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Details of Filing

Document Lodged:	Submissions
File Number:	NSD138/2021
File Title:	CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v MARKET FOODS PTY LIMITED (ABN 48 604 308 581)
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 2/09/2021 9:26:17 PM AEST

Registrar

Important Information

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No. NSD138 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations

Chubb Insurance Australia Limited (ABN 23 001 642 020)

Applicant and Cross respondent

Market Foods Pty Limited (ABN 48 604 308 581)

Respondent and Cross claimant

RESPONDENT'S AND CROSS-CLAIMANT'S

OUTLINE OF ARGUMENT FOR HEARING

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PART I – INTRODUCTION

Section A: Overview

1. The Applicant (and Cross Respondent), Chubb Insurance Australia Limited[1], is the insurer of the Respondent (and Cross Claimant), Market Foods Pty Ltd[2], under a policy of insurance[3] which, amongst other provisions, includes a "*business interruption insurance*" section.

2. The Policy is a standard form policy. It was not the subject of negotiation between Chubb and Market Foods.

3. Market Foods suffered losses as a result of the responses to the COVID 19 pandemic and their consequences for Market Foods' businesses. A claim was made under the "*business interruption insurance*" section of the Policy. Chubb denied liability. Market Foods therefore complained to the Australian Financial Complaints Authority[4]. These proceedings are the consequence.

4. Chubb seeks a declaration that the Policy "*does not respond to the claim for indemnity*", and certain alternative relief discussed below. Market Foods contends that Chubb wrongly approached the interpretation and application of the Policy in the context of

[1] referred to in this Outline as **Chubb**. Generally, terms defined in Market Foods' pleadings are used in this Outline with the same meanings.

[2] referred to in this Outline as **Market Foods**.

[3] referred to in this Outline as **the Policy**.

[4] referred to in this Outline as **AFCA**.

the measures imposed by the Queensland Government and the University of Queensland[5]. It seeks declarations to that effect.

5. This is one of a number of test case proceedings in the Federal Court of Australia[6] which will collectively determine the application and scope of business interruption clauses in common insurance policies, and specifically whether and to what extent those clauses respond to the COVID 19 pandemic and public authority responses to the pandemic.

6. The Court has the benefit of separate submissions on behalf of other insureds in the Second Test Case Proceedings. In the interests of efficiency, this Outline will not repeat matters addressed in those submissions except as appropriate to address material points of difference, such as differences of policy wording. Otherwise, Market Foods adopts and relies upon the submissions of other insureds in the Second Test Case Proceedings.

7. The Second Test Case Proceedings seek to determine a number of questions which are likely to resolve the claims by numerous insureds for indemnity pursuant to different policies issued by different insurers. However, the outcome will also have significance for the wider community as it is likely to determine or, at least, to provide guidance regarding the entitlements of other SMEs under similarly worded business interruption policies.

8. Market Foods and Chubb have filed a statement of agreed facts[7] and a statement of agreed issues[8]. A separate document styled "*statement of agreed facts*" has been filed in proceedings NSD132 to 137 and NSD144 to 145 of 2021[9]. Part I of the SOAF in NSD132 to 137 and 144 to 145 comprises facts common to all of the Second Test Case Proceedings.

9. There remains issues between Chubb and Market Foods which cannot be determined in this hearing. These issues are identified in Parts II, VII and VIII of this Outline.

10. Market Foods has filed expert evidence from Professor Ramon Z. Shaban, Clinical Chair, Infection Prevention and Disease Control, University of Sydney[10]. The Shaban Report addresses two issues:

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[5] referred to in this Outline as **the Public Authority Interventions**; see also Annexure A to Market Foods' Defence.

[6] collectively referred to in this Outline as **the Second Test Case Proceedings**.

[7] referred to in this Outline as **NSD138 SOAF**.

[8] referred to in this Outline as **NSD138 SOAI**.

[9] referred to in this Outline as **NSD132-137 and 144-145 SOAF**.

[10] referred to in this Outline as **the Shaban Report**.

(a) the "*outbreak*" issue in Section 2, Extension C, of the Policy; and

(b) the "*damage to property*" issue in Section 2, Extension B, of the Policy.

11. The "*damage to property*" issue is also the subject of evidence by Dr Scheirs[11]. Chubb relies upon the Scheirs Report as resolving the question whether SARs Cov 2 causes "*damage to property*" as that expression is used in Extension B of Section 2 of the Policy. For reasons canvassed later in this Outline, the interpretation of the Policy (more particularly, the expression "*damage to property*") is not properly a matter for expert opinion.

Section B: Test Case Decisions from other Jurisdictions

12. A number of test case decisions have been handed down in other comparable jurisdictions which have involved the interpretation of business interruption policies in the context of the COVID 19 pandemic. Those decisions include:

(a) *The Financial Conduct Authority v Arch Insurance (UK) Ltd*, a UK decision at first instance;[12]

(b) *The Financial Conduct Authority v Arch Insurance (UK) Ltd*, the appellate decision in the same matter;[13]

(c) *Hyper Trust Limited v FBD Insurance plc*, a decision from the Republic of Ireland;[14]

(d) *Ma Afrika Hotels (Pty) Ltd v Santam Limited (6499/2020*), a decision of the High Court of South Africa;[15] and

(e) *Guardrisk Insurance Company Limited v Café Chameleon CC (Case no 632/20)*, a decision of the Supreme Court of Appeal of South Africa[16].

13. These decisions are of some assistance to the extent that:

(a) they involve the interpretation of clauses which bear some similarity to the policy clauses in the Second Test Case Proceedings; and

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[11] referred to in this Outline as **the Schiers Report**.

[12] [2020] EWHC 2448, referred to in this Outline as **FCA (1st instance)**.

[13] [2021] UKSC 1, referred to in this Outline as **FCA (appeal)**.

[14] no 2020/3656 P, referred to in this Outline as **the Irish decision**.

[15] [2020] ZAWCHC 160; [2021] 1 All SA 195 (WCC), referred to in this Outline as **the Santam Decision**.

[16] [2020] ZASCA 173 (17 December 2020), referred to in this Outline as **the Guardianrisk Decision**.

(b) the reasoning employed by those Courts rely upon some authorities which have been applied in the Australian context, particularly relating to questions of causation.

14. So far as counsel have been able to ascertain, there are not yet any judicial decisions concerning the substantive operation of business interruption policies in the context of the COVID 19 pandemic in other Common Law jurisdictions, such as:

(a) Canada;

(b) the United States of America;

(c) New Zealand; or

(d) Singapore.[17]

PART II – CHUBB'S SUBMISSIONS

15. Chubb has filed submissions in support of its Statements of Claim in the Waldeck[18] and Market Foods proceedings[19]. By the Chubb Submissions as they relate to the Market Foods proceedings, Chubb now concedes certain issues which are expressed as being contested in the NSD138 SOAI. Relevantly, these include:

(a) Chubb now concedes[20] that the Queensland Government Directions and the University of Queensland Direction were actions of a "*legal authority*" as that expression is used in Extension B4[21].

(b) Chubb now concedes[22] that both categories of Queensland Government Directions (relevantly, the Business Closure Directions and the Home Confinement Directions) "*prevented or restricted access to [the] Insured Locations*" in the context of Extension B4. However, Chubb contends that the UQ Direction did not have that effect[23].

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[17] the Singaporean decision in *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2021] 3 SLR 1422; [2020] SGHC 251 concerns procedural issues with respect to arbitration under such a policy, but does not address substantive liability issues.

[18] NSD137 of 2021.

[19] referred to in this Outline as **the Chubb Submissions**.

[20] see sub-issue 14(a) of NSD138 SOAI.

[21] see the Chubb Submissions at [367].

[22] sub-issues 14(b) and 19(a) of NSD138 SOAI.

[23] see the Chubb Submissions at [368].

(c) Consistently with the concession in (b), Chubb now also concedes[24] that the Queensland Government Directions and the UQ Direction were interventions of "*public bod[ies] authorised to restrict or deny access to the Insured Location*" in Extension C. However, Chubb contends that only the Queensland Government Directions had the effect of restricting or denying access to the Insured Locations[25].

(d) Consistently with above concessions, Chubb now also concedes[26] that there was "*interruption of or interference with the Insured Location in direct consequence of*" the Queensland Government Directions but not the UQ Direction[27].

(e) Chubb now concedes[28] that there were occurrences of COVID 19 "*in Brisbane during the Policy Period and some possibly may have been quite close to the Insured Locations*", but contends that is insufficient to satisfy Extension C which requires an "*occurrence … at the premises*"[29].

(f) Chubb now concedes[30] that the Queensland Government Directions and the UQ Direction constituted "*order[s] or advice of the local health authority or other competent authority*" as required by Extension C[31].

16. Chubb further submits that a number of other issues "*involve complex factual issues going to causation which Chubb contends cannot be resolved as part of this hearing*"[32]. Relevantly, these include:

(a) Issue 7, relevant to Extension B1, was there "*loss resulting from*" the Business Interruption?[33]

(b) Issue 11, relevant to Extension B3, whether the damage "*resulted in cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*"?[34]

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[24] sub-issues 18(a), 19 and 19(a) of NSD138 SOAI.

[25] see the Chubb Submissions at [402], [407] and [408].

[26] issue 20 of NSD138 SOAI.

[27] see the Chubb Submissions at [410].

[28] sub-issue 17(b) of NSD138 SOAI.

[29] see the Chubb Submissions at [392]-[393].

[30] sub-issue 19(b) of NSD138 SOAI.

[31] see the Chubb Submissions at [409].

[32] referred to in this Outline as the **Carve Out Issues**.

[33] see the Chubb Submissions at [333].

[34] see the Chubb Submissions at [347].

(c) Sub issue 11(c), relevant to Extension B3, whether the Queensland Government Directions and the UQ Direction "*result[ed] in [the] cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom*"?[35]

(d) Issue 12, also relevant to Extension B3, was there "*loss resulting from*" the Business Interruption?[36]

(e) Issue 16, relevant to Extension B4, was there "*loss resulting from*" the Business Interruption?[37]

(f) Issue 21, relevant to Extension C, was there any "*loss resulting from such interruption of or interference with the Insured Location*"?[38]

17. With respect to the Carve Out Issues and to avoid any misunderstanding it should be clearly stated that Market Foods does not accept that the directions given for the present hearing entitle Chubb to reserve its evidence with respect to these (or any other) issues, aside from issues of pure quantum. The relevant directions, made by consent following protracted discussions and negotiations between all parties, entitle Market Foods (along with other insureds) to adduce further evidence, at a subsequent hearing, should this be required. This entitlement is not reciprocal.

PART III – MATERIAL FACTS

18. The following summary includes a broad chronology of relevant events, but not with detailed reference to events specifically related to each of Market Foods' business locations. Further details of Market Foods' Businesses and the locations from which those businesses are conducted are outlined in the NSD138 SOAF.

Section A: Market Foods' business and locations

19. Chubb is an insurer. It holds an Australian Financial Services Licence, number 239687.[39]

[35] see the Chubb Submissions at [354].

[36] see the Chubb Submissions at [357].

[37] see the Chubb Submissions at [384].

[38] see the Chubb Submissions at [412].

[39] refer to p 2 of the Policy.

20. From around November 2017,[40] Market Foods has run its business from three locations[41]:

    (a) 15 Butterfield Street, Herston[42];

    (b) 1 William Street, Brisbane[43]; and

    (c) Level 2, Room 215, Chancellors Place, University of Queensland, St Lucia[44].

