to the Trends in the Business clause in the Waldeck Policy and Market Foods Policies. It provides:

> *"adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected that Business had the Insured Damage not occurred, so that the figures adjusted will represent as nearly as may be reasonably practicable the results which but for the Insured Damage would have been obtained during the relative period after the Insured Damage."*

417. It is significant for present purposes that the Trends in the Business clause requires, in express terms, that the appropriate counter-factual be assessed by an application of the *"but for"* test to the Insured Damage.

418. As has been demonstrated above, the definition of Insured Damage requires physical loss, destruction or damage.

419. As was the case in the FCA Decision, this is obviously incompatible with cover which does not, in terms, require such damage as is the case under Extension C.

420. The Supreme Court dealt with that issue at [257] noting it was determined in the Court below, and was common ground on appeal, that in such instances the reference to *"damage"* should be read as referring to the *"insured peril"*.

421. Chubb agrees the same approach should be taken to the Waldeck Policy and the Market Foods Policies such that the reference to Insured Damage in the Trends in the Business clause should be read as a reference to the insured peril insofar as that clause is applied in respect of any indemnity available under Extension C.

422. The more controversial aspect of the FCA Decision was its approach to the correct counter-factual to be assumed for the purposes of clauses such as the Trends in the Business Clause.

423. In considering the Appeal Decision, it should not pass without mention that the majority[11] in the Appeal Decision included Lord Hamblen and Lord Leggat.

424. Lord Hamblen decided the OEH Case at first instance as a puisne judge of the High Court. Lord Leggat, then Her Majesty's Counsel, was part of the arbitral tribunal whose award gave rise to the OEH Case.

425. The Supreme Court referred to the trends clause in the wording identified as Hiscox 3 as an example at [255] and also referred to the trends clauses identified in the wordings identified as MSA, QBE, RSA 3, Argenta and Arch at [256].

426. The Hiscox 3 wording was set out in full at [255]:

> *"The amount we pay for loss of gross profit will be amended to reflect any special circumstances or business trends affecting your business, either before or after the loss, in order that the amount paid reflects as near as possible, the result that would have been achieved if the damage had not occurred."*

427. The MSA, QBE, RSA 3, Argenta and Arch wordings were referred to at [256] and, it appears, were considered to be materially identical to Hiscox 3 with all the clauses seeking to represent *"as near as possible"* or *"as nearly as may be reasonably practicable"* the results which would have been achieved *"but for the damage"* or *"if the damage had not occurred"*.

428. At [258], the Supreme Court set out a conformed version of the Arch wording by substituting the insured peril in question[12] where the word *"Damage"* appeared.

429. The approach to the construction of the trends clauses adopted by the Supreme Court emphasised the following points at [259] to [264]:

    (a) the trends clauses are part of the machinery contained in the policies for quantifying loss. They do not address or seek to delineate the scope of the indemnity. That is the function of the insuring clauses in the policy;

    (b) the trends clauses should, if possible, be construed consistently with the insuring clauses in the policy;

    (c) to construe the trends clauses consistently with the insuring clauses means that, if possible, they should be construed so as not to take away the cover provided by the insuring clauses. To do so would

[11] As described by Lord Briggs at [314] (with whom Lord Hodge agreed).
[12] *"Prevention of access to The Premises due to the actions or advice of a government … due to an emergency which is likely to endanger life"*.

effectively transform the quantification machinery into a form of exclusion; and

(d) in the present case it meant that, unless the policy wording otherwise requires, the trends clauses should not be construed so as to take away cover for losses *prima facie* covered by the insuring clauses on the basis of concurrent causes of those losses which do not prevent them from being covered by the insuring clauses.

430. The Supreme Court did, however, reject the approach taken by the High Court to the correct counterfactual under the trends clauses at [265] and [266] having regard to the earlier rejection of the Supreme Court of the "*but for*" test for the purposes of causation, notwithstanding that such a test is expressly called for by the trends clauses.

431. This issue was resolved by the Supreme Court in the following way at [268]:

> *"How then are the trends clauses to be construed so as to avoid inconsistency with the insuring clauses? In our view, the simplest and most straightforward way in which the trends clauses can and should be so construed is, absent clear wording to the contrary, by recognising that the aim of such clauses is to arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause. Accordingly, the trends or circumstances referred to in the clause for which adjustments are to be made should generally be construed as meaning trends or circumstances unrelated in that way to the insured peril."*

432. This approach was repeated at [287]:

> *"For the reasons given, we consider that the trends clauses in issue on these appeals should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause. Such an approach ensures that the trends clause is construed consistently with the insuring clause, and not so as to take away cover prima facie provided by that clause."*

433. The Supreme Court examined the history of trends clauses at [269] to [277] to demonstrate that this approach *"is consistent with the historical evolution of such clauses which shows that their focus has been on trends or circumstances unconnected with the insured peril."*

434. Quite how this historical survey bears upon the proper construction of the trends clauses, if it does, was not explained by the Supreme Court and it does not appear these historical matters were considered admissible on issues of construction.

