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Details of Filing

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File Title:	CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v MARKET FOODS PTY LIMITED (ABN 48 604 308 581)
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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 IN REPLY

Introduction

1. These submissions are in reply to those filed on behalf of Market Foods at 9:26 pm on 2 September 2021 (**the MF Submissions**).[1]

2. As in all insurance cases, the task which this Court must undertake is ascertaining the legal meaning[2] of the clauses relied upon by the parties and then whether the facts as proven enliven an entitlement to indemnity on the part of the insured.

3. The MF Submissions, despite their length, fail to clearly engage with the elements or integers of Extensions B1, B3, B4 and C and indicate:

   (a) the construction of these clauses for which Market Foods contends; and

   (b) the findings of fact which Market Foods say should be made so as to engage each integer of these clauses once properly construed.

4. Market Foods has failed to clearly structure their submissions by reference to the Statement of Agreed Issues (**SOAI**) filed in these proceedings.

5. The SOAI was structured so as to expose each integer within Extensions B1, B3, B4 and C so that the combined effect of the written submissions of each party would make clear to the Court the areas of controversy which exist.

MF[1] to [14]

6. MF[2] is incorrect. The Policy is not *"standard form"*.

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[1] Throughout these submissions the various paragraphs in the MF Submissions are referred to as MF[1], MF[2] etc.
[2] Which is not necessarily the same thing as the literal or grammatical meaning as explained by Leeming JA in **Zhang v ROC Services (NSW) Pty Ltd; National Transport Insurance by its manager NTI Ltd v Zhang** [2016] NSWCA 370 at [53].

7. The true position is that the wording of the Policy is a PDS drafted by Chubb but the Policy also comprises a schedule and was issued in circumstances where Market Foods was represented by an insurance broker.

8. MF[2] seeks to buttress Market Foods' later reliance on *contra proferentem* by characterising the Policy as something presented on a *"take it or leave it"* basis to Market Foods.

9. There is no evidence of this and the presence of an insurance broker rather suggests it was not.

10. Ms Harcourt, the sole director of Market Foods, has sworn an affidavit and at paragraphs 52 to 54 she specifically deals with the Policy as renewed. She makes no mention of the Policy being offered on a *"take it or leave it"* basis. Indeed, she gives no evidence at all about the negotiation and inception of the Policy.

11. The broker who represented Market Foods, perhaps the person best placed to explain the negotiations of the Policy, has not been called. Chubb says an adverse inference should be drawn by reason of the broker's absence should Market Foods persist with any suggestion that the Policy was issued on a *"take it or leave it"* basis.

12. As to MF[13], Chubb says that decisions from other jurisdictions may provide some assistance but remain subject to the eternal caveat that their value depends on whether there is a material equivalence between the policy terms and facts the subject of those judgments and those presently under consideration.

13. As to MF[14], there is a steady stream of decisions coming out of the United States on the issue of COVID-19 and business interruption cover and these include, in particular, the issue of whether COVID-19 or SARS-CoV-2 can cause damage to property.

14. The answer given to date in these cases is 'no' with the American courts sometimes reaching that conclusion on a summary basis.

15. A non-exhaustive list will be handed up during oral address but two examples are:

    (a) **Ralph Lauren Corporation v Factory Mutual Insurance Company**, 2021 WL 1904739 (D.N.J. May 12, 2021): In this case, the court rejected a claim for COVID-19 related business interruption loss under coverage clauses that limited coverage for *"physical loss or damage"* or for the prevention or immediately impending physical loss or damage. The court granted judgment to the insurer on the pleadings as the alleged presence of the virus in or around the insured's stores does not equate to actual or imminent physical loss or damage of any sort; and

    (b) **Jennifer B Nguyen v Travelers Casualty Insurance Company of America**, 2021 WL 2184878 (W.D. Wash. May 28, 2021): The court in this case also rejected claims for COVID-19 related business

interruption loss under a number of policy wordings that required physical loss or damage holding that COVID-19 does not cause direct physical damage to property as the term is used in the insurance policies.

MF[15] to [17]

16. These paragraphs are the first instance of Market Foods referring to Chubb *"now"* making various *"concessions"*, the implication being that such concessions were belatedly made.

17. They misstate Chubb's position as pleaded and developed in its written submissions.

18. The basis of these concessions is said to be that certain issues are *"expressed as being contested"* in the SOAI: MF[15].

19. This submission misunderstands the purpose and function of the SOAI which was to clearly identify each constructional and factual issue for determination, whether they be the subject of contest or not.

20. This can be shown by reference to the asserted concession in MF[15](a).

21. Issue 14(a) of the SOAI is:

> *"Were the Queensland Government Directions and the UQ Directions actions of a "legal authority?"*

22. Insofar as the Queensland Government Directions are concerned, their status as actions of a legal authority have never been a fact in issue.

23. These directions are pleaded by Market Foods as being part of the *"Public Authority Directions"* at paragraph 38 of the Statement of Cross Claim.

24. The pleaded allegation appears at paragraph 76(a)(i) of the Statement of Cross-Claim:

> *"By reason of the matters set forth in Chapters II, III, IV and V of this pleading:*
>
> *(a) each of the Public Authority Directions:*
>
> *(i) was an act by a legal authority;*
>
> *…"*

25. The Defence to the Statement of Cross-Claim pleads in response to this allegation at paragraph 76:

> *"In answer to paragraph 76 of the SCC, Chubb:*
>
> *(a) admits sub-paragraph (i) except in respect of the UQ Direction."*

26. The only relevant concession at paragraph 367 of the Chubb submissions is that the UQ Direction was that of a legal authority and only then is this relevant if the answer to each of Issues 13, 13(a), 13(b), 13(c) and 13(d) are favourable to Market Foods.

27. MF[15](b) conflates Issues 14(b) and (19)(a) in the SOAI when those issues deal with different Extensions within the Policy and different language within each Extension.

28. The second so-called concession in MF[15](b) is said to arise from paragraph 368 of the Chubb submissions which deal with Issue 14(b).

29. Paragraph 368 provides as follows:

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

30. Plainly enough, whatever one is to take from paragraph 368 requires it be read with paragraphs 325 to 331.

31. These paragraphs deal with Sub-Issue 6(c) and commence at paragraph 324 which provides:

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

32. Paragraph 325 then goes on to say:

> *"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."* [emphasis added]

33. It should be appreciated that Sub-Issue 6(d) deals with Extension B1 with the response of that extension the subject of Issues 3, 3(a), 3(b), 3(c), 3(d), 4, 5, 6, 6(a), 6(b), 6(c) and 7 which are cascading in nature and require a succession of answers favourable to Market Foods before Sub-Issue 6(b) is even reached.

34. Chubb says that the Market Foods claim does not proceed past Issue 3.

35. Thus, whatever appears in paragraph 368 of Chubb's submissions is only on the assumption that Market Foods has succeeded on all issues up to and including Sub-Issue 6(b).