21. The locations of these businesses are of particular significance in the present context, and make the Market Foods claim especially pertinent as a test case:

    (a) The Herston business is located on the ground floor of commercial premises identified as a Queensland Health building, directly across Butterfield Street from the Royal Brisbane and Women's Hospital[45].[46] This is the largest hospital in Queensland possibly in Australia and was the epicentre of COVID 19 treatment in Queensland from the outset of the pandemic.

    (b) The 1 William Street businesses[47] were located in a 43 storey building, popularly known as "*the Tower of Power*", situated within Brisbane's CBD, which accommodates a significant number of Queensland Government departments and agencies.

    (c) Market Foods' business[48] at the University of Queensland[49] is centrally located within the principal campus of the University of Queensland in the Brisbane suburb of St Lucia, and in a section of the campus dedicated to the provision of services to students from every faculty and department of the university.

22. The Herston business comprises a café selling food and beverages, catering to dine in customers but also providing a take away service[50]. Its clientele includes but is not limited to healthcare professionals and administrators working in the same

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[40] subject to the William Street Business ceasing in late August 2020 (refer to [4] of the NSD138 SOAF).

[41] collectively, the businesses will be referred to in this Outline as **the Market Foods Businesses**; see Chapter II, Part B of Market Foods' Defence.

[42] referred to in this Outline as **the Herston Building**.

[43] referred to in this Outline as **the William Street Building**.

[44] referred to in this Outline as **the UQ Insured Location**.

[45] referred to in this Outline as **the RBW Hospital**.

[46] NSD138 SOAF at [3].

[47] referred to in this Outline as **the William Street Business**.

[48] referred to in this Outline as **the UQ Business**.

[49] referred to in this Outline as **UQ**.

[50] referred to in this Outline as **the Herston Business**.

building or the adjacent hospital, day patients and visitors to in patients. The Herston Building is located in the Brisbane suburb of Herston, bearing the postcode 4006[51].

23. Prior to August 2020, Market Foods operated three businesses at 1 William Street: a café on the ground level; a restaurant on level one; and a rooftop bar on level 2.[52] The William Street Building is located in the Brisbane Central Business District, the postcode for which is 4000.

24. Market Foods' business at the University of Queensland sells take away food and beverages. It is located in a food court within the university campus. A map of the UQ campus identifying the UQ food court and other relevant buildings is exhibited to the Affidavit of James Piao Arn Tan[53] as exhibit JPT 10. The UQ campus is located in the suburb St Lucia, postcode 4067.

Section B: COVID-19 and the Public Health Interventions

25. On **31 December 2019**, the World Health Organization[54] was informed of pneumonia cases of unknown cause in the city of Wuhan, in the Hubei province in China.[55]

26. On **9 January 2020**, the WHO announced that a novel coronavirus had been identified in samples obtained from cases in China. The virus was named "*severe acute respiratory syndrome coronavirus 2*", or "*SARS CoV 2*", and the associated disease was named "*COVID 19*".[56]

27. On **11 January 2020**, China reported the first COVID 19 death to have occurred.

28. On **19 January 2020**, a person with COVID 19 entered Australia[57].

29. On **21 January 2020**, the WHO confirmed the possibility of human to human transmission of COVID 19. "*Human coronavirus with pandemic potential*" was determined to be a listed human disease under the *Biosecurity Act 2015* (Cth).[58]

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[51] the postcode 4006 also incorporates other Brisbane suburbs including, relevantly, Newstead and Bowen Hills.

[52] NSD138 SOAF at [4].

[53] referred to in in this Outline as **Mr Tan's affidavit.**

[54] referred to in this Outline as **the WHO**.

[55] NSD132-137 and 144-145 SOAF at [1].

[56] NSD132-137 and 144-145 SOAF at [2]. The description "*19*" identifies the year in which the novel strain was first identified.

[57] NSD132-137 and 144-145 SOAF at [3].

[58] NSD132-137 and 144-145 SOAF at [4].

30. On **25 January 2020**, the first Australian case of COVID 19 was reported in incoming travellers from China.[59]

31. On **29 January 2020**:

    (a) The first COVID 19 case in Queensland was confirmed by the Chief Health officer, Dr Jeannette Young[60]. A 44 year old male Chinese national from Wuhan, in isolation at the Gold Coast University Hospital[61], was confirmed to have the disease then called "*novel coronavirus*"[62].

    (b) The Queensland Minister for Health made an order declaring a public health emergency in relation to COVID 19[63]. Broadly speaking, the effect of that declaration was to empower the Queensland CHO to exercise powers conferred by the *Public Health Act 2005* (Qld)[64] in response to what was to become known as the COVID 19 pandemic.[65]

32. On **30 January 2020** the WHO declared a "*Public Health Emergency of International Concern*"[66]. On the same day, a 42 year old Chinese woman became Queensland's second reported case of COVID 19.[67]

33. On **6 February 2020**, emergency laws were expedited through Queensland Parliament to give the Queensland CHO more expansive powers to enforce restrictions upon individuals and testing requirements in connection with COVID 19.

34. On **11 February 2020**, the WHO announced it had adopted "*COVID 19*" as a shortened name for the disease.

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[59] the Shaban Report at [16].

[60] referred to in this Outline as **the Queensland CHO**.

[61] referred to in this Outline as **the GCU Hospital**.

[62] Market Foods' Defence at [16(b)(i)], admitted in Chubbs' Defence to Cross Claim at [16(a)].

[63] Market Foods' Defence at [15(a)], admitted in Chubbs' Defence to Cross Claim at [15(a)].

[64] referred to in this Outline as **the PH Act**.

[65] refer to Chapter 8, Parts 1 and 2 of the PH Act.

[66] Market Foods' Defence at [15(c)], not specifically traversed but taken to be admitted, at least by inference, in Chubbs' Defence to Cross Claim at [15(d)].

[67] Market Foods' Defence at [16(b)(ii)], admitted in Chubbs' Defence to Cross Claim as an "*occurrence*" at [16(a)].

35. On **27 February 2020**, the Prime Minister of Australia, the Hon. Scott Morrison MHR, activated the Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID 19).[68]

36. On **1 March 2020**, Australia recorded its first death from COVID 19, a 78 year old man who had been evacuated from the *Diamond Princess* cruise ship.[69]

37. The following day, on **2 March 2020**, Australia recorded the first confirmed case of community acquired COVID 19 (in New South Wales).[70]

38. On **3 March 2020**, a 20 year old male from the suburb of Toowong, Brisbane, being a student at the UQ campus, was confirmed with the COVID 19 disease and transferred to isolation at the RBW Hospital[71]. (The suburb of Toowong adjoins St Lucia, where the principal campus of the University of Queensland is situated.)

39. On **5 March 2020**:

    (a) a COVID 19 infected UQ student[72] attended lectures between 4.00 pm and 6.00 pm at the UQ campus;[73] and

    (b) another COVID 19 infected UQ student[74] attended lectures and seminars between 10.00 am and 5.00 pm at the UQ campus[75].

40. On **6 March 2020**, UQ Infected Student A attended lectures and seminars between 9.00 am and 5.00 pm at the UQ campus[76].

41. On **9 March 2020**, UQ Infected Student B attended lectures and seminars between 10.00 am and 7.00 pm at the UQ campus.[77] On the same day, a COVID 19 infected UQ staff member[78] attended the UQ campus for an unspecified period of time[79].

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[68] the Shaban Report at [17].

[69] the Shaban Report at [18].

[70] the Shaban Report at [18].

[71] Market Foods' Defence at [16(a)(ii)], admitted in Chubbs' Defence to Cross Claim at [16(a)].

[72] referred to in this Outline as **UQ Infected Student A**.

[73] NSD138 SOAF at [21C(a)], at the time of writing this Outline, these facts are yet to be agreed, referred to in this Outline as **Disputed Fact**.

[74] referred to in this Outline as **UQ Infected Student B**.

[75] NSD138 SOAF at [21D(a)], a Disputed Fact.

[76] NSD138 SOAF at [21C(b)], a Disputed Fact.

[77] NSD138 SOAF at [21D(b)], a Disputed Fact.

[78] referred to in this Outline as **UQ Infected Staff Member**.

[79] NSD138 SOAF at [21F], a Disputed Fact.

42. **On 10 March 2020**, the UQ Infected Staff Member attended the UQ campus for an unspecified period of time[80].

43. On **11 March 2020**, the WHO described COVID 19 as a pandemic[81].

44. On **12 March 2020**, a third COVID 19 infected UQ student[82] attended lectures between 11.00 am and 7.00 pm at the UQ campus.[83]

45. On **13 March 2020,** a COVID 19 infected person was reported at Newstead (being a suburb which adjoins, and has the same postcode as, Herston)[84]. The episode date was recorded as **12 March 2020**.

46. On **14 March 2020**, a COVID 19 infected person was reported at Brisbane's CBD[85]. The episode date was recorded as **12 March 2020**.

47. On **15 March 2020:**

    (a) the total cases of COVID 19 in Queensland had reached 61[86]; and

    (b) the Vice Chancellor and President of UQ[87] issued a direction pausing all coursework teaching at UQ, including lectures and tutorials in person and online, from 16 March 2020.[88]

48. On **16 March 2020**, a COVID 19 infected person was reported at Brisbane's CBD[89]. The episode date was recorded as **7 March 2020**.

49. On **17 March 2020,** a COVID 19 infected person was reported at Bowen Hills (another suburb which adjoins, and has the same postcode as, Herston)[90]. The episode date was recorded as **16 March 2020**.

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[80] NSD138 SOAF at [21F], a Disputed Fact.

[81] NSD132-137 and 144-145 SOAF at [6].

[82] referred to in this Outline as **UQ Infected Student C**.

[83] NSD138 SOAF at [21E], a Disputed Fact.

[84] JPT-4 to Mr Tan's Affidavit.

[85] JPT-4 to Mr Tan's Affidavit.

[86] NSD138 SOAF at [17]; noting the total case numbers are agreed but the particular numbers in each hospital and health service (**HHS**) area is not admitted (by Chubb).

[87] Professor Peter Høj, B.Sc., M.Sc., Ph.D., AC.

[88] referred to in this Outline as **the UQ Direction**; Market Foods' Defence at [35] (admitted at [35] of Chubb's Defence to Cross Claim).

[89] JPT-4 to Mr Tan's Affidavit.

[90] JPT-4 to Mr Tan's Affidavit.

50. On **19 March 2020**:

    (a) The Queensland Government became aware that there were two persons who worked on levels 19 and 24 of the William Street Building (for Queensland Treasury) who were suspected of having the COVID 19 disease at that time. Those two persons had come into contact with a person who had tested positive to the COVID 19 disease[91].

    (b) The Queensland CHO issued the first of a number of public health directions pursuant to s 362F(2) of the PH Act.[92] Its purpose was to "*enable owners or operators of businesses to open the business outside the hours allowable pursuant to the Trading (Allowable Hours) Act 1990, or limit access to the business*".

    (c) The Prime Minister of the Australia announced that Australian borders were closed to all non residents from 9.00 pm on 20 March 2020[93].

51. On **21 March 2020**, the Queensland CHO issued two further public health directions pursuant to s 362B(2) of the PH Act:[94]

    (a) The first public health direction was the "*Non Essential Indoor Gatherings Direction*", the purpose of which was to "*prohibit non essential indoor gatherings of 100 persons or more*".

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[91] NSD138 SOAF at [21A], a Disputed Fact.

[92] PH Act, s 362F(1) and (2) relevantly provide:

> *(1) The chief health officer may, to respond to the COVID-19 emergency, publish a notice under this section directed to the owners or operators of businesses or undertakings of a stated class.*
>
> *(2) The notice may state the chief health officer's recommendation that the owners or operators should do 1 or more of the following, at a stated time, in a stated way or to a stated extent, in relation to any facility used by them in conducting the business or undertaking—*
>
> *(a) open the facility;*
>
> *(b) close the facility; and*
>
> *(c) limit access to the facility… .*

[93] Market Foods' Defence at [15(d)], not specifically traversed but taken to be admitted, at least by inference, in Chubbs' Defence to Cross Claim at [15(e)].