435. Brief mention was then made of some United States authorities at [278] to [280] with an example provided in support of the approach taken by the Supreme Court at [281] to [286].

436. The issue of pre-trigger losses was dealt with at [289] to [296] with the High Court overturned such that where, having regard to the insured peril, the assumption properly made is that there was no COVID-19 pandemic, then, in calculating loss, the assumption should be made that pre-trigger losses caused by the pandemic would not have continued during the operation of the insured peril.

437. The Supreme Court then considered the decision in the OEH Case at [297] to [312].

438. The main error in the reasoning in the OEH Case identified by the Supreme Court was explained at [309] to [310]:

> *"The main error occurred at the first stage of the analysis when considering causation under the insuring clause. Applying the analysis set out earlier under the heading "Causation", business interruption loss which arose because both (a) the hotel was damaged and also (b) the surrounding area and other parts of the city were damaged by the hurricanes had two concurrent causes, each of which was by itself sufficient to cause the relevant business interruption but neither of which satisfied the "but for" test because of the existence of the other.* ***In such a case when both the insured peril and the uninsured peril which operates concurrently with it arise from the same underlying fortuity (the hurricanes), then provided that damage proximately caused by the uninsured peril (ie in the Orient-Express case, damage to the rest of the city) is not excluded, loss resulting from both causes operating concurrently is covered****. In the Orient-Express case the tribunal and the court were therefore wrong to hold that the business interruption loss was not covered by the insuring clause to the extent that it did not satisfy the "but for" test.*
>
> *If the tribunal or the court had held that the loss concurrently caused by both the damage to the hotel and the damage to other parts of the city was covered by the insuring clause, that would have fundamentally affected the approach to the interpretation of the trends clause. In any event, for the reasons set out above under the heading "The trends clauses", we consider that the correct approach in the Orient-Express case would have been to construe the trends clause so as to exclude from the assessment of what would have happened if the damage had not occurred circumstances which had the same underlying or originating cause as the damage, namely the hurricanes."* [emphasis added]

439. The most significant aspect of the OEH Case was that the trends clause in question adopted the "*but for*" test in express terms and made clear that the counterfactual involved the stripping away of Damage and not Damage and whatever caused it, this said to be mandated by the language of the clause.

440. This language prevented the adoption of anything other than the *"but for"* test in satisfying the causation requirements of the policy.

441. The approach taken by the Supreme Court explained at [309] and [310] was that where the business interruption had two concurrent causes, each of which was by itself sufficient to cause the relevant business interruption but neither of which satisfied the "*but for*" test because of the existence of the other then:

(a) the underlying fortuity must be identified;

(b) it must then be considered whether the concurrent causes arise from that fortuity;

(c) if they do, then the question is whether those concurrent causes are insured, uninsured or excluded;

(d) where an uninsured but unexcluded peril was a proximate cause of the loss, then cover will be available; and

(e) the trends clause is then construed so as to exclude from the assessment of what would have happened, if the damage had not occurred, circumstances which were inextricably linked with the insured peril in that they had the same underlying or originating cause as the damage.

442. In effect, the Supreme Court departed from the *"but for"* test for causation on a basis which Hamblen J had indicated in the OEH Case may warrant such a departure, namely independent concurrent causes where the "*but for*" test produces no cause of the loss.

443. The Supreme Court evidently considered the insured perils in question had independent concurrent causes arising from the COVID-19 pandemic and its consequences.

444. It was these circumstances which revealed the difficulty with the trends clauses in dealing with a pandemic.

445. Such clauses were typically to operate in respect of a discrete item of property which had been damaged or destroyed. The damage did not include the circumstances which affected the macroeconomic conditions in which the insured business operated with the counterfactual assumption being that such conditions which existed prior to the damage to the insured property persisted during the indemnity period.

446. In effect, the trends clause assumes every relevant circumstance outside of the insured's business remains the same both before and after the insured property was damaged. Where physical damage to discrete items of property is concerned, such a counterfactual presents little difficulty.

447. However, where, as here, there are non-damage covers available which allow the recovery of economic loss and encompass events that effect the overall economic environment, the "*but for*" test may produce a commercially

unsatisfactory result for an insured in that the insured may have enlivened the insuring clause yet be deprived of indemnity (or any meaningful indemnity) by the application of the trends clause.

448. However, that test is precisely what is called for by the language of the trends clause considered by the Supreme Court and the Trends in the Business Clause being considered here.

449. The least satisfactory aspect of the Supreme Court's approach is how they sought to reconcile such express language with their preferred construction which strips out the Damage and *"the circumstances arising out of the same underlying or originating cause"*.