36. Paragraph 368 is not a concession of the type suggested at MF[15](b).

37. Market Foods similarly misstates the asserted concessions at MF[15](c) to (f).

38. MF[15](c) relies on paragraphs 402, 407 and 408 of Chubb's submissions.

39. Paragraph 402 makes no concession at all.

40. Paragraph 407 refers to paragraphs 403 to 406.

41. Paragraphs 403 to 406 again make limited and conditional concessions on the assumption that Issues 17, 17(a), 17(b), 17(c), 17(d), 18, 18(a) and (b) are answered favourably to Market Foods.

42. MF15(d) relies on paragraph 410 of the Chubb submissions which, in turn, repeat paragraphs 325 to 331 of the Chubb submissions. As already submitted, those paragraphs mean that whatever concession can be taken from paragraph 407 is limited, conditional and may never arise.

43. MF[15](e) relies on paragraphs 392 to 393 of the Chubb submissions.

44. The only concession, if it is one, in these paragraphs is that there were occurrences of COVID-19 in Brisbane. That concession is made on the premise that Issues 17, 17(a) and 17(b) have been answered favourably to Market Foods.

45. This acceptance is made in the context of Issue 17(b) which Chubb says does not arise as it amounts to an advisory opinion.

46. It is not an issue which was pleaded. The relevant allegation is at paragraph 79 of the Statement of Cross-Claim and it assumes Issue 17(b) in its favour.

47. MF[15](f) relies on paragraph 409 of the Chubb submissions.

48. Paragraph 409 is a concession similar in nature to MF[15](b) in that it is only made if Issues 17, 17(a), 17(b), 17(c), 17(d), 18, 18(a), 18(b), 19 and 19(a) are answered favourably to Market Foods.

49. When the matters in MF[15] are read with footnotes 20 to 31 of the MF Submissions, it is apparent these asserted concessions are not made as suggested or, if some concession has been made, it is limited and conditional on one or more anterior issues being determined in favour of Market Foods.

50. For reasons that will become apparent, it will not be necessary for the Court to proceed on the basis of any of these asserted so-called concessions.

51. Insofar as MF[17] is concerned, Market Foods misunderstands the separate question as ordered. There is no freestanding right for Market Foods to adduce further evidence – it is limited to documents which have not been produced in response to the subpoenas on issue prior to the commencement of the final hearing and expert opinion based on those documents.

52. Otherwise, Market Foods appears to accept that what it defines as the Carve-Out Issues cannot be determined as part of this hearing.

MF[18] to [68]

53. MF[21](a) refers to the Queensland Health Building as *"commercial premises"*. This is disputed by Chubb. There is no evidence in support of the assertion in the second sentence of this paragraph nor is it the subject of an agreed fact.

54. MF[21](c) is unsupported by evidence insofar as it says that the Market Foods business is in a *"section of the campus dedicated to the provision of services to students from every faculty and department of the university"* nor is this the subject of an agreed fact.

55. The second sentence of MF[22] is unsupported by evidence nor is it the subject of an agreed fact.

56. MF[39], [40], [41], [42], [44], [50](a), [54](a) are factual matters in dispute as acknowledged in the accompanying footnotes.

57. MF[47] fails to mention that the UQ Direction saw the UQ campus remain open, including its eating areas. The full text of the UQ Direction is at paragraph 328 of Chubb's submissions.

58. The asserted facts in MF[45], [46], [48], [49], [53] and [54](b) are said to be supported by evidence in an affidavit from Mr Tan, Market Foods' solicitor, which was recently served.

59. Chubb has only had a limited opportunity to consider this evidence so should not be taken to accept these matters. Chubb will indicate its position on these matters in oral address.

60. The asserted concession at MF[61] is limited and conditional in the manner described above.

61. As to MF[62] and [63], Chubb has sought amendment to the proposed agreed facts in MF[62] at [21C], [21D] and [21E] and awaits Market Foods' response but Chubb does not agree those matters in [21F], [21G], [21H] and MF[63].

MF[64] to MF[80]

62. MF[64] to [80] fail to acknowledge that under the Property Damage section of the schedule to the Policy, Market Foods was not insured in respect of Buildings.

63. The significance of this arises in respect of Extensions B1, B3 and B4 as these extensions require there to be Business Interruption to *"property of a type insured by this Policy"*.

64. The difficulties this causes Market Foods' claim under those extensions is explained at paragraphs 265 to 280 of Chubb's submissions.

MF[81] to [86]

65. As to MF[86], for the reasons submitted above, the Policy is not a *"take it or leave it"* standard form contract so *contra proferentem* has no application.

66. Even if it did, it would only be as a matter of last resort and only where each of the competing constructions can be strongly supported such that one cannot be preferred over the other at the end of the constructional process: **Johnson v American Home Assurance Co** (1988) 192 CLR 266 at 275 per Kirby J as cited with approval by the Full Court of the Supreme Court of South Australia in **Galaxy Homes Pty Ltd v National Mutual Life Assn of Australasia Ltd (No 2)** [2013] SASCFC 66 at [73].

67. No such impasse will be reached in the present case.

MF[87] to [92]

68. The suggestion at MF[92](a) that the statutory duty of utmost good faith has some relationship to *contra proferentem* is simply incorrect and does not represent the law of Australia.

69. No authority is cited in support.

70. The second sentence of MF[92](a) represents a misuse of authority.

71. The case cited by way of footnote is Market Foods is **Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd** (2003) 12 ANZ Ins Cas 61-553; [2002] 165 (incorrectly cited as [2013] NSWC 165) at [25] to [28].

72. It is said this decision is an instance where an *"insurer's attempts to rely upon ambiguity in the terms of the insurance contract to avoid liability have been held to breach the requirements of uberrima fides*".

73. The paragraphs relied upon by Market Foods say the following:

> *"An insurance policy, usually being a contract of adhesion provided by the insurer to the insured in printed form on a 'take it or leave it' basis, is not to be construed so as to allow the insurer to escape liability by means of any ambiguity which the ingenuity of its lawyers may tease from the words of the policy. If liability is to be excluded in any particular circumstance, then that circumstance and the exclusion must be expressed in the policy so clearly "that he who runs can read"; otherwise, the insurer is held to the indemnity: per Lord St Leonards in Anderson v Fitzgerald (1853) 4 HL Cas 484, at 510; 10 ER 551. Courts have long enunciated that principle: see, eg, Fowkes v Manchester & London Assurance Association (1863) 3 B&S 917, at 925 per Cockburn CJ and at 929 per Blackburn J; 122 ER 343; Woolfall & Rimmer Ltd v Moyle [1942] 1 KB 66, at 73 per Lord Greene MR; Provincial Insurance Co Ltd v Morgan [1933] AC 240, at 250 and 255.*
>
> *That principle is merely an application of the established doctrine that policies of insurance are to be construed "contra proferentem": the Courts set their face against an insurer who, having drafted the terms of the policy which are imposed on the insured and having received premiums under that policy, possibly for years, then insists on construing an ambiguity in the terms in such a way as to deny liability. There are many strong judicial statements to this effect: see eg per*

Farwell LJ in In re Etherington & Lancashire & Yorkshire Accident Insurance Co [1909] 1 KB 591, at 600; Maye v Colonial Mutual Life Assurance Society Ltd (1924) 35 CLR 14, at 22 per Isaacs J; Halford v Price (1960) 105 CLR 23, at 34 per Fullagar J.