[94] NSD132-137 and 144-145 SOAF Annexure D, Item #3 and #4; PH Act, s 362B(2) relevantly provides:

> *The chief health officer may, by notice published on the department's website or in the gazette, give any of the following public health directions –*
>
> *(a) a direction restricting the movement of persons;*
>
> *(b) a direction requiring persons to stay at or in a stated place;*
>
> *(c) a direction requiring persons not to enter or stay at or in a stated place;*
>
> *(d) a direction restricting contact between persons; or*
>
> *(e) any other direction the chief health officer considers necessary to protect public health…*

(b) The second public health direction was the "*Mass Gatherings Direction*", the purpose of which was to "*prohibit non essential mass gatherings of 500 persons or more*".

52. Public health directions under s 362B(2) generally commence operation on the day they are made: s 362C[95]. It is an offence not to comply with them: s 362D[96].

53. On the same date, a COVID 19 infected person was reported at St Lucia[97]. The episode date was recorded as **17 March 2020**.

54. On **23 March 2020**:

(a) The Queensland Government became aware that there was another person who worked on level 19 of the William Street Building (for Queensland Treasury) who was suspected of having the COVID 19 disease[98].

(b) Another COVID 19 infected person was reported at Bowen Hills[99]. The episode date was recorded as **21 March 2020**.

(c) The Queensland CHO issued a further direction pursuant to s 362B(2) of the PH Act.[100] That direction was the "*Non Essential Business Closure Direction*"[101] and it was stipulated to take effect from midday on 23 March 2020 until the end of the declared public health emergency unless the direction was revoked or replaced sooner. Subsequent Non Essential Business Closure Directions replaced the Initial Business Closure Direction.

55. On **29 March 2020**, the Queensland CHO issued a further direction pursuant to s 362B(2) of the PH Act. That direction was the "*Home Confinement Direction*"[102] and it was stipulated to take effect from 11.59 pm on 29 March 2020 until the end of the

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[95] PH Act, s 362C relevantly provides:

A public health direction takes effect –
(a) when the direction is given;
(b) if the direction fixes a later day or time—on the later day or at the later time … .

[96] PH Act, s 362D relevantly provides:

A person to whom a public health direction applies must comply with the direction unless the person has a reasonable excuse.

Maximum penalty—100 penalty units or 6 months imprisonment … .

[97] JPT-4 to Mr Tan's Affidavit.

[98] NSD138 SOAF at [21B], a Disputed Fact.

[99] JPT-4 to Mr Tan's Affidavit.

[100] PH Act, s 362B(2).

[101] the direction is Annexure C to Market Foods' Defence.

[102] the direction is Annexure D to Market Foods' Defence.

declared public health emergency unless the direction was revoked or replaced sooner. Subsequent Home Confinement Directions replaced the Initial Home Confinement Direction.

56. Thereafter, all people within the territorial limits of Queensland were subject to the Queensland Government Directions until they were subsequently lifted on differing dates which are not relevant for the purposes of this proceeding.

57. The parties have agreed, at least, the total number of cases in Queensland at paragraph 17 of NSD138 SOAF[103]. As at 30 April 2021, there were 1,559 **reported** cases of COVID 19 in Queensland since the COVID 19 pandemic commenced. That number was 319 when the Initial Closure Direction was issued on 23 March 2020. The numbers of infected people rapidly climbed from that date to 934 by 7 April 2020. From 7 April 2020, the number of COVID 19 cases in Queensland gradually slowed such that, by 28 April 2020, the total number of COVID 19 cases, both current and historical, was around 1,058.

58. Although the parties cannot agree on the accuracy of the balance of the Queensland Prevalence Table, as at the date of the Initial Closure Direction (23 March 2020) 33% of the reported cases related to the Metro North and Metro South regions; that is to say, regions in which the Insured Locations are situated and, clearly, within 50 kilometres of all of the Insured Locations.

59. To complete the narrative, we note that as of "*4:06 pm Central European Time, 18 August 2021, the WHO reports there to have been 208,470,375 confirmed cases of COVID 19, including 4,377,979 deaths*"[104].

Section C: The Agreed Effect of the Queensland Government Directions

60. In broad terms, the effect of Initial Business Closure Direction was that Market Foods could only serve take away food from its businesses. Since that time, the Queensland CHO has issued a number of public health directions which have replaced the Initial Business Closure Direction. It is agreed between the parties that the Initial Closure Direction (and its successors)[105]:

[103] in this Outline referred to as **the QLD Prevalence Table**.

[104] the Shaban Report at [20].

[105] NSD138 SOAF at [25]-[27].

The agreed consequences of business closure public health directions (causation)
[25] ... [the Initial Closure Direction] ... caused the closure of the businesses conducted from the Market Foods Insured Locations for the period of time that direction remained in force (subject to the provision of take away food in accordance with the provisions of that direction). The same consequence applied in respect of subsequently issued business closure public health directions which mandated the closure of Market Foods' business. [26] The Initial Business Closure Direction, Subsequent Business Closure Directions and Business Operation Directions involved the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or competent authority. [27] The Initial Business Closure Direction, Subsequent Business Closure Directions and Business Operation Directions had the direct consequence of interrupting or interfering with the Insured Location.

61. As noted in Section B of this Part, Chubb now concedes that the Initial Home Confinement Direction and its successors had the effect of, at least, interfering with Market Foods' Businesses at the Insured Locations.

Section D: The University of Queensland Subpoenaed Documents

62. Section B of this Part chronologically summarises the occurrences of COVID 19 at the UQ campus. The full extent of those historical facts are yet to be agreed between the parties and are identified as "*Disputed Facts*". In fairness to Chubb, the proposed amendments to NSD138 SOAF reflecting the facts taken from the documents produced by UQ pursuant to subpoena are set out below. The amendments appear as [21C] to [21H] of the SOAF.

Prevalence at UQ - paragraphs [21C] to [21H] of the NSD138 SOAF
[21C] On or around 10 March 2020, the UQ Vice Chancellor became aware that a current student in a Business Management Program had attended on the UQ Campus on 5 and 6 March 2020 while having the COVID 19 disease and that the known tutorials, seminars, lectures and locations on the campus that the student attended on the aforementioned dates were as follows: (a) 5 March 2020: (i) 4.00 pm to 6.00 pm: Lecture in Building 14, Room 217 (b) 6 March 2020:

(i) 9.00 am to 10.00 am: Tutorial in Building 32, Room 207

(ii) 2.00 pm to 5.00 pm: Seminar in Building 5, Room 213

[21D] On 12 March 2020, the UQ Vice Chancellor became aware that another current student studying a psychology degree had attended on the UQ Campus on 5 and 9 March 2020 while having the COVID 19 disease and that the known tutorials, seminars, lectures and locations on the campus that the student attended on the aforementioned dates were as follows:

(a) 5 March 2020:

(i) 10.00 am to 12.00 pm: Lecture (Subject: PSYC3034 "Topics in Applied Psychology")

(ii) 12.00 pm to 1.00 pm: Tutorial (Subject: PSYC3034 "Topics in Applied Psychology")

(iii) 2.00 pm to 5.00 pm: Lecture (Subject: "Psychopathology")

(b) 9 March 2020:

(i) 8.30 am to 3.00 pm: Studying in the Common Room near the Red Room

(ii) 4.00 pm to 5.30 pm: Tutorial (in a small computer lab) (Subject: PSYC3010 "Psychological Research Method")

(iii) 6.00 pm to 7.00 pm: Tutorial (Subject: PSYC3010 "Psychopathology")

[21E] On 15 March 2020, the UQ Vice Chancellor became aware that another current student studying a psychology degree had attended on the UQ Campus on 12 March 2020 while having the COVID 19 disease and that the known tutorials, seminars, lectures and locations on the campus that the student attended on the aforementioned date were as follows:

(a) 11.00 am to 12.00 pm: Lecture (Subject: PSYC3034 "Applied Psychology") (Building 80 Room 2171 Queensland Bioscience Precinct, Lecture Theatre)

(b) 12.00 pm to 1.00 pm: Tutorial (Subject: PSYC3034 "Applied Psychology") (Building 67 Room 145 Priestley Building, Collaborative Room)

(c) 1.00 pm to 2.00 pm: Lunch

(d) 2.00 pm to 4.00 pm: Lecture (Subject: PSYC3102 "Psychopathology") (Building 27A Room 220 UQ Centre, Lecture Theatre)

(e) 4.00 pm to 5.00 pm: Tutorial (Subject: PSYC3102 "Psychopathology") (Building 27A Room 220 UQ Centre, Lecture Theatre)

(f) 5.00 pm to 7.00 pm: Contact Session (Subject: PSYC3052 ("Judgement & Decision Making") (Building 32 Room 215 Gordon Greenwood Building, Collaborative PC Room).

[21F] In consequence of the matters set out [21C] to [21E] above, UQ directed 600 students and seven staff members to quarantine.

[21G] On or around 20 March 2020, the UQ Vice Chancellor became aware that a UQ staff member had attended on the UQ Campus on 9 and 10 March 2020 while having the COVID 19 disease.

[21H] Building 67 (Priestley Building) is opposite the building which contains the UQ Food Court (Building 63).

63. The evidence in relation to UQ, which has yet to be agreed, establishes that:

(a) Between 4 and 9 March 2020, two COVID 19 Infected students[106] attended the UQ Campus for significant periods of time.

(b) The UQ Infected Students attended various lectures and participated in ordinary recreational activities throughout the UQ Campus on three full days during the period between 4 and 9 March 2020.

(c) A UQ staff member attended the UQ Campus, more particularly, the building opposite the UQ Food Court, on 9 and 10 March 2020[107].

PART IV: THE POLICY

Section A: The Structure of the Policy

64. It is appropriate, first, to consider the Policy as a whole. The Policy includes the provisions set out in the business pack, the policy schedule and the insurance application[108]. The Policy runs to almost 60 pages. Each page generally comprises three columns of text.

65. The Policy provides cover against events likely to cause loss or damage to Market Foods in the conduct of Market Foods' businesses at the locations from which the businesses are conducted. Twelve "*Sections*" identify the events or types of loss covered by the Policy. The insured under the Policy can choose the events or losses in respect of which it wishes to be insured.

---

[106] referred to in this Outline as **the UQ Infected Students**.

[107] referred to in this Outline as **the UQ Infected Teacher**.

[108] see p 4, column 1 of the Policy.

66. In the broadest terms, the Policy can be summarised in the following way:

(a) The policy period was from 31 August 2019 to 31 August 2020.[109]

(b) The "*Insured Location(s)*" are described in the following way:

(i) "*15 Butterfield Street, Herston Queensland 4006 Australia*";

(ii) "*1 William Street, Brisbane City Queensland 4000 Australia*"; and

(iii) "*Level 2, Room 215, University of Queensland Chancellors Place, St Lucia Queensland 4067 Australia*".

(c) The premium payable in respect of the Policy was [redacted] (including GST and stamp duty).

(d) The Schedule tabulates which of the sections are applicable to each of the Insured Locations under "*summary of cover*" by noting "*insured*" or "*not insured*" next to each of the listed sections. Under that table, a further table notes the sum insured (if any) and the excess (if any) for each asset or, in the case of the excess, for each event.