450. The rationale for the construction preferred by the Supreme Court was driven by its assessment of the historical function and purpose of such clauses and to ensure that any right to indemnity which had been enlivened under the insuring clause was not then rendered illusory by the trends clause operating as an exclusion.

451. This does not sit easily with the express language of the trends clause which required the application of the "*but for*" test in respect of the insured damage or loss which is often narrowly defined within the various forms of cover provided.

452. It appears on this issue the Supreme Court, with respect, temporarily forgot Lord Mustill's injunction about the Court not re-writing the contract to provide what it considers to be a more suitable bargain.

453. Even more perplexing is what appears at [268] where the Supreme Court says that its approach to the construction of the trends clauses in question should be taken *"absent clear wording to the contrary"*.

454. As the trends clauses considered by the Supreme Court used language which called for the application of the *"but for"* test either in substance or in terms, it is difficult to conceive what different language could be used to clearly require the application of the "*but for*" test.

455. The Supreme Court has identified a circumstance where the express language of an insurance contract may be departed from, namely where independent concurrent causes exist which deny any cover or any meaningful cover to an insured under the insuring clause if the *"but for"* test is applied.

456. Chubb submits the FCA Decision should not be followed by this Court on this issue and the approach in the OEH case should be adopted instead.

457. That approach involved the following propositions:

(a) as a general rule, the "*but for*" test is a necessary condition for establishing causation in fact (at [33]);

(b) there may be cases where reasonableness or fairness require that it should not be a necessary condition, this most likely occurring in the context of negligence or conversion claims and potentially where there

are two concurrent independent causes of loss where the application of the "*but for*" test would mean there is no cause of loss (at [33]);

(c) the presence of the circumstances giving rise to the exception referred to in (b) were not present as the policy recorded the agreement between the parties that a *"but for"* approach to causation would be adopted to the assessment of the loss of revenue, that made clear by the trends clause using the language *"had the Damage not occurred"* or *"but for the Damage"* and the High Court observed that *"it is difficult to see how it could ever be appropriate to disregard that causal test, or how the Policy would work if one did"*(at [33]);

(d) the answer to the submission that this would see clauses such as the Trends in Business clause operate as an exclusion is that it merely involves adopting an approach to causation which is consistent with and, indeed, required under the policy and this is highly relevant to what *"fairness and reasonableness"* requires (at [35] to [36]);

(e) if the *"fairness and reasonableness"* test was to be applied, the alternative approaches would deliver other outcomes which did not appear to be more fair and reasonable than those produced by the "*but for*" test adopted by the tribunal and less clearly so as to require the discarding of that test (at [38]); and

(f) as to whether the trends clause permitted an adjustment for the very same peril which gave rise to the business interruption and relevant loss, that clause is concerned only with the Damage, not the causes of the Damage nor did the *"variations or special circumstances"* in question have to be completely unconnected with the Damage in the sense it had to be independent to the cause of the Damage. To accept the argument advanced to the contrary by the insured would effectively re-write the clause and would be inconsistent with the causation requirement of the main insuring clause (at [57] and [58]).

458. Noting the appeal was confined to questions of law, the reasoning of Hamblen J (as his Lordship then was) was orthodox and, unsurprisingly, turned on the wording of the policy in question:

(a) it was held that the "*but for*" test would usually be applied, subject only to certain exceptions where *"fairness and reasonableness"* dictate such a result and the language of the policy did not require a departure from the *"but for"* test. This meant there was no error of law on the part of the arbitral panel; and

(b) as a matter of contractual construction, the language of the trends clause being considered was conditioned on the Damage which occurred and not that "*the Damage and whatever event caused the Damage had not occurred"* so, again, there had been no error of law.

459. It is submitted, with respect, that the Supreme Court has departed from its own statements of principle so as to deliver a more commercially satisfying result in the unusual circumstances thrown up by the COVID-19 pandemic and the response to it by the British government.

460. The language of the Trends in the Business clause could not be clearer in calling for the application of the *"but for"* test when determining the appropriate counter-factual and effect should be given to those words for the reasons provided by the arbitral panel in the OEH Case and affirmed by Lord Hamblen when sitting at first instance.

461. The error in this reasoning identified by the Supreme Court at [309] and [310] is not, in truth, an error at all much less one that justified an effective re-writing of the trends clauses in the FCA Decision.

462. The presence of concurrent effective causes does not justify such a re-writing no matter how unique the circumstances are said to be and no matter how unusual a result they may produce when the express and unambiguous terms of policy calling for a *"but for"* test are applied to those facts.

463. If the approach in the OEH Case is adopted by this Court then the answer to Issue 22 is that the appropriate counter-factual under the Trends in Business Clause would be to ignore or *"strip-out"* only the Insured Damage or insured peril.

464. This means the presence and effect of COVID-19 generally and other than in respect of the Insured Damage or insured peril can properly be taken into account in the adjustment to be made under the Trends in the Business clause.

Date: 19 August 2021

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