That ambiguity in an insurance policy cannot operate to disadvantage the insured is a principle which is just as much to be applied by the Courts today as it ever was; perhaps more so when, by means of lavish advertising campaigns, insurance companies seek to foster in the minds of the public a comfortable belief that insurance will protect one from practically all of the vicissitudes of life. Insurance companies and their legal advisers must remind themselves of this long-established and clear principle of law before denying a claim on the basis of an exclusion which is not clear and express and before contesting that claim in the Courts. They must remind themselves that a contract of insurance contains an implied term requiring the insurer to act towards the insured with the utmost good faith in respect to any matter arising under it: s13 of the Insurance Contracts Act 1984 (Cth) ("ICA").

If insurance companies and their advisers do not bear these principles in mind, if they come to Court seeking to construe an exclusion out of ambiguous words or by recourse to implied terms, they may well face not only an adverse judgment almost out of hand, but also an indemnity costs order. This is so because it is notorious how dependent upon insurance many people are in order to protect them from the financial disaster that all kinds of insurable misfortunes can bring. If an insurance company denies liability on the basis of ambiguous wording or implied terms in the policy, necessitating a Court case to resolve the issue, the lives and wellbeing of those insured may be destroyed before the case is concluded, particularly if they are of modest means: a victory for the insured may, in the end, provide Pyrrhic indeed in human terms."

74. Palmer J did not hold that the insurer had breached its duty of utmost good faith. The duty was mentioned as part of a general exhortation by Palmer J as to how his Honour considered insurers should behave.

75. The suggestion by Market Foods that Palmer J was upheld on appeal in respect of these paragraphs is completely incorrect.

76. A reading of **QBE Mercantile Mutual Ltd v Hammer Waste Pty Ltd** [2003] NSWCA 356 reveals that utmost good faith was not even an issue on appeal.

77. The issue of notice referred to in MF[92](b) is dealt with under section 37 of the **Insurance Contracts Act 1984 (Cth)** (**the ICA**) but issues of notice do not arise here as Market Foods accepts at MF[96].

[MF93] to [102]

78. Market Foods misstates the submission made by Chubb at MF[94].

79. Chubb make no submission of the type suggested.

80. As to MF[97], Market Foods' submission appears to be that, notwithstanding Chubb is freed from its notice obligations under section 37 by reason of section 71 and the presence of Market Foods' broker, it must still make disclosures consistent with section 37 by reason of section 13.

81. Even if that dubious proposition is accepted for the sake of argument, it could only require such disclosures in the most unusual and extreme circumstances. There are no such circumstances here. There is no evidence at all as to the negotiation and inception of the Policy.

82. Based on MF[102], the problematic suggestion is made that *contra proferentem* and section 13 operate together in respect of the exclusion clauses to Section 1 of the Policy.

83. This submission should be rejected. It is unsupported by authority and it cannot assist Market Foods in an effort to excise those parts of the Policy which create problems for its case.

MF[103] to [119]

84. MF[104] refers to a concession which Chubb does not accept has been made.

85. Chubb agrees with MF[105].

86. The suggestion that Chubb is *"guilty of a significant over-reach*" is inappropriate. The Public Authority Directions made by the Queensland Government were made on a state-wide basis as Market Foods itself says at MF[56].

87. If, as Market Foods suggests, those Public Authority Directions were directed towards the City of Brisbane, the Greater Brisbane Area and the adjacent conurbation which extends to the Gold and Sunshine Coasts, the Queensland government could have confined those directions accordingly.

88. The Queensland Government did not do so and there is no suggestion that it was unable to do so.

89. As to MF[107] to [119], Market Foods makes various submissions as to causation based on the approach in the FCA Appeal in a way which is neither relevant nor helpful for several reasons.

90. MF[109] does not properly capture Chubb's argument. Chubb's argument is based on the causative requirements of each of the Extensions.

91. The policy terms the subject of the analysis of the United Kingdom Supreme Court involved numerous and disparate clauses being considered. Market Foods has not explained how any of these clauses are substantially similar to Extensions B1, B3, B4 and C.

92. Indeed, none of the clauses considered by the Supreme Court is even remotely like Extensions B1 and B3.

93. There were clauses with some similarities to Extensions B4 and C, however none of those clauses was subject to the preamble to Extension B4 and none imported the direct causation requirements of Extension C where cover is for loss from interruption or interference *"in direct consequence"* of the intervention of a public body which is *"directly arising*" from an occurrence or outbreak of COVID-19 *"at the premises"*.

94. The causation requirements for each of Extensions B1, B3, B4 and C are of course to be found in the language of each clause and not through the reasoning of the United Kingdom Supreme Court concerning different clauses using different language.

95. This means the arguments advanced at MF[115] to [119] should be rejected, primarily because they pay no regard to the causative requirements of Extensions B1, B3, B4 and C.

96. None of Extensions B1, B3, B4 and C is conditioned on the government response to some generalised risk of fomite transmission throughout Queensland which Market Foods speculates was on the minds of unidentified government officials.

97. At a factual level, there is simply no evidence to this effect nor any evidence from which such a motive can be properly inferred.

98. This being so, Market Foods impermissibly calls for judicial notice to be taken of matters which it must prove but has not.

99. It is notable that MF[115] to [119] do not refer to a single document generated by the Queensland Government which supports the motive attributed to it by Market Foods despite Market Foods having issued subpoenas seeking such documents: **Court Book at K.121_2909 to K.121_2932**.

MF[120] to [129]

100. As to MF[120] to [126], the preamble is attended by no more difficulty than that which routinely attaches to any insurance policy or other commercial contract.

101. As to MF[128], these are not concessions by Chubb but submissions as to what it considers to be issues which cannot be determined as part of this hearing in light of the nature of those issues and the time available.

102. As to MF[129], for the reason explained above, paragraphs 367 and 368 of Chubb's written submissions do not contain any general concession of the type stated in MF[129] and any concession which is made is neither significant nor belated.

MF[130] to [141]

103. Market Foods refers to two decisions in support of the proposition at MF[140] that, in the context of insurance contracts, there exists *"judicial support"* for *"damage to property*" existing where *"the cause*" subsists on property, even if it is temporary and it can be remediated.