(e) A further table appears at the end of the Schedule which lists the Sections which "*apply across all the Insured Locations*". This table lists the "*Business Interruption Section*" and the "*Public and Products Liability Section*" as being the two sections which apply "*across*" all the Insured Locations. The columns next to "*Business Interruption Section*" establish the extent or limits of the cover. So, the "*Indemnity Period*" is limited to 12 months; the "*sum insured*" for "*Gross Profit*" is expressed as [redacted]; and the "*additional increase in cost of working*" is limited by the "*sum insured*" to [redacted].

(f) According to the Schedule, Market Foods was insured in respect of the following types of cover:

(i) Property Damage;

(ii) Business Interruption;

(iii) Theft;

(iv) Money;

---

[109] it is uncontentious that the Policy was renewed subsequently to 31 August 2020 (see [51] of the Market Foods' Defence and [51] of Chubb's Reply). It is noted that Market Foods' claim pertains to both the initial and renewed Policy terms.

(v) Glass; and

(vi) Public Liability and Products.

(g) According to the Schedule, Market Foods was <u>not</u> insured in respect of the following types of cover:

(i) General Property;

(ii) Electronic Equipment Breakdown;

(iii) Machinery Breakdown;

(iv) Environmental Protection;

(v) Cyber Liability; and

(vi) Tax Audit.

67. The Policy includes an additional four parts which are not numbered, being:

(a) a product disclosure statement;

(b) an introduction;

(c) a part described as "*general exclusions*"; and

(d) a further part which incorporates "*general definitions*".

68. Each section of the Policy contains further discrete clauses dealing with definitions, extensions, exclusions, conditions and optional cover applicable solely to that section.

<u>Section B: Parts of the Policy with (apparently) general application</u>

69. The Policy's Introduction contains the following:

General Provisions of the Policy
This is a Chubb Business Pack Insurance Policy ('the policy'). Please read the entire Policy carefully. 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.
>
> **General Provisions**
>
> **General Insuring Agreement**
>
> In consideration of the premium being paid by You to Us, and:
>
> …
>
> 2. subject to the terms, exclusions, definitions, conditions and limitations of this Policy,
>
> We agree to provide insurance cover as set out in those Sections identified as insured in the Schedule.
>
> …
>
> **Applicable Law**
>
> 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.
>
> …
>
> **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.
>
> **Insurance Contracts Act 1984**
>
> Nothing contained in this Policy is to be construed to reduce or waive either Your or Our privileges, rights or remedies available under the Insurance Contracts Act 1984.
>
> …

70. The General Exclusions part of the Policy[110] excludes claims arising from certain events such as terrorism, war, confiscation, radiation and loss of electronic data. These exclusions purport to apply to all sections of the Policy. They are irrelevant to the present matter save that the general exclusions do not include claims arising from an epidemic, pandemic or other outbreak of a disease.

[110] from p 10 of the Policy.

71. The following relevant terms are defined in the General Definitions part of the Policy:

General Definitions Applicable to the Entire Policy
Throughout this Policy words appearing in upper case have special meanings attributed to them as set out below. … **Business** means the Business described in the Schedule. … **Insured Location** means the Insured Location(s) stated in the Schedule. … **Policy** means this Product Disclosure Statement and policy wording, the Schedule, Your insurance application, and any other document that We tell You forms part of Your policy describing the insurance contract between You and Us. **Property Insured** 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 … **Schedule** means the Schedule issued with this policy wording. … **"Us", "We", "our" and "Chubb"** means Chubb Insurance Australia Limited ABN 23 001 642 020 AFSL 239687 … **"You", "your", "Yours" and "Insured"** means the person(s) or entity/ies identified as Named Insured in the Schedule. …

72. The Schedule does not contain any identifiable category of "*Property Insured*". However, each "*Section*" which is identified as being "*insured*" includes a number of

items which might be regarded as insured property (such as "*buildings*", "*contents & stock*", "*glass*" etc).

73. Section 1 (Property Damage) relevantly includes certain "*Definitions*" and "*Cover*". Section 1 also includes what are described as "*Excluded Causes*" which purport to exclude certain causes of "*Damage*" (being accidental physical damage, destruction or loss) to property in that section of the Policy. The following parts of Section 1 are relevant:

Relevant Parts of Section 1 of the Policy (Property Damage)
Definitions Wherever appearing in this Section 1 Property Damage, the following definitions apply: … **Damage or Damaged** means accidental physical damage, destruction or loss. … **Cover** 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. … **Excluded Causes** 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 variation in temperature, evaporation, ***disease***, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations; …

> Provided that Exclusions 2.a) to e) shall not apply to subsequent loss, destruction of or Damage to the Property Insured occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion.
>
> [emphasis added to the words "*contamination*" and "*disease*"]

Section C: Business Interruption, Section 2 of the Policy

74. Business Interruption (Section 2) is an optional cover offered by Chubb. The insuring clause in Section 2 provides that Chubb "*will pay the amount of loss resulting from interruption of or interference with [Market Foods'] Business resulting from Insured Damage to Property Insured at an Insured Location that occurs during the policy Period*".

75. Consistently with other Sections in the Policy, Section 2 contains a definitions part solely applicable to that Section. The Section 2 definitions include the following:

Relevant Definitions in Section 2 of the Policy

Definitions

Wherever appearing in this Section 2 Business Interruption, the following definitions apply:

…

Business Interruption

means the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the policy Period.

…

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.

Notifiable Disease

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 or any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies

...

Trend in the Business
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. … **<u>Cover</u>** Provided this Section is shown as insured in the Schedule, We will pay the amount of loss 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.

76. If the Basis for Settlement is engaged, Section 2 sets out a formula for the calculation of the loss indemnified[111].

77. Once the relevant definitions are incorporated into the "*Cover*" for business interruption, it reads:

Section 2 Cover Incorporating the Definitions
... [Chubb] will pay the amount of loss resulting from **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** to Property Insured at an Insured Location that occurs during the policy Period.

78. Section 2 includes three extensions, Extensions A, B and C. Extensions B and C are relevant. Extension B provides:

Extension B of the Policy
<u>Extensions B: Following damage at locations not occupied by You</u>

[111] see pp 24-25 of the Policy.

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.

…

79. Extension C relevantly provides:

Extension C of the Policy

<u>Extension C: non damage</u>

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.

80. Other discrete parts of the Policy will be referred to in the analysis of the Policy in context of the respective arguments regarding its interpretation, the agreed and disputed facts and the evidence. The Policy provisions relevant to the "*Trend Clause*" issues are dealt with separately at a later point in this Outline.

PART VI – RELEVANT LEGAL PRINCIPLES

Section A: Interpretation of Insurance Contracts

81. The Second Test Case Proceedings involve the legal process of interpreting a particular species of commercial agreements namely, contracts of insurance. The Court's primary task is to ascertain, objectively, the intention of the parties according to the meaning of the words actually used in the Policy.[112]

82. The principles relevant to insurance contracts and their interpretation were recently (and, with respect, comprehensively) summarised by Allsop CJ in *MOS Beverages Pty Ltd v Insurance Australia Ltd trading as CGU Insurance*[113]. His Honour relevantly explained[114]:

> **Extract from *MOS Beverages* at [18]**
>
> The principles to apply in relation to the interpretation and construction of insurance policies as commercial contracts … can be found in authorities dealing with the construction of commercial contracts, such as *Electricity Generation Corporation v. Woodside Energy Ltd* ... *Mount Bruce Mining Pty Limited v. Wright Prospecting Pty Limited* ... *Simic v. New South Wales Land and Housing Corporation* ... *Ecosse Property Holdings Pty Ltd v. Gee Dee Nominees Pty Ltd* ... and

[112] *HDI Global Specialty SE v. Wonkana No. 3 Pty Ltd*, [2020] NSWCA 296 (referred to in this Outline as "***HDI Global Specialty SE***) at [18], per Meagher JA and Ball J, citing *Inland Revenue Commissioners v Raphael*, [1935] AC 96 at 142 per Lord Wright.

[113] [2020] FCA 1716, referred to in this Outline as ***MOS Beverages***.

[114] *MOS Beverages* at [18].

> also in authorities dealing specifically with contracts of insurance: *McCann v. Switzerland Insurance Australia Limited* ... *Wilkie v. Gordian Runoff Limited* ... *Johnson v. American Home Assurance Company* (Kirby J, albeit in dissent); and *Australian Casualty Co Limited v. Federico*, [1986]... See also *Legal & General Insurance Australia Ltd v. Eather* ..., which emphasises the importance of commercial purpose in the interpretation and construction of a policy. … [I]t is important to note that the policy is to be given a businesslike interpretation, paying attention to the language used by the parties in its ordinary meaning, and to the commercial purpose and object of the contract, in the context of the surrounding circumstances, including the market or commercial context in which the parties are operating, by assessing how a reasonable person in the position of the parties would have understood the language: *Todd v. Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* ... . As Lord Halsbury LC said in *Glynn v. Margetson & Co* ... "*a business sense will be given to business documents*". Lord Bingham of Cornhill's explication of that phrase of Lord Halsbury in *Homburg Houtimport BV v. Agrosin Private Ltd (The 'Starsin')* ... bears repetition: "*The business sense is that which businessmen, in the course of their ordinary dealings, would give the document.*" His Lordship reinforced the powerful sense of that expression of the matter by reference to the famous observation of Lord Mansfield in *Hamilton v. Mendes* ... "*The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.*" Cardozo J expressed the matter similarly in the context of considering causal connections in the words of a contract of insurance in *Bird v. St Paul Fire and Marine Insurance Company* ... "*General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract.*" Preference is to be given to a construction supplying a congruent operation to the various components of the whole ...
>
> [citations omitted]

83. Before *MOS Beverages* was determined, the Learned Chief Justice was a member of the Court[115] in *Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003)*[116] (***Onley***). In that case, the Court said[117]:

[115] with Lee and Derrington JJ.

[116] [2018] FCAFC 119; (2018) 360 ALR 92; applied in *Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited trading as Vero Insurance* [2020] FCAFC 228, Besanko, Derrington and Colvin JJ.

[117] at 100-101 [33].

Extract from *Onley* at [33]
The Applicants' arguments before this Court concern the interpretation of the Advancement Extension in the context of the policy and, to some degree, the existence of an implication preventing the insurer from exercising its entitlements under s 28. Such arguments call for the application of the well established principles concerning the construction of policies of insurance as commercial contracts. Those principles were not in dispute between the parties. Necessarily, a policy of insurance is assumed to be an agreement which the parties intend to produce a commercial result … as such, it ought to be given a businesslike interpretation being the construction which a reasonable business person would give to it … The contract is naturally enough interpreted, in a temporal sense, as at the date on which it was entered into … The Courts frequently have regard to the contextual framework in which a contract is formed, to the extent to which it is known by both parties, to assist in identifying its purpose and commercial objective … It goes without saying that a construction that avoids capricious, unreasonable, inconvenient or unjust consequences, is to be preferred where the words of the agreement permit. [citations omitted]

Section B: *Contra proferentum* and exclusion clauses

84. Market Foods expressly relies upon the "*contra proferentum rule*" in relation to the various identified ambiguities in the Policy. Chubb relies upon the exclusion clause in Section 1 of the Policy to deny liability under Extension B in Section 2. The legal principles applicable to each are extensive and, at times, unhelpfully contradictory. For the purposes of this proceeding, the explanation of the relevance and application of both principles are summarised in the judgment of Meagher JA and Ball J in the recent New South Wales Court of Appeal decision of *HDI Global Specialty SE*. With respect to exclusion clauses and *contra proferentum*, their Honours said:

Extract from *HDI Global Specialty SE* at [29] to [31]
[29] There is no special rule which applies to the construction of exclusion or limitation clauses in contracts of insurance (see, for example McClure P in *Allianz Australia Insurance Ltd v. Inglis* [2016] WASCA 25 at [25]). As Lord Hodge (with whom Lords Mance, Sumption and Toulson agreed) uncontroversially observed in *Impact Funding Solutions Ltd v. AIG Europe Insurance Ltd* [2017] AC 73; [2016] UKSC 57 at [7]: > An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not

> repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly.
>
> [30] There remains the *contra proferentem* rule which provides that any ambiguity in a policy of insurance should be resolved by adopting the construction favourable to the insured: *Halford v. Price* (1960) 105 CLR 23 at 30; [1960] HCA 38; *Darlington Futures* at 510; *Johnson v. American Home Assurance* (1998) 192 CLR 266 at 275 (Kirby J, dissenting); [1998] HCA; *McCann* at [74]. The justification for the rule is that the party drafting the words is in the best position to look after its own interests, and has had the opportunity to do so by clear words. It ought only be applied for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity: *Cornish v. Accident Insurance Co Ltd* [1889] UKLawRpKQG 136; (1889) 23 QBD 453 at 456 (Lindley LJ).
>
> [31] With acceptance of the principle that ambiguity can be resolved by reference to the surrounding circumstances, the *contra proferentem* rule is now generally regarded as a doctrine of last resort. However, it continues to have a role to play in insurance and other standard form contracts. That is so for two reasons. First, by their nature, standard form contracts are not negotiated between the parties, and the surrounding circumstances relevant to the entry into one contract or another are less likely to shed much light on the meaning of the written words. Secondly, the *contra proferentem* rule complements the principle that standard form contracts should be interpreted from the point of view of the offeree. The offeror has the opportunity to, and should, make its intentions plain. The point was made by Dixon CJ (at 30) in *Halford v. Price*, citing with approval the following statement in *Halsbury's Laws of England* (Butterworth & Co, 3rd ed, 1958) vol 22, p 214:
>
> > The printed parts of a non marine insurance policy, and usually the written parts also, are framed by the insurers, and it is their language which is going to become binding on both parties. It is therefore their business to see that precision and clarity is attained and, if they fail in this, any ambiguity is resolved by adopting the construction favourable to the assured …

85. Meagher JA and Ball J specifically referred to the English decision of *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd*[118] (***Impact Funding***) for the proposition that exclusion clauses may be read narrowly depending on the circumstances of the case. In *Impact Funding*, Lord Toulson[119] further explained:

[118] [2017] AC 73; [2016] 3 WLR 1422; [2016] UKSC 57.

[119] with whom Lords Mance, Sumption and Hodge agreed.

Extract from *Impact Funding* at [29] to [31]
[35] The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed. (See, among many authorities, *Dairy Containers Ltd v. Tasman Orient Line CV*, [2005] 1 WLR 215, para 12, per Lord Bingham.) This applies not only where the words of exception remove a remedy for breach, but where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation.

86. In the present case, there is no doubt that the Policy is a "*standard form*" contract, proffered by Chubb to Market Foods. Whatever the scope and impact of the principles discussed in *HDI Global Specialty SE* and in *Impact Funding*, Market Foods is entitled to the full benefit which those principles afford, both:

    (a) generally with respect to the construction of the Policy, which is to be "*interpreted from the point of view*" of Market Foods to the extent that Chubb has failed to "*make its intentions plain*"; and

    (b) specifically with regard to exclusions, exceptions and exemptions, to the extent that Chubb as the contracting party "*otherwise liable, [who] wishes to exclude or limit his liability to the other party*" has failed to "*do so in clear words*".

Section C: The *Insurance Contracts Act 1984* (Cth)

THE DUTY OF UTMOST GOOD FAITH

87. Part II of the *Insurance Contracts Act 1984* (Cth)[120] is entitled "*The Duty of Utmost Good Faith*". Sections 13 and 14 (in Part II) relevantly provide:

[120] referred to in this Outline as the **Insurance Contracts Act**.

Extracted parts of ss 13 and 14 of the Insurance Contracts Act
13. The duty of the utmost good faith (1) 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. … **14. Parties not to rely on provisions except in the utmost good faith** (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.

88. There is no definition of "*utmost good faith*" in the Insurance Contracts Act. Section 12 establishes the paramountcy of the duty and expressly provides that the effect of "*this Part*" is "*not limited or restricted in any way by any other law …*". The content of an insurer's duty of utmost good faith was considered by the High Court in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*[121] (**CGU Insurance**), where Gleeson CJ and Crennan J said:

Extract from *CGU Insurance* at [15]
[15] We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due

[121] (2007) 235 CLR 1; [2007] HCA 36 Gleeson CJ and Crennan J at 12 [15].

> regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.

89. In *Re Zurich Australian Insurance Limited*[122], Chesterman J[123] referred to the duty of good faith as being most commonly relied upon in the context of an insured's duty to disclose all facts "*material to the insurer's decision whether to accept the proposal or what premium to demand*"[124]. However, his Honour observed that the statutory duty "*of the utmost good faith*" is traditionally wider than a mere duty of disclosure. His Honour referred[125] to the observations of the Australian Law Commission in its *Report No 20 on Insurance Contracts* that the duty of utmost good faith "*should apply equally to other aspects of the insurance relationship*"[126]. For example, as Chesterman J explained, the duty provides a foundation for the rationale of other principles of construction or interpretation. His Honour, relevantly, said:[127]

> **Extract from *Re Zurich Insurance Ltd* at [38]**
>
> [38] A similar phenomenon can be seen in relation to other incidents of the contract of insurance. In *Re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415, Farwell L.J. (at 430) regarded the requirement of good faith from both insurer and insured as providing the rationale for construing policies of insurance *contra proferentum*. Because the insurer invariably prepares the policies and chooses the wording and because it must act in good faith towards its insured it is obliged to make the meaning of its policies plain. If it does not, any ambiguity is resolved in favour of the insured.

90. In *Re Bradley and Essex and Suffolk Accident Indemnity Society*[128] (**Re Bradley**), a case specifically relied upon by Chesterman J, the insurer rejected a claim to pay worker's compensation because, it argued, the insured had a contractual requirement to maintain wage books which the insured had failed to do. The insurer's submission was to the effect that the requirement was a condition precedent to the insurer's liability to pay the claim. In rejecting the insurer's submission, Farwell LJ said[129]:

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[122] [1999] 2 Qd R 203; [1998] QSC 209.

[123] sitting as a puisne judge in the Supreme Court of Queensland (as his Honour then was).

[124] [1999] 2 Qd R 203 at 209 [37].

[125] [1999] 2 Qd R 203 at 209 [36].

[126] *ibid*, at [328] of the Report.

[127] [1999] 2 Qd R 203 at 209-210 [38].

[128] [1912] 1 KB 415.

[129] [1912] 1 KB 415 at 430.2.

Extract from *Re Bradley* at p 430
Contracts of insurance are contracts in which *uberrima fides* is required, not only from the assured but also from the company assuring. It is the universal practice for the companies to prepare both the form of proposal and of policy: both are issued by them on printed forms kept ready for use; it is their duty to make the policy accord with and not exceed the proposal, and to express both in clear and unambiguous terms ... it is especially incumbent on insurance companies to make clear, both in their proposed forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non observance or non performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed "*contra proferentes*" applies strongly against the company.

91. Although *Re Bradley* involved rejection of a claim on the basis of the insured's alleged non compliance with a term of the policy, the Lord Justice's observations are entirely on point regarding the relationship between the content of *uberrima fides* and the insurer's obligation to bring to the insured's attention clauses which have exclusionary effect but may not be clearly identifiable as such within the policy. Market Foods submits that the present is such a case. In making that submission, one must accept the caution expressed by Allsop CJ in *Australian Securities and Investments Commissioner v TAL Life Limited (No 2)*[130]:

Extract from *ASIC v TAL Life Ltd* at [173]
[173] It is inappropriate to draw conclusions of principle or of rules from other articulated fact situations about a duty of this character. Fact situations should not be converted into rules by a process of extrapolation and abstraction. It is, however, helpful to recognise from articulated fact situations how the standard can be taken to be breached. Fairness, decency and fair dealing are normative standards judged by reference to community expectations. Unfairness or a lack of decent treatment may take many forms. Arbitrary, capricious and unreasonable conduct may well inform a conclusion of unfairness sufficient to fall short of community expectations of fairness and decency. The obligation upon insurers and the content of the duty in any given case is informed, in part, by the important part insurance and insurers play in the life of the commercial

[130] [2021] FCA 193 at [173].

> community and of the general community. People rely upon it and them for their commercial and personal stability and wellbeing.

92. Accordingly, it is submitted that:

    (a) There is a relationship between the statutory duty of utmost good faith and the principle of *contra proferentum*. Historically, insurers' attempts to rely upon an ambiguity in the terms of an insurance contract to avoid liability have been held to breach the requirements of *uberrima fides*.[131]

    (b) The obligation requires an insurer to bring to the insured's notice in the clearest way possible clauses which operate so as to exclude a liability which otherwise would entitle the insured to indemnity within the terms of the policy.

SECTIONS 13 AND 14 OF THE INSURANCE CONTRACTS ACT

93. By the Chubb Submissions, Chubb submits that Market Foods is foreclosed from relying upon ss 13 and 14 of the Insurance Contracts Act on the basis that Market Foods retained a broker to "*arrange*" the Policy[132]. That submission expressly relies upon s 71 of the Insurance Contracts Act. Chubb then asserts that Market Foods' reliance on the statutory duty is "*embarrassing and should be withdrawn*"[133].

94. It is, with respect, surprising that an insurer would make the submission that it is released of its statutory obligations of utmost good faith simply on the basis that an insurance policy was placed through a broker. If that is Chubb's contention, then, for the reasons that follow, it has no merit.

95. Paragraphs 259 and 260 of the Chubb Submissions assert:

Extract from the Chubb Submissions at [259] to [260]
[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)

[131] *Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd*, (2003) 12 ANZ Ins Cas 61-553; [2013] NSWSC 165 at [25]-[28] per Palmer J, upheld on appeal: *QBE Mercantile Mutual Ltd v Hammer Waste Pty Ltd* [2003] NSWCA 356.

[132] the Chubb Submissions at [248]-[260].

[133] the Chubb Submissions at [261].

> 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.

96. Section 37 of the Insurance Contracts Act has no direct application in this case, having regard to section 71, which relevantly provides:

> **Section 71(1) of the Insurance Contracts Act**
>
> **71. Agency**
>
> (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.

97. However, section 37 has a continuing relevance insofar as subsection 14(3) provides that "*[i]n 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*". Accepting that there was no obligation to give a notice under section 37, Chubb's failure to give notice whether in accordance with that section or otherwise remains relevant in deciding whether Chubb's "*reliance … on a provision of the contract of insurance would be to fail to act with the utmost good faith*".

98. Section 71 is in Part IX of the Insurance Contracts Act. That Part is styled "*Information, notices and reasons*". Amongst other things, the Part deals with: how relevant "*information*" is to be given (s 69); the content of the information when it is given (s 72); the service (including service on a body corporate or a natural person) of the information (s 72A); and the giving of reasons for cancelling a policy or otherwise refusing to accept or renew a policy (s 75).

99. However, Part IX does not deal with the insurer's obligation of utmost good faith. Nor does it purport to deal with the content of that obligation in the context of the insurer's putative right to rely upon ambiguities in the Policy and exclusion clauses which are concealed within a myriad of cross referenced definitions. Part IX sets out the requirements of information, notices and reasons expressly[134] provided for in that Part and elsewhere in the Insurance Contracts Act. And, in that context, s 71 of the Act releases the insurer from those requirements, save to the limited extent of s 58(2).

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[134] or by necessary implication.

That is so having regard to the text of the section, its apparent purpose and its statutory context.

100. Hence, s 71 does not release the insurer from its obligation of good faith, including its obligation of good faith considered in light of information provided to the insured. That remains the case, whether or not:

(a) the insured was represented by a broker, through whom the policy was placed; or

(b) the insurer had a positive obligation to notify the insured of something, or merely could have done so if it wanted to rely on an obscure and ambiguous exclusionary provision.

101. If there was any doubt as to operation of Part IX on ss 13 and 14 of the Insurance Contracts Act, s 12 of the Act removes that doubt by unequivocally providing, "*[t]he effect of this Part is not limited or restricted in any way by any other law,* ***including the subsequent provisions of this Act***" [emphasis added].

102. In summary, Market Foods relies upon ss 13 and 14 of the Act in respect of its arguments regarding *contra proferentum* and the operation of exclusion clauses in Section 1 of the Policy.

Section D: Principles of Causation

103. Each of the clauses in the Policy upon which Market Foods relies has a particular causation element challenged by Chubb. Those challenges are expressed in the following way:

(a) As to Extension B1, Chubb contends that the "*Public Authority Directions were not* ***caused*** *by any physical loss, destruction or damage to any property within 50 kilometres of any Insured Location*"[135] [emphasis added].

(b) As to Extension B3, and in the event Market Foods otherwise satisfies the requirements of the clause, Chubb contends that, insofar as there was interruption of or interference with Market Foods' Business, the Public Authority Directions "...*did not result in any cessation or diminution of Your trade or normal business operations due to a falling away of potential custom as such falling away of potential custom would have occurred in the absence of the Public Authority Directions*"[136]. This is now a Carve Out Issue.

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[135] Chubbs' Defence to Cross Claim at [70(c)].

[136] Chubbs' Defence to Cross Claim at [72(d)].

(c) As to Extension B4 (and as an alternative to other defences) "*... the Public Authority Directions prevented or restricted access to any Insured Location because of the threat posed to persons by the COVID 19 Disease across the entire State of Queensland and not due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Locations*"[137].

(d) As to Extension C, the Public Authority Directions "*... were taken in response to the general threat of a Notifiable Disease across the state of Queensland so were not directly arising from an occurrence or outbreak at the premises*"[138]; and, as an apparent extension of this denial of causation, "*... were not taken on the basis of any known, diagnosed or confirmed case(s) of a Notifiable Disease at the premises so were not directly arising from an occurrence or outbreak at the premises of a Notifiable Disease*".

104. Market Foods does not dispute that its loss was caused by the Queensland Government Directions comprising part of the Public Authority Interventions. As noted above, Chubb concedes that, at least, the Business Closure Directions and the Home Confinement Directions caused Market Foods to close certain businesses, restricted Market Foods' use of its other businesses to takeaway only and otherwise interfered with Market Foods' Businesses, although Chubb contends that Market Foods' losses would have been suffered in any event (which is to say, even absent any of the Public Authority Directions).

105. Notwithstanding Chubb's contention regarding the Carve Out of some of the issues identified in the NSD138 SOAI, the general approach to questions of causation can be decided, offering a framework within which any of Chubb's "*counterfactuals*" identified in the Chubb Submissions will ultimately be determined.

106. It may be observed that Chubb is guilty of a significant over reach when it contends that the Public Authority Directions "*... were taken in response to the general threat of a Notifiable Disease across the state of Queensland*". Plainly, there was no such threat at (say) Thursday Island, or Weipa, or Normanton; nor at Poeppel Corner, Cameron Corner, or Haddon Corner; nor, as that prominent solicitor and sometime poet Andrew Barton Paterson put it, "*On the outer Barcoo / Where the churches are few / And men of religion are scanty / On a road never cross'd / 'Cept by folk that are lost*".[139] Self evidently, the Queensland CHO and other responsible public authorities were responding to a "*general threat*" which existed in the more densely populated parts of the State: specifically (but not exclusively) in the City of Brisbane, the Greater

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[137] Chubbs' Defence to Cross Claim at [74(e)(iv)].

[138] Chubbs' Statement of Claim at [31(d)].

[139] A.B. ('Banjo') Paterson, *A Bush Christening*, first published in *The Bulletin* magazine, 16 December 1893.

Brisbane Area and the adjacent conurbation which extends to the Gold and Sunshine Coasts.

107. Putting to one side the UQ Direction which applied exclusively on the UQ Campus the contest on this issue is whether the Queensland Government Directions were, as Chubb asserts, the product of a single cause (*a response to the general threat of a Notifiable Disease across the state of Queensland*), or whether they were the product of "*equally efficient proximate causes*"[140] as Market Foods contends. The following submissions are made on the basis that the proper approach to these issues is a matter for determination.

108. The general causation challenges to Extensions B1, B4 and C are an incident of Chubb's reliance upon a single cause of the Queensland Government Directions; that is say, Chubb's contention that those directions were a response to the threat posed by COVID 19 across the entire state (of Queensland) and not a response to:

    (a) property damage;

    (b) the threat of property damage or the threat of damage to persons; or

    (c) an occurrence or outbreak "*at the premises*".

109. Chubb is contending that the only or material reason for the interventions was the general threat of the disease across the whole of the State. That contention assumes a single dominant, proximate or effective cause of the Queensland Government Directions and, impliedly, rejects the alternative position which is to the effect that those measures were the product of multiple concurrent causes, one of which falls within the Extensions.

110. In the FCA cases, the disease clauses required the business interruption to be caused by a COVID 19 occurrence within specified radii. The insurers argued that causation needed to be determined on a "*but for*" basis, which could not succeed because the relevant intervention was a response to thousands of COVID 19 cases and not a particular case (or cluster of cases) within each relevant radius. The insurers also argued that any loss the insureds suffered would have been suffered by them even if there were no COVID 19 cases within the relevant radius, because the material

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[140] *City Centre Cold Store Pty Ltd v Preservative Skandia Insurance Ltd* [1985] 3 NSWLR 739; *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* [1998] NSWSC 436; (1998) 43 NSWLR 601 at 612B per Sheller JA (with whom Beazley and Stein JJA agreed); see also *McCarthy v St Paul International Insurance* [2007] FCAFC 28; (2007) FCR 402 at 421 [56]-[57] per Kiefel J (agreeing with Allsop J as his Honour then was), 422 [58] (also agreeing with Allsop J) and 429-438 [88]-[116] especially 429-31 [88]-[92].

reason for the intervention in that case was a national response. Chubb adopts that approach in this proceeding, at least in the context of the Trends Clause issues.

111. The Court in FCA (appeal) acknowledged that the traditional approach to most insurance (and commercial) cases was to establish that the loss would not have occurred *but for* the relevant conduct.[141] However, after analysis, the Court rejected the traditional approach as applying to the facts of the cases before it[142]. The reasoning is instructive and, with respect, has much to recommend it in the present case[143]. The Court considered the different positions adopted by the insurers and the insureds and, more particularly, the insurers' reliance on the traditional *but for* test as an essential link between business interruption and the manifestation of the infection. On Market Foods' case, that would extend to infected persons and property. In any event, the plurality in the FCA (appeal) explained:

FCA (appeal) and the "*but for*" test – [194] to [197]
194. In deciding between these competing interpretations, we consider that the matters of background knowledge to which the court below attached weight in interpreting the policy wordings are important. The parties to the insurance contracts may be presumed to have known that some infectious diseases including, potentially, a new disease (like SARS) can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision. 195. We do not consider it reasonable to attribute to the parties an intention that in such circumstances the question whether business interruption losses were

[141] FCA (appeal), [181]:

> We agree with counsel for the insurers that in the vast majority of insurance cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y…

[142] FCA (appeal), [181]-[188] and [192]-[197].

[143] that approach, at least as it was expressed in the FCA (1st Instance), was adopted by the Courts in the *Santam* and *Guardianrisk* decisions.

> caused by cases of a notifiable disease occurring within the radius is to be answered by asking whether or to what extent, but for those cases of disease, business interruption loss would have been suffered as a result of cases of disease occurring outside the radius. Not only would this potentially give rise to intractable counterfactual questions but, more fundamentally, it seems to us contrary to the commercial intent of the clause to treat uninsured cases of a notifiable disease occurring outside the territorial scope of the cover as depriving the policyholder of an indemnity in respect of interruption also caused by cases of disease which the policy is expressed to cover. We agree with the FCA's central argument in relation to the radius provisions that the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius.
>
> 196. This conclusion is reinforced by the other matter to which the court below attached particular importance in interpreting the disease clauses. This is the fact that the relevant wordings do not confine cover to a situation where the interruption of the business has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere. As leading counsel for the FCA, Mr Edelman, pointed out, to apply a "but for" test in a situation where cases of disease inside and outside the radius are concurrent causes of business interruption loss would give the insurer similar protection to that which it would have had if loss caused by any occurrence of a notifiable disease outside the specified radius had been expressly excluded from cover. If the insurers had wished to impose such an exclusion, it was incumbent on them to include it in the terms of the policy.
>
> 197. We accordingly reject the insurers' contention that the occurrence of one or more cases of COVID 19 within the specified radius cannot be a cause of business interruption loss if the loss would not have been suffered but for those cases because the same interruption of the business would have occurred anyway as a result of other cases of COVID 19 elsewhere in the country.

112. Having rejected the appropriateness of a "*but for*" approach to causation, the Court considered the requisite causation existed on a "*multiple concurrent causes*" basis. In this regard, the Court reasoned that "*all the [COVID 19] cases were equal causes of the imposition of national measures*"[144] and that, where the relevant COVID 19 case was a separate, but equal, cause of the relevant peril, the requisite causal nexus existed[145]. Relevantly:

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[144] FCA (appeal) at [176].

[145] FCA (appeal) at [189]-[191] and [206]-[212].

FCA (appeal) conclusion on causation – [212]
212. We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID 19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID 19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID 19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "*following*" or some other formula such as "*arising from*" or "*as a result of*". It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case.

113. As we explain below, the Court's analysis is directly relevant to the Trends Clause issue.

114. However, in the context of the balance of the causation issues, the present case is slightly different from the UK test cases insofar as the contested causation issue in the UK cases was whether or not there was a causal link between the business interruption and the disease. In the present case, the relevant challenge (at least so far as this issue is concerned) is the causal link between (on the one hand) COVID 19 Infected Property or a COVID 19 occurrence or outbreak and (on the other hand) the Public Authority Directions. However, that distinction without more is not significant in the context of the analysis of the causation issues in this case. That is because, in FCA (appeal), the causation principles applicable to the "*disease clauses*" were held to be equally applicable to the analogous causation questions that arose in respect of the "*hybrid clauses*".[146]

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[146] FCA (appeal) at [213]:

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

115. It follows that each reported or suspected case of COVID 19 may be regarded as a sufficiently proximate cause of the Public Authority Directions . This (relevantly) includes:

    (a) the residents of Newstead and Bowen Hills, both suburbs neighbouring Herston;

    (b) the two treasury officials at 1 William Street; and

    (c) the two students, and the lecturer, at the UQ Campus.

116. The question of causation in the present case is an unusual one since it does not relate to an objective fact (whether, say, the failure of a car's brakes caused it to collide with another vehicle), but the subjective state of mind of governmental/public decision makers. And, in assessing that state of mind, it must be remembered that, as at the time of this hearing, most members of the community at least those who read newspapers, listen to radio news and current affairs programmes, or watch such programmes on television have a greater understanding of the transmissibility of COVID 19 than even the most experienced and well read public health officials had in March of 2020.