104. The first and perhaps only point to be made about these cases is that they do not represent the law of Australia.

105. The decision in **Jan De Nul** suggests that functional inutility amounted to property damage in the circumstances of that case. As explained at paragraphs 281 to 292 of Chubb's submissions, such a proposition has been consistently rejected in Australia.

106. The decision in **Jan De Nul** illustrates the limited utility available from previous decisions involving policy wordings that are not materially similar to those being considered.

107. The wording in that case is set out in the extract at MF[138]. It is apparent from that extract that the relevant part of the wording used the phrase *"damage to property"* in an undefined manner.

108. In the present case, the preamble to Extensions B specifically introduces a gateway requirement of *"physical loss, destruction or damage*" by reason of the term *"Insured Damage"* which is incorporated into the definition of *"Business Interruption"*.

109. Furthermore, the term *"damage to property"* when undefined in a property insurance policy, as it is in Extension B1, will mean physical injury unless there is some obvious contextual requirement to the contrary: **Switzerland Insurance Australia Ltd (formerly Federation Insurance Ltd) v Dundean Distributors Pty Ltd** [1998] 4 VR 692 at 703 per Ormiston JA citing Lord Atkinson in **Moore v Evans** [1918] AC 185 at 191.

110. The decision in **The Orjula** can be immediately disregarded because, as Market Foods properly indicates, it involved a strike-out application and was a case about negligence, not the responsiveness of an insurance policy, that perhaps explaining why the MF Submissions did not set out any policy terms.

111. The proposition at MF[141] is not the proper characterisation of the issue as it relies on functional inutility as the relevant Insured Damage and assumes the existence of property which can be infected by COVID-19 where there is no evidence of such a scientific phenomenon.

112. The issue is whether SARS-CoV-2, if located on real or personal property the subject of insurance under the Policy, physically alters that property in the manner described in **Ranicar**.

MF[142] to [148]

113. The first observation to make is that weighing the expert evidence from Dr Scheirs and Professor Shaban on the issue of property damage by a virus

such as SARS-CoV-2 or a disease such as COVID-19 involves inadmissible opinion from Professor Shaban.

114. The issue on which the Court is to be assisted by expert opinion is whether SARS-CoV-2 or COVID-19 is capable of physically altering any real or personal property on which it is assumed to subsist.

115. This issue calls for evidence from someone who can explain to the Court the interaction between a human virus and a particular type of surface or material.

116. Professor Shaban describes himself in his report as a *"leading internationally credentialled expert infection control practitioner with strengths in high-consequence infectious diseases, disease control, antimicrobial resistance, and emergency care."*.

117. Such an issue obviously calls for a materials expert such as Dr Scheirs not an infectious diseases expert such as Professor Shaban.

118. In short, Professor Shaban is not qualified to provide an opinion on this issue as required by section 79 of the **Evidence Act 1995 (Cth)** and paragraphs 58 to 67 of his report should be rejected on that basis.

119. The suggestion at MF[143] to [144] that Dr Scheirs' opinion is inadmissible as he usurps the judicial function, notwithstanding section 80 of the **Evidence Act 1995 (Cth)**, should be rejected.

120. Dr Scheirs offers his opinion on the basis of an assumption that *"damage to property"* has a meaning consistent with the relevant authorities referred to above so the suggestion at MF[144] that it falls outside his specialised knowledge simply misunderstands the basis on which that opinion is offered.

121. The authority referred to by Market Foods at MF[144] in footnote 188 does not assist its objection. The expert evidence in **Allstate** was as to foreign law and it can readily be appreciated how such evidence might impinge upon the judicial function. No such risk exists here.

122. Market Foods' position on this issue also has an obvious contradiction based on MF[143] in that Professor Shaban (who is not a materials expert) can give opinion evidence as to the ultimate issue about damage to property but Dr Scheirs (who is a materials expert) cannot.

123. The argument concerning the fall-back position of Chubb described by Market Foods at MF[145] has two shortcomings.

124. The first is that it does not properly describe Chubb's position at paragraphs 100 and 123 of its submissions which is that there is no evidence, whether directly or by inference, that COVID-19 or SARS-CoV-2 subsisted at the Insured Locations at any time during the Policy Periods or that any person infected with COVID-19 attended the Insured Location during those times.

125. MF[145] invites speculation in the absence of evidence.

126. As to MF[146], it amounts to no more than the suggestion that functional inutility amounts to damage to property as a constructional proposition.

127. This should be rejected for the reasons already submitted.

128. Even if this erroneous construction is accepted for the sake of the argument then, as a factual proposition, to satisfy the terms of the preamble to Extension B1 it must be shown that property of the type insured (which, in this case, was Contents and Stock, Money or Glass) was functionally inutile.

129. Market Foods does not even acknowledge this requirement, much less seek to satisfy it by admissible evidence.

130. Market Foods appears to proceed on the basis that the Extensions B provides some form of disease cover where all that need be shown is the risk of fomite transmission in general and at locations which are unidentified.

131. Whatever else may be said about the cover under Extensions B, it is not conditioned on such a general risk over an unspecified area and which is not tethered to a particular location in which the Insured Location is situated (B3) or within a 50 kilometre radius of an Insured Locations (B1 and B4).

132. MF[147] and [MF148] seek to demonstrate the requirement for damage to property has been satisfied on an erroneous construction and do not demonstrate that such damage occurred to the relevant insured property in any event.

MF[149] to [160]

133. As to MF[150](a), the term *"Insured Damage"* in Section 2 specifically refers to an event insured under, *inter alia*, the Property Damage section of the Policy.

134. It is not explained how such an enquiry can avoid considering the excluded perils under that section.

135. The submissions in MF[150](b) and (c) return to the *contra proferentem* and good faith arguments which can be rejected for the reasons already submitted.

136. As to MF[151](a), the distinction sought to be made by Market Foods is unhelpful and inapt. There is no useful analogy to be drawn between illness caused by radioactivity and that caused by a human virus.

137. As to MF[151](b), Extension B4 is not rendered nugatory by the operation of the exclusion upon it. There are countless forms of physical damage which would engage that extension if disease is excluded.

138. As to MF[152] to [156], the issue is resolved by the plain language of the definition of *"Insured Damage"* which requires physical loss, destruction or damage by an *"event insured under the Property Damage, Theft, Money, Glass or General Property sections."*.

139. Remembering that Market Foods is not covered for Buildings under the Property Damage section and is not insured at all under the General Property section of the Policy, this means that the Court must enquire as to what events are insured under each of the Property Damage, Theft, Money and Glass sections.

140. There is nothing in the language which suggests otherwise.

141. Market Foods suggests at MF[154] that this circumscribes cover in an unacceptable way as the Excluded Property and Excluded Causes are *"legion"* but in the same paragraph says it has not engaged in a comprehensive review.