117. The Court may properly take judicial notice of the fact that, in March of 2020, there was a great deal of concern surrounding the potential transmissibility of COVID 19 from the surfaces of everyday objects. Hence, from the earliest days of the pandemic, people were urged to wash their hands frequently, or to use chemical disinfectants; and to refrain, in public, from touching surfaces which may have been touched by others, such as lift buttons, pedestrian call buttons, hand rests in busses and trains, and reusable (as opposed to disposable) cups and glasses.

118. With such a mind set, it is hardly to be surprised that public health authorities were anxious to suppress any opportunity to catch COVID 19 from such "*fomites*" (objects or surfaces which carry an infectious pathogen). And what is critical to the question of causation is <u>not</u> whether there was a high risk (or, indeed, any significant risk) of catching COVID 19 from the benches and table surfaces, the cups and saucers and plates and glasses or the cutlery and other utensils within the premises conducted by Market Foods. The question, rather, is whether that apprehended risk however slight we may now know it to be was one of the "*multiple concurrent causes*" which led to the making of the Public Authority Directions. Indeed, the same reasoning would hold good even if it were now clearly established that fomites are not a vector for the transmission of COVID 19.

119. Understood in that way, the fact that Market Foods operated food outlets at three sites which happen to coincide with three of the earliest COVID 19 breakouts in

Queensland, occurring days before the making of the first Public Authority Direction, inevitably leads to the conclusion that the presence (or even the possible presence) of COVID 19 fomites within those premises was (at the very least) one of "*multiple concurrent causes*" which led to the making of the Public Authority Directions. In fact, when the businesses operated by Market Foods are considered along with other businesses of a similar nature, it may safely be concluded that the risk of fomite transmission was one of the primary causes for the making of the Public Authority Directions.

PART VII –APPLICATION OF EXTENSION B

120. It is convenient first to deal with the preamble to the insuring clause in order to provide a textual foundation for the definitional clauses of Section 2. Unfortunately, the drafter of the Policy has invested the preamble as a source of profound confusion rather than elucidation. Accordingly, any attempt to attribute a clear meaning to the preamble elides the problems manifest in performing that task.

Section A: Extension B's Proper Construction

121. The preamble to Extension B requires that the definition of "*Business Interruption*" be incorporated or assimilated into it. That process is made more complex by the fact that the definition of "*Business Interruption*" includes a further (capitalised) defined term, "*Insured Damage*". Once these two defined terms are incorporated into the preamble it reads:

The Transposition of Defined Terms into the Extension B Preamble
Cover under Section 2 is extended to include loss resulting from the interruption of or interference with Your Business in consequence of **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** that occurs during the policy Period to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below … [the incorporated definition of "Business Interruption" is underlined; the incorporated definition of "**Insured Damage**" is in bold]

122. The preamble is confusing, even to experienced lawyers. For an insured layperson the preamble is practically unintelligible.

123. That confusion is compounded when the preamble is read with each extension in B1 to B8. According to the preamble, those extensions purport to extend to the eight

"*locations*". However, on a plain reading of the sub clauses, they describe more than mere "*locations*" and, in some of the examples, do not purport to identify any "*location*" whatsoever. So, by way of example only, if the preamble including the incorporated definitions is read without any modification in conjunction with Extension B4 one is left with the following extension:

An Absurd Example of the Incorporation of Defined Terms; Extension B4
Cover under Section 2 is extended to include loss resulting from the interruption of or interference with Your Business in consequence of 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 that occurs during the policy Period to property: (a) of a type insured by this Policy; and (b) at [4.] 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. [the incorporated Extension B4 is underlined]

124. Extension B4 does not read coherently. Moreover, as Extension B4 clearly incorporates a mere "*threat*" of damage and the threat is literally expressed as extending to people, it does not sit well with the Extension's preamble which appears to be limited to actual damage to property. This point is further discussed below.

125. A proper construction of Extension B requires a consideration of its language in the context of the Policy read as a whole[147]. The heading of the Extension (which cannot be used to interpret the Policy[148]) seems to suggest that the critical insured peril which triggers potential liability is some "*damage*" to "*property*" occurring "*at locations*" which are not the Insured Locations. For the reasons set out above, that does not sit comfortably with, particularly, Extension B4. Although the clause is the product of considerable convolution and resulting confusion, the most common sense approach to its interpretation is by separating its components into "*elements*".

Section B: The Issues for Determination, Extension B

126. Notwithstanding the tortuous and confusing language used in Extension B, the parties have agreed to approach the determination of issues arising in the context of Extension B by addressing the issues set out in the NSD138 SOAI. Some of these

[147] see *Onley, HDI Global Specialty SE* and *MOS Beverages, supra.*

[148] see p 8, column 2 of the Policy.

issues are common to all extensions, others are particular to individual limbs of the Extension. The issues common to all the Extension B limbs are as follows:

(a) Does the subsistence of the SARS CoV 2 virus on property, if proved, constitute "*physical loss, destruction or damage … to property*"?[149]

(b) If the answer (a) is "*yes*", did the damage to property "*occur… during the Policy Period*"? This is addressed in the Chubb Submissions, presumably on the basis that Market Foods cannot satisfy the first issue which is a precondition to the second. There is, however, no serious challenge to the conclusion that, should Market Foods otherwise succeed on the first issue, relevant damage to property occurred during the Policy Period.

(c) If the answer to (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) of Section 1? [150]

(d) If the answer to (c) is "*yes*", was the Property Damage "*at the location … described in"* Extension B1, B3 and B4[151]?

127. Common issue (d) raises issues unique to each of the B Extensions; more particularly:

(a) Was there damage to any property "*within 50 kilometres of any Insured Location*" during the Policy Period (Extension B1)[152]?

(b) 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…*" (Extension B3)?[153]

(c) 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*" (Extension B4)?[154]

128. Before leaving the issues relevant to Extension B, is convenient to re state some of the issues which Chubb has either conceded or agree are part of the Carve Out Issues. Relevantly, Chubb concedes or submits that the Carve Out Issues include:

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[149] NSD138 SOAI, Issues 3(a), 4, 8(a), 9, 13(a) and 15(a)(i).

[150] NSD138 SOAI, Issues 3(c), 8(c) and 13(c).

[151] NSD138 SOAI, Issues 3(d), 5, 8(d), 9, 10, 13(d) and 15(d).

[152] NSD138 SOAI, Issue 5.

[153] NSD138 SOAI, Issue 10.

[154] NSD138 SOAI, Issue 15.

(a) whether or not losses "*resulted from*" Business Interruption as expressed in Extensions B1[155], B3[156] and B4[157]; and

(b) whether or not damage to property[158] or Public Health Directions[159] "*resulted in*" a cessation or diminution in Market Foods' trade or normal business operations due to a falling away of potential custom in B3.

129. At the same time, Chubb has belatedly made two significant concessions; namely

(a) that the Queensland Government directions and the University of Queensland directions were actions of a "*legal authority*" (B4)[160]; and

(b) that the Queensland Government directions "*prevented or restricted access to [the] Insured Locations*" (B4)[161].

Section C: Analysis of the Issues for Extension B

THE FIRST COMMON ISSUE "PHYSICAL LOSS, DESTRUCTION OR DAMAGE TO PROPERTY"

130. The Policy contemplates that disease is, at least, a potential cause of damage to property, as it is expressly excluded as an insured peril in Section 1. Whether or not the exclusion is engaged for the purposes of Section 2 and, if engaged, whether Chubb is otherwise entitled to rely upon it is a separate issue. It is sufficient for consideration of this element that the Policy contemplates that disease is capable of constituting "*damage to property*" for the purpose of satisfying this element.

131. The definition uses the expression "*physical loss, destruction or damage … to property*".[162] Reading the Policy, sensibly and as a whole, the nature of the loss or the damage sustained by or to the property must be physical in nature[163]. That is because the word "*physical*" attaches to the word "*loss*" in the relevant definition provision and also in circumstances where the concepts of "*destruction*" and "*damage*" are

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[155] see the Chubb Submissions at [333]; NSD138 SOAI, Issue 7.

[156] see the Chubb Submissions at [357]; NSD138 SOAI, Issue 12.

[157] see the Chubb Submissions at [384]; NSD138 SOAI, Issue 16.

[158] see the Chubb Submissions at [347]; NSD138 SOAI, Issue 11.

[159] see the Chubb Submissions at [354]; NSD138 SOAI, Issue 11(c).

[160] see the Chubb Submissions at [367]; NSD138 SOAI, Issue 14(a).

[161] see the Chubb Submissions at [368]; NSD138 SOAI, Issue 14(b).

[162] this is the result **if** the definition of "*Insured Damage*" is assimilated into the preamble by first incorporating the definition of "*Business Interference*" and then incorporating its component definitions.

[163] this appears to be consistent with the definition of, "*Damage or Damaged*" in Section 1 (parts of which are "picked up" by the definitions in Section 2), as *"… means accidental physical damage, destruction or loss*".

inherently linked with a requirement that there be some physical alteration or change to the property.

132. There is no suggestion that "*property*" is to be limited to "*real property*", and the word is consistently used in law and in the Policy to include real property, fittings and fixtures thereto and personal property or goods. Market Foods concedes that, at least as a general proposition, when the terms "*physical loss*" or "*damage*" are used in connection with property insurance, those terms are unlikely to extend to damage which falls in the categories of pure economic loss or latent defects.[164] The property in question was not "*lost*" or "*destroyed*".

133. But that then begs the question, what meaning is to be ascribed to the expression "*physical damage to property*" for the purposes of Section 2 of the Policy and, more particularly, the word "*damage*" in the context of that expression? Although "*Insured Damage*" is defined in Section 2, it incorporates the word "*damage*" as part of its meaning. "*Damage or Damaged*" is defined for the purposes of Section 1 and Section 6 of the Policy as meaning "*accidental physical damage, destruction or loss*". So, once again, the defined word is, unhelpfully, incorporated into the definition itself. It is not otherwise a defined term in the Policy[165]. The *Shorter Oxford Dictionary* defines "*damage*" in the following relevant way[166]:

Shorter Oxford Dictionary definition of "*damage*"
damage *noun* **1.** Loss or detriment to one's property, reputation, etc. *arch*. ME. **2.** Harm done to a thing or (less usually, chiefly *joc*.) person; *esp.* physical injury impairing value. LME. ... **damage** *verb tran.* ME. [Old French *damagier*, formed as prec.] Injure (a thing) so as to diminish value or usefulness; cause harm (now rarely physically) to (a person), *esp*. detract from the reputation of. ...

[164] *Sutton on Insurance Law*, electronic database, *op.cit.*, accessed 27 August 2021 at [16.40]-[16.50].

[165] for completeness, it is noted that "***damages***" is a defined term for the purposes of Section 11 "*Cyber Liability*" but Market Foods was not covered for that Section and, in any event, the word is clearly used in a "*financial loss*" sense and so this is otherwise unhelpful.

[166] *Shorter Oxford Dictionary*, Oxford University Press, 5th Ed, 2002, Volume I, p 596.

134. Chubb refers, amongst other cases, to the Tasmanian Supreme Court case of *Ranicar v Frigmobile Pty Ltd* (***Ranicar***)[167] for the conclusion, stated by Allsop CJ in *R&B Directional Drilling Pty Ltd (in liq) v CGU Insurance (No 2)*[168] (***R&B Directional Drilling (No 2)***), that there must be a "*change of physical state*"[169] to constitute damage to property. That case relevantly concerned the interpretation of the expression "*physical injury to tangible property*" and was not, therefore, directly concerned with "*damage to property*", although it is conceded that his Honour considered some cases in which that expression was discussed. In any event, Allsop CJ expressly conceded that the "*question is a matter of degree, of meaning and of characterisation*"[170] in reaching his conclusion, in that case, that the tunnel "*was not physically injured; its temporary loss of use was not caused by physical injury, but by defective works*".[171] The Chief Justice did, however, refer with apparent approval to *Ranicar*. It is appropriate, therefore, to consider that case and other cases in which the particular expression has been considered.