142. The examples provided at MF[154](a) to (g) do not assist. They deal with discrete instances of excluded property and excluded risks under Section 1.

143. It is not explained by Market Foods how they render cover under Extensions B to be illusory or inutile but not also the cover under Section 1 which would be the consequence of the submission where the primary cover under Section 2 is conditioned on *"Insured Damage to Property Insured at an Insured Location"*.

144. The submissions based on good faith and *contra proferentem* at MF[156] to [159] can be rejected for the reasons already submitted.

145. There is no evidence from either Ms Harcourt or Market Foods' broker about the complaints made in MF[159].

146. MF[160] misstates Chubb's position. The exclusions to Section 1 are relied upon by Chubb only if it is wrong about the proper construction of Extensions B1, B3 and B4 and if the facts which enliven Market Foods construction have been proven.

MF[161] to [166]

147. Insofar as MF[162] deals with Extension B4, it incorrectly describes its operation. Extension B4 does not merely require a threat of damage to property or persons within the 50 kilometre radius – such threat must arise from anterior physical damage to property within that radius.

148. MF[163] does not articulate the real dispute in the context of Extension B1 as submitted by Market Foods as Chubb obviously does not accept that the subsistence of COVID-19 on property is possible (it can only be SARS-CoV-2 as the virus) nor that it causes damage to property.

149. Both at a constructional and factual level, Market Foods seeks to convert the cover under Extension B1 into disease cover operating on a 50 kilometre radius.

150. Extension B1 does not provide any disease cover as it is conditioned on physical alteration to property whether by way of the preamble (*"Insured Damage"* by way of *"Business Interruption"*) or the language in the extension itself (*"damage to property"*).

151. MF[164] to [166] deal with the proper meaning of the term *"commercial complex"*.

152. The construction contended for by Market Foods is that this term means *"assemblage of related buildings"* at MF[166](f) based on the Shorter Oxford Dictionary definition of *"premises"* which is *"where people work and do business, rather than premises where they reside*".

153. In doing so, Market Foods simply ignores the presence of the word *"commercial"*. This term obviously has a qualifying effect, as Market Foods accepts at MF[166](a) before saying the opposite at [166](d).

154. Chubb submits it must be a term of limitation otherwise why would it be used at all? The parties could have used the term *"complex"*, which would be of the broadest import, if that what was intended.

155. That being so, Market Foods accepts that none of the Insured Locations is situated in *"entirely commercial"* complexes at MF166(d) in the sense of *"likely to make a profit"*.

156. The only other matters raised against Chubb's construction appear at MF[166](c) and are that it would leave Extension B3 with no work to do and that Chubb had *"unfettered control over defining the term in a narrow way"* and cannot now complain that *"drafting omission should be used as a tool to deny liability"*.

157. Chubb makes no drafting complaint of the type suggested and seeks to give the term *"commercial complex*" an obvious and commercial construction.

158. Chubb also does not accept that it had unfettered control as to the wording of Extension B4 as the Policy was a negotiated document.

MF[167] to [177]

159. The problem referred to in MF[168] does not arise where the preamble to Extension B4 is read with the extension itself.

160. This is what Chubb has done at paragraph 360 of its submissions and there is no re-writing of Extension B4 as suggested by Market Foods.

161. As to MF[171](a), the narrowing referred to is precisely in accordance with the preamble which requires the property in question to be *"of a type insured by this Policy"*. The property insured under the Policy is limited to Contents and Stock, Money and Glass. Market Foods cannot sensibly say otherwise having regard to the terms of the schedule to the Policy.

162. As to MF[171](b), the Market Foods' construction converts Extension B4 to a form of freestanding cover for any threat to property or persons within 50 kilometres.

163. Again, the preamble prevents such a construction and it cannot simply be ignored as Market Foods has done.

164. The preamble requires that a location, not being an Insured Location, be the place where Business Interruption occurs and is within 50 kilometres of an Insured Location.

165. MF[174] misstates the argument which Chubb advances.

166. As to MF174(a) – the property which is damaged in the 50 kilometre radius need not be owned by the insured. To the contrary, the proposition forms no part of Chubb's argument.

167. The radius to be drawn is 50 kilometres from any Insured Location. Within that radius, the damaged property can be owned by anyone.

168. As to MF174(b), the nominated location is that referred to by Extension B4 and is within a 50 kilometre radius of any Insured Location.

169. As to MF174(c), the property is that which is required by the preamble to Extension B4 namely *"of a type insured by this Policy*" where Contents and Stock, Money and Glass are the only such property. This is clear from the terms of the schedule to the Policy.

170. As to MF[174](d), Contents and Stock, Money and Glass can be damaged, as Market Foods accepts.

171. Market Foods' submission at MF[174](e) that *"the threat of further damage to the same property is not good enough"* misconstrues the Policy.

172. The property in question has already been damaged and provoked a response from the legal authority which restricts access to an Insured Location. Any further damage must be to other property otherwise the words *"threat of damage to property*" will have no work to do.

173. Extension B4 must be read with Extension B1 – each deals with different perils within the 50 kilometre radius of an Insured Location and which prevent or hinder the access to or use of (B1) or prevents or restricts access to (B4) an Insured Location.

174. Extension B1 deals with damage to property within that radius which prevents or hinders the use of or access to the Insured Location. Chubb says this is directed towards a prevention or hindrance that is physical in nature, which is to say the use of or access to the Insured Location is prevented or hindered because the insured physically cannot gain access to or use that location.

175. Extension B4 must deals with a different peril, being that arising where a public authority prevents or restricts access to an Insured Location where an insured can still physically access the Insured Location but is prevented from doing so due to the concern of the public authority about the risks which the physical damage to the non-insured property within the 50 kilometre radius has created.

176. The cordoning off of a city block because of damage to a single building and the threat it poses to other buildings or persons is a common example.

177. Market Foods' excursus at [175] to [177] does not explain how Extension B4 is to be properly construed bearing in mind it requires loss resulting from:

(a) Business Interruption;

(b) that requiring Insured Damage;

(c) that requiring physical loss, destruction or damage during the Policy Period by an event insured under the Property Damage, Theft, Money and Glass sections;

(d) to property of a type insured by the Policy (ie. Contents and Stock, Money and Glass);

(e) at the location described in Extension B4, ie. within 50 kilometres of an Insured Location;

(f) that damage causing the legal authority to prevent or restrict access to the Insured Location;

(g) because that damage threatens to cause damage to other property or persons; and

(h) by reason of that threat the legal authority prevents or restricts access to the Insured Location.

178. The example at MF[175] mocking Chubb's construction rather makes its point.

179. Where, as here, the only property insured under the Policy consists of Contents and Stock, Glass and Money, the circumstances in which Extensions B1 or B4 would be engaged must be relatively rare as those items, if damaged within the 50 kilometre radius, would usually be unlikely to provoke a response from the relevant legal authority which then prevents or restricts access to an Insured Location.

180. The cover under Extensions B1 and B4 plainly will operate more generously where buildings and similar structures within the 50 kilometre radius have been damaged.

181. However, the Policy provides no cover for such structures so they are outside the operation of the Extensions B.

182. The Market Foods construction effectively ignores the preamble to Extensions B and construes Extension B4 in the following way:

> *"Cover under Section 2 is extended to include loss resulting…from 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."*

183. It seeks to broaden the scope of the Policy to one which provides some form of wide area disaster cover which is not conditioned in any way on physical damage at a particular location as required by the preamble.

184. The suggestion at MF[177] unjustifiably contends that an insurer seeking to construe a policy by giving meaning to all of the relevant language in a particular clause amounts to a lack of good faith. Rather, Market Foods simply ignores those parts of the clause which do not suit its case.

MF[178] to [193]

185. MF[179] misstates the agreed fact. It is not common ground that the concept of *"Notifiable Disease"* includes COVID-19.

186. Paragraph 38 of Statement of Agreed Facts says that:

> *"The COVID-19 disease is a human infectious or human contagious disease within the meaning of "Notifiable Disease" in Extension C of the policy."*

187. The definition of Notifiable Disease requires *"illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease…"*.

188. The rewriting of Extension C by Market Foods begins at MF[180] to [181] where it is said that the term *"premises"* should be construed as:

(a) premises which the Insured Location is *"connected to"* (the mode of connection is not explained); or

(b) premises which the Insured Location *"forms a part"* of, that said to be the UQ campus insofar as the Insured Location at UQ is concerned.

189. The basis for these proposed constructions appears at MF[181] and [182].

190. As to MF[181](a), the argument is one based on a presumption against redundancy. As was acknowledged in **HDI Global Specialty SE v Wonkana No. 3 Pty Ltd** [2020] NSWCA 296 at [44], such a presumption is not a strong one.

191. As was observed by Lord Hoffmann in **Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd** [1999] 1 A.C. 266 at 273-4:

> *"I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words."*

192. As to MF[181](b), Market Foods relies on a dictionary definition where the perils and limitations of doing so are well known and were explained by Leeming JA in **TAL Life Ltd v Shuetrim** (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80]:

> *"Dictionary definitions may assist in identifying the range of possible meanings a word may bear in various contexts, but will not assist in ascertaining the precise meaning the word bears in a particular context. As much was recognised by a unanimous High Court (and earlier by Learned Hand J) in Thiess v Collector of Customs [2014] HCA 12 ; 250 CLR 664 at [23] when observing that a mature and developed jurisprudence does not "make a fortress out of the dictionary"; see also 2 Elizabeth Bay Road Pty Ltd v The Owners — Strata Plan No 73943 [2014] NSWCA 409 ; 88 NSWLR 488 at [81]. Although the distinction between the dictionary definition of a word and its legal meaning is not often well understood, it is clear that dictionaries are no substitute for the interpretative process, as was observed by R McDougall, "Construction of contracts: The High Court's approach" (2016) 41 Aust Bar Rev 103 at 115; see also Comcare v Martinez (No 2) [2013] FCA 439; 212 FCR 272 at [68] (Robertson J)."*

193. As to MF[181](c) and (d), securing the legal meaning of the word *"premises"* necessarily brings with it the need to appreciate the manner in which that word was used to define and confine the risk which the insurer was prepared to take having regard to the entirety of Extension C.

194. It is submitted this is significant as Extension C provides a form of *"non-damage"* cover where the indemnity trigger does not involve physical loss, destruction or damage to property.

195. It is also apparent when Extension C is read as a whole that only a very limited and localised form of cover was to be provided, that being the obvious import of the multiple uses of the words of *"directly"* in a causative sense and *"at the premises"* in a geographic sense.

196. Viewed in these terms, there can be no intent for Chubb to have insured events *"connected"* to the Insured Location (whatever that may mean) or some wider area in which the Insured Location is situated.

197. The example given by Market Foods of the UQ campus being the premises actually makes this point – it could not have been the intention that Chubb was to effectively insure Market Foods in respect of what may occur at each and every location on what is a very large area and where many different activities incorporating different levels of risk take place.

198. The risk which Chubb was insuring was only intended to be that which arose directly from an Insured Location.

199. MF[182] also makes Chubb's point. The submission made there is that the meaning of premises changes depending on which Insured Location is being referred to. There is certainly no textual or contextual support for the meaning of the term *"premises"* to vary between a building in which the Insured Location is situated and the expanses of a university campus.

200. Such an approach bespeaks Market Foods' essential difficulty – there was no outbreak or occurrence at any of the Insured Locations. As a result, Market Foods is driven to argue for a definition of the term *"premises"* which

accommodates the geographical location of cases of COVID-19 which are unrelated and unconnected to the Insured Locations in any geographical sense.

201. The resort to *contra proferentem* referred to in MF[183](a) should be rejected for the reasons already submitted.

202. As to MF[183](b) and (c), the complaint is that the cover provided for by Extension C would be substantially undermined if Chubb's construction was accepted.

203. The simple answer to this is that such a construction is entirely consistent with the narrow and localised cover for the perils contemplated by Extension C and this is apparent from the plain language of that clause.

204. The shopping centre analogy at MF[183](b) again makes Chubb's point – there is nothing in the language of Extension C which suggests that Chubb was willing to insure the diverse risks which might exist and occur within individual shops across a large shopping centre.

205. If this were the intent, Chubb would be exposing itself to risks about which neither it nor the insured knew anything and which could not be priced and reflected in the premium to be paid.

206. There is nothing about Extension C which suggests that Chubb was prepared to insure the risks of activities undertaken on premises that were not owned, occupied or under the control of Market Foods.

207. The reasoning of the United Kingdom Supreme Court invoked at MF[184] to [189] is of limited assistance as the policy terms and the underlying facts there were very different from the present case and, in any event, there is no explanation by Market Foods as to as why the broad (and minority) view of causation should be adopted having regard to the terms of the Policy.

208. As to MF[190] to [192], the reasoning of the High Court may be accepted as far as it goes but the task confronting Market Foods is that it must show there was:

    (a) an occurrence or outbreak at the premises of a Notifiable Disease;

    (b) where Notifiable Disease requires:

        (i) an illness sustained by any person;

        (ii) resulting from any human infectious or human contagious disease, that being COVID-19; and

        (iii) of which there has been an outbreak which the competent local authority has stipulated must be notified to them (there is no issue that COVID-19 meets this description).

209. At MF[192](a), Market Foods offers yet another construction of the term *"premises"* being somewhere in the vicinity of the Insured Location.

210. Such a construction should be rejected for the same reasons given in respect of a similar argument made in the Waldeck proceedings (NSD137/2021) and which appears in Chubb's submissions in that case at paragraphs 177 to 189.

211. The submission at MF[192](b) gets to the heart of the matter. It is suggested that if the term *"premises"* means Insured Location it can be inferred that at least one COVID-19 infected person came to each of the Insured Locations in the relevant time.

212. Implicit in this submission is acceptance by Market Foods that it cannot prove such matters directly so invites the Court to infer the factual finding it needs.

213. However, there is simply no explanation as to the basis on which such an inference can properly be drawn nor the foundational or primary evidence which is necessary to give rise to such an inference.

214. To the contrary, the safest inference for the Court to draw is that there was no COVID-19 infected person who attended any Insured Locations at any relevant time.

215. If this had occurred, it offends common sense and logic to think that Market Foods would not have been informed by now by the relevant department of the Queensland government.

216. This did not occur and Market Foods agrees this did not occur in paragraph 1 of the Supplemental Statement of Agreed Facts dated 5 September 2021.

MF[193] to [200]

217. The argument at MF[193] to [200] has three flaws which should see it rejected.

218. Firstly, it seeks to construe the word *"outbreak"* acontextually so as to give it the broader reach which Market Foods requires in the absence of any Notifiable Disease having occurred or broken out *"at the premises"*.

219. Secondly, the evidence of Professor Shaban does not support such a construction in any event as he says at [68] of his report that *"there is no universal scientifically recognised definition for the word 'outbreak'*.

220. That being so, there is no warrant for construing that term as it appears in Extension C by reference to scientific or technical criteria. Its meaning is to be resolved in the usual way as part of the constructional process.

221. It should be noted that Market Foods construes the words *"outbreak at the premises"* at MF[197](c)(iii) to include a situation where the *"premises are situated in an area where an outbreak has occurred"*.

222. This construes the contract to yield a particular result rather than dealing with its terms as written. The premises must be identified first and then the outbreak of the Notifiable Disease and whether it was *"at the premises"*.

223. Thirdly, the high point of the argument appears to be at MF197(d) and is that:

> *"for present purposes it is not necessary to identify the outer limits of the relevant "outbreak" area: it suffices that the Insured Location – or, more accurately, the premises containing the Insured Location – all fell within the relevant "outbreak" areas; and it does not matter whether that "outbreak" area extended only as far north as Caboolture, or reached as far as Rockhampton, Cooktown or Thursday Island"*

224. It can be seen that Market Foods seeks to invert the requirements of Extension C by first describing the outbreak with an undefined geographical limits and then defining and placing the premises within that vague area.

225. Extension C actually requires the opposite – the identification of the geographical extent of the *"the premises"* as a matter of construction and fact as the first step and then whether there was an occurrence or outbreak of a Notifiable Disease within that geographical area.

226. An analogous argument was comprehensively rejected by the United Kingdom Supreme Court in the FCA Appeal where the policy identified as RSA 3 had a disease clause which operated on the occurrence of a Notifiable Disease within a 25 mile radius of the Premises.

227. The submission on appeal is set out at [63]:

> *"The way in which Mr Colin Edelman QC on behalf of the FCA sought to defend the result reached by the court below involved interpreting the word "occurrence" to mean or be capable of meaning an "outbreak" of a Notifiable Disease. An outbreak might extend well beyond the 25-mile radius of the insured premises and potentially, as has happened with COVID-19, across the entire country. On this reading of the clause, provided the outbreak is present within the 25-mile radius, the whole outbreak (or "occurrence") is covered."*

228. After observing that such an argument was not put below, the Supreme Court rejected the argument in the following terms at [65]:

> *"The interpretation for which the FCA contends has the advantage that it bears a closer relationship to what the policy actually says and recognises that what is covered is not a Notifiable Disease as such but an "occurrence" of a Notifiable Disease which satisfies the relevant description. Nevertheless, it still seems to us to involve an attempt to re-write the wording of the policy, as what the clause says is not that there is cover for an occurrence <u>some part of which</u> is within the specified 25 mile radius but that there is cover for "any … occurrence of a Notifiable Disease within" that radius.* ***In other words, it is only an occurrence within the specified area that is an insured peril and not anything that occurs outside that area.****"* [emphasis added]

229. Adapted to Extension C, it is only an outbreak or occurrence of a Notifiable Disease (being illness resulting from COVID-19) at the premises that is an insured peril and not anything that occurs outside the premises.

230. The argument which Market Foods advances is weaker than that advanced before the Supreme Court as the geographical limit here is *"at the premises"* and, on the basis this means the Insured Locations, there is no evidence of a single case of COVID-19 at any of the Insured Locations.

231. Unlike the FCA, Market Foods cannot even say there was an occurrence or outbreak of a Notifiable Disease and that some part of it was within the premises.

232. The response to MF[200] is that the answer to Sub-Issue 17(d) is 'no' as:

(a) the term *"premises"* means Insured Location;

(b) there is no evidence that a COVID-19 infected person was present at an Insured Location at any relevant time; and

(c) the plain language of Extension C requires there be an outbreak within the geographical confines of the premises not the premises being within the geographical confines of the outbreak.

MF[205] to [212]

233. This Court should not adopt the approach of the Supreme Court in the FCA Appeal as Extension C is in different terms from the clauses considered in that case.

234. The only slightly analogous clause was the Hiscox 1-4 clauses which are set out at in the table at [96]:

> *"losses resulting solely and directly from an interruption to your activities caused by your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority"*

235. The first and most obvious difference is that the Hiscox 1-3 clauses allowed for the occurrence of COVID-19 without geographical restriction (Hiscox 4 had a one mile radius limitation). This was acknowledged by the Supreme Court at [105].

236. As the majority said at [104]:

> *"As can be seen from Hiscox 4 and all the disease clause wordings, where insurers are only willing to cover consequences of an occurrence of a notifiable disease which is local to the insured premises, they specify the requisite distance in the clause."*

237. Equally important is that Extension C has even stricter causative requirements where:

(a) interruption or interference must be in direct consequence of the intervention of a public body; and

(b) that intervention directly arises from an occurrence or outbreak of a Notifiable Disease at the premises.

238. There is nothing equivalent to these causal requirements in the clauses considered by the Supreme Court.

239. Paragraphs [194] to [197] of the FCA Appeal which are extracted at MF[207] follow a reference at [192] to the use of MSA 1 as an example.

240. MSA 1 appears at [178] of the decision below:

> "***We*** *will pay* ***you*** *for:*
> *...*
>
> ***6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide***
>
> ***Consequential loss*** *as a result of interruption of or interference with the* ***business*** *carried on by* ***you*** *at the* ***premises*** *following:*
>
> *a) i. any* ***notifiable disease*** *at the* ***premises*** *or due to food or drink supplied from the* ***premises****;*
>
> *ii. any discovery of an organism at the* ***premises*** *likely to result in the event of a* ***notifiable disease****;*
>
> *iii. any* ***notifiable disease*** *within a radius of twenty five miles of the* ***premises****;*
>
> *b) the discovery of vermin or pests at the* ***premises*** *which causes restrictions on the use of the* ***premises*** *on the order of the competent local authority;*
>
> *c) any accident causing defects in the drains or other sanitary arrangements at the* ***premises*** *which causes restrictions on the use of the* ***premises*** *on the order of the competent local authority; or*
>
> [d)] *any murder or suicide at the* ***premises****."*

241. MSA 1 is plainly in very different terms from Extension C.

242. The decision below also focused on the requirement in MSA 1 that the notifiable disease be within the 25 mile radius of the premises as opposed to being at the premises, as is apparent from [194] of the FCA Appeal.

243. For these reasons, the issue of multiple concurrent causes does not arise as Extension C mandates two proximately causal relationships: (a) between the occurrence or outbreak and the intervention of the public body in the first place; and (b) the loss resulting from the interruption or interference with Insured Location by reason of that intervention.

244. There is nothing in the FCA Appeal which offers any guidance in respect of such causative requirements.

245. It follows that the submissions at MF[209] to [212] proceed on the basis of a false equivalence between the clauses considered in FCA Appeal and Extension C, this being an exemplar of the dangers where a party seeks to adopt the reasoning of another Court where the policy wording is materially different.

246. Market Foods does not grapple with the causative requirements of Extension C – there is no evidence of any occurrence or outbreak of a Notifiable Disease at the premises much less that the interventions of the public bodies relied on by Market Foods directly arose because of such occurrence or outbreak.

MF[213] to [224]

247. The concessions at MF[215], [220] and [222] are made only if Market Foods' case proceeds to Issue 19.

248. The suggestion at MF[218] that the loss of clientele can amount to a loss of *"use"* within the meaning of Extension C is faintly put and untenable.

249. There is no contextual reason why the legal meaning of this word should be any different from its ordinary or grammatical meaning so a restriction or denial of use of Insured Locations imports a notion of some physical restriction placed on Market Foods in respect of those locations.

250. Ms Harcourt from Market Foods has given evidence and makes no mention in her affidavit of the UQ Direction preventing her from using the Insured Location on the UQ campus.

251. The difficulty with the submission at MF[223] to [224] is the requirement of interruption or interference with the *Insured Location*, as opposed to the business of Market Foods more generally by a reduction in clientele who may attend the Insured Location at the UQ campus.

252. This necessarily connotes something which interrupts or interferes with Market Foods' ability to physically access the Insured Location on the UQ campus by reason of the public intervention.

253. This is also consistent with the last requirement of Extension C that the use of the Insured Location be restricted or denied in that one cannot use something which cannot be physically accessed.

MF[225] to [232]

254. The Market Foods argument at MF[225] to [232] simply ignores the presence of the words *"direct"* and *"directly"* in Extension C.

255. The argument advanced in these paragraphs should be rejected.

256. Chubb's argument is simply not that which is stated in MF[232](d).

257. The reliance on the *contra proferentem* and good faith arguments should be rejected for the reasons already submitted.

MF[233] to [243]

258. The suggestion at MF[243] that cover would be a chimera or delusion fails to appreciate how narrow the cover for disease is under Extension C.

259. On no view is it some form of pandemic cover which is what it would become if the approach of the Supreme Court was, in some fashion, followed.

260. The cover under Extension C is intended to be narrow and localised both geographically (by the use of the term *"at the premises"*) and causatively (by reason of the requirements that public body intervention arise directly from the occurrence or outbreak of the Notifiable Disease and that any business interruption be a direct consequence of that intervention).

261. But for the anachronistic error in the exclusionary language and the decision in **Wonkana**, there would be no cover under the Policy for SARS-CoV-2 or COVID-19 at all.

262. There is nothing about Extension C, no matter how it is approached, which suggests that it was to provide some form of cover for Market Foods from the prevailing economic conditions which exist independently of what occurred at the Insured Locations.

263. The clauses considered by the Supreme Court had none of these features.

264. To remove the COVID-19 pandemic generally from the counter-factual under the Trends Clause will, at least in this case, fundamentally transform the cover from that which was agreed.

265. The reliance on the *contra proferentem* and good faith arguments should be rejected for the reasons already submitted.

Jobkeeper and rent rebates

266. One issue which should be determined in these proceedings but has been overlooked is the treatment of items such as Jobkeeper payments and rental reductions or abatements provided to Market Foods.

267. This is an issue to be determined in proceedings NSD 132 to 137 and 144 and 145 and appears in the List of Issues for Determination filed in those proceedings at paragraphs 7(d), 11(f)(i) and (ii), 14(g)(i) and (ii), 17(d), 21(d), 25(c), 28(a)(ii) and 30(a)(ii).

268. For whatever reason, the issue was not included in the SOAI in these proceedings but should have been.

269. This has been raised in correspondence by Chubb on 30 August 2021 and Market Foods has yet to indicate its position.

270. That Market Foods received such payments is not a matter of controversy as Ms Harcourt's affidavit acknowledges as much at paragraph 50.

271. Chubb seeks to have the issue resolved on the same basis as in the other proceedings in which it is raised which is to say as a matter of principle having regard to the terms of the Basis of Settlement in the Policy.

272. In this respect, the relevant terms of the Policy are materially the same as those in proceedings NSD132 involving Swiss Re.

273. For ease of reference, the policy terms in question are:

Swiss Re	**Chubb**
"Turnover" means the *"the money (less discounts if any allowed) paid or payable to the Insured for goods sold and delivered and for services rendered in the course of the Business conducted at the Situation"*	*"Turnover"* means *"the money paid or payable to You for goods sold and delivered and for services rendered in the course of Your Business at the Insured Location(s)."*
Clause 10.1.3 which provides: *"There shall be deducted from the amount calculated in 10.1.1 and 10.1.2 any sum saved during the* ***Indemnity Period*** *in respect of such charges and expenses of the* ***Business*** *payable out of* ***Gross Profit*** *as may cease or be reduced as a consequence of the* ***Damage*** *(excluding depreciation and amortisation)*	The formula for calculating Gross Profit which includes: *"c) subtracting any sum saved during the Indemnity Period in respect of such of the charges and expenses of Your Business payable out of Gross Profit as may cease or be reduced in consequence of the Insured Damage."*

274. On that basis, Chubb adopts paragraphs 9.7 to 9.18 of Swiss Re's written submissions filed on 19 August 2021.

275. These submissions have been responded to by the insured in NSD132 at paragraphs 428 to 433 of their written submissions.

276. Should Market Foods wish to say more orally or in writing, Chubb would obviously have no objection.

Date: 7 September 2021

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