135. In *Ranicar*, Green CJ considered a number of interpretations of the word "*damage*" in the context of penal statutes in the United Kingdom and Australia, concluding that the utility of those cases was limited to a universally applied principle that the word is to be defined according to its ordinary meaning. His Honour found the dictionary definition to be largely unhelpful because it incorporated the word "*injury*", being synonymous with the "*question which [he had] to determine*"[172]. The Chief Justice then said[173]:

Extract from *Ranicar* at p 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 …

[167] [1983] Tas R 113; (1983) 2 ANZ Ins Cas 60-525.

[168] [2019] FCA 458; (2019) 369 ALR 137.

[169] *R&B Directional Drilling (No 2)* at [79].

[170] *R&B Directional Drilling (No 2)* at [135].

[171] *R&B Directional Drilling (No 2)* at [136].

[172] much like the definitions from the *Shorter Oxford Dictionary* set out in the table above.

[173] [1983] Tas R 113 at 116.7; applied in *Switzerland Insurance Australian Ltd v Dundean Distributors Pty Ltd* [1998] 4 VR 692 per Ormiston JA at 703 and Phillips JA at 714. Ormiston JA also referred to the application by Giles J in *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Insurance Cases ¶61-026 at 76,865-6.

136. In *Ranicar*, the plaintiff was an exporter of frozen scallops. A consignment of scallops was rejected for export on the basis that it failed to comply with a Commonwealth standard requiring the scallops be stored at 18°. The scallops were stored at a temperature between 6° and 12°. The plaintiff was forced to sell the consignment locally for less than the contract price. The plaintiff made a claim for loss pursuant to its insurance policy. The insurer rejected the claim on the basis that the scallops were not lost or damaged within the meaning of the insuring clause, relevantly clause 5. That clause provided for "… *insurance against all risks of loss or damaged to the subject matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject matter insured*". The expert evidence, which was accepted by the Chief Justice, was to the effect that "*changes due to enzymic activity and the chemical oxidation of fats in the scallops would have been greater at*" the higher temperature than at the lower temperature however, the difference in the storage temperature would not have resulted in "*any significant difference in the edibility, taste, smell, texture or appearance of the scallops*".[174]

137. The Chief Justice rejected the argument that the changes caused by enzymic activity and chemical oxidation constituted damage to scallops.[175] However, His Honour concluded that the change in temperature nonetheless constituted damage to property because it changed the property from being exportable to not being so. The Learned Chief Justice's reasoning (including further examples) are apposite to Market Foods' arguments in this proceeding; relevantly, the Chief Justice explained[176]:

Extract from *Ranicar* at p 117
Even had the scallops undergone no change of any kind, the mere fact that they were stored at a temperature above 18° would have been sufficient to prevent the plaintiffs from being able to export them. The question which remains is whether in the circumstances of this case that change in temperature amounted to damage in the scallops. In my view, it plainly did …. It may be that under some circumstances goods could be said to have been damaged notwithstanding that they have not undergone any physical change. For example, it might be arguable that food which was handled in a way which violated the religious dietary laws of the country to which it was being exported could be regarded as having been damaged. Similarly, it might be that goods which were handled contrary to quarantine regulations so as to prevent their

[174] [1983] Tas R 113 at 117.4.

[175] [1983] Tas R 113 at 117.5.

[176] [1983] Tas R 113 at 117.6 to 118.2.

> importation into a country could be regarded as having been damaged notwithstanding that the handling had no contamination effect upon them.

138. In *Jan de Nul (UK) Ltd v. Axa Royale Belge*[177] (***Jan de Nul***), the English Court of Appeal accepted that a deposit of silt on a riverbed which created only a temporary change to the property was nonetheless physical damage for the purpose of establishing liability under a policy of insurance. That was so notwithstanding the change was temporary and capable of remediation. In *Jan de Nul*, Lord Shiemann (delivering the judgment of the Court) summarised the relevant part of the insurer's argument and the Court's response in the following way:

> **Extract from *Jan de Nul* at [32]-[33]**
>
> [32] Before the policy responds there must be damage to property. Property damage is defined in the General Conditions as meaning 'damage to, destruction or loss of property'. The insurers say that all that could be described as property is the river bed and this has not been damaged. The rights which ABP have as conservators cannot be described as property. They point to paragraph 65 of the judgment where the judge says that "*there is no evidence that ABP as owner of the river bed suffered any significant damage as a result*" and to the fact that the judge did not allow JDN to run a case that they incurred liabilities to ABP in the latter's capacity as owner of the river bed.
>
> [33] The answer to this point is that it is legitimate for the purposes of construing this policy to regard
>
> 1. the waterway, comprising the river bed, the banks and the water as being the property;
> 2. the deposit of quantities of silt **which interfered with its previous use as a waterway as being damage to property**; and
> 3. to regard the cost of moving the silt from the adjacent areas as financial loss resulting from property damage covered under the policy and thus constituting 'consequential immaterial damage'
>
> [emphasis added]

139. Similarly, in *Lojinska Plovidba v Transco Overseas Ltd* (***The Orjula***)[178], a layer of hydrochloric acid had leaked on to the deck and a hatch of a ship. Although it was more likely than not the acid would have caused a physical alteration to the ship,

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[177] [2002] EWCA Civ 209; [2001] 1 Lloyd's Rep 583.

[178] [1995] 2 Lloyds Rep 395; (1995) CLC 1325.

Mance J[179] was asked to (and did) proceed on the basis that there was in fact no physical alteration of the deck caused by the acid, but that the acid had to be cleaned off. Because *The Orjula* was a strike out case, his Honour was proceeding on the assumption that the facts as alleged were true. One of the assumed facts was that the port authorities required the vessel to be decontaminated of the acid before it could sail. The question for the purposes of the motion was, on those assumed facts, including the absence of any physical alteration to the ship, whether the vessel could have been said to have suffered physical damage. After referring to some criminal cases, Mance J said[180]:

Extract from *The Orjula* at p 399
The criminal test is thus one of fact and degree, depending on the circumstances and on the nature and effect of what has been done. Relevant considerations are whether there has been 'injury impairing value and usefulness' of the property in question, and the need for work and the expenditure of money to restore the property to its former usable condition is material. It seems to me that this guidance is also relevant in a civil context.

140. There is, therefore, judicial support for the proposition that, in the context of insurance contracts, "*damage to property*" can occur in circumstances where:

(a) the cause subsists on the property;

(b) it is temporary; and

(c) it can be remediated.

141. It is the existence of SARS CoV 2 on property which changes it from property which is free of SARS CoV 2 to property which is infected and therefore a fomite (or capable of being a fomite) for the transmission of COVID 19. The key enquiry is whether, once it is established that, in this case, SARS CoV 2 exists on the subject property, its existence causes an impairment to the property's value and usefulness.

THE SHABAN AND SCHIERS REPORTS

142. Dr Shiers purports to conclude that the existence of COVID 19 on property does not constitute "*damage to property*". As noted above, Chubb relies upon that conclusion as definitively determining the ultimate issue posed by NSD138 SOAI, Issues 3(a), 4, 8(a), 9, 13(a) and 15(a)(i); and, by extension, as foreclosing Market Foods' right to rely

[179] as his Honour then was.

[180] [1995] 2 Lloyds Rep 395 at 399; (1995) CLC at 1325 and 1328-1329.

upon Extension B in Section 2. The ultimate issue as to whether or not SARs Cov 2 causes "*damage to property*" in the relevant sense is properly a matter for judicial determination and not opinion evidence[181].

143. It is true that Dr Shaban expresses an opinion regarding the issue. However, his opinion does not purport to decide the issue which is, appropriately, a matter for the Court. Dr Shaban sets out the scientific basis[182] for the appropriately qualified opinion that SARs Cov 2 "*may cause physical alteration or change to the object or property, not necessarily permanent or irreparable, relative to its existing integrity*" depending "*on the material properties of the individual object or property*"[183]. That is in stark contrast to Dr Scheirs, who opines in an unqualified and impermissible way that SARs Cov 2 cannot cause "*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*"[184].

144. Dr Scheir's conclusion and any of his opinion evidence which relies directly or indirectly on that conclusion is inadmissible. The question of "*damage to property*" takes its ordinary meaning[185] and is clearly a matter which does not fall within any recognised field of "*specialised knowledge*"[186]. Moreover, by answering the very questions posed as issues for the Court's determination[187], Dr Scheirs trespasses upon the judicial function of the Court[188].

145. Chubb's fall back position is that, even if the presence of SARs Cov 2 virus could constitute "*damage*" in the relevant sense, Market Foods is unable to adduce any direct evidence of its presence.[189] But this is unsurprising. One would not expect any insured, anywhere in Australia, under any such policy, to have direct evidence of the presence of fomites, possibly shed by an asymptomatic COVID 19 sufferer, which might have existed on a particular surface for minutes, hours or (at most) days. So, like any question which arises in judicial proceedings, and which by its very nature

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[181] cf the conclusions reached by Chubb's Expert Dr Scheirs, referred to in this Outline as **the Scheirs Report**.

[182] see [48]-[57] of the Shaban Report.

[183] see [61] of the Shaban Report.

[184] see p 8 of the Scheirs Report.

[185] *Ranicar*; *Jan de Nul (UK) Ltd v Axa Royale Belge* [2002] EWCA Civ 209; [2001] 1 Lloyd's Rep 583.

[186] s 79 of the *Evidence Act 1995* (Cth); *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744 per Heydon JA; *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588 at [30], [43] and [128].

[187] see, particularly, p 6 of the Scheirs Report.

[188] that is so regardless of s 80 of the *Evidence Act 1995* (Cth): see *Allstate Life Insurance Co and Ors v. Australia and New Zealand Banking Group Limited and Ors (No 6)* (1996) 64 FCR 79 at 84 per Lindgren J.

[189] the Chubb Submissions at [100] and [323].

cannot be established through direct evidence, the Court must draw its own inferences from the known facts.

146. Accepting that the COVID 19 virus can be acquired from built surfaces and objects (including hard surfaces like door knobs, lift buttons, table tops and benches), on any view, a table in a café or restaurant is "*damaged*" in the relevant sense of being less useful for its intended purpose, and therefore less valuable if it harbours a pathogen which is capable of causing a life threatening disease. Moreover, the entire premises are "*damaged*" in the sense of being less useful for their intended purpose, and therefore of less value for business purposes if it contains such a virus. The fact that the precise location of the virus within the premises is unknown, and indeed cannot be discovered, only exacerbates the damage caused by the presence of the virus.

147. Professor Shaban opines that SARS CoV 2's survival on property is influenced by ambient environmental temperatures. So, for example, a number of studies have concluded that "*viable SARS CoV 2 persisted for up to seven days on stainless steel and surgical mask surfaces*"[190] and a study by the CSIRO[191] found that "*viable virus was present for up to 28 days at 20°C on glass, stainless steel and banknotes (paper and polymer)*"[192]. At 30°C the viable virus survived on the same materials for up to seven days. Professor Shaban also explains that, once identified as being infected or suspected of being infected, the relevant property must be remediated before it can be used for its intended purpose and that remediation is subject to prescriptive requirements. In that regard, Professor Shaban explains that:

The Shaban Report at [53] to [54]
Comprehensive Australian national and state guidelines exist for the cleaning and disinfection of a rage of clinical and non clinical environments, including in instances where cases of suspected or confirmed COVID 19 occur therein. For a cleaning product and/or disinfectant to work, it must be prepared and used according to the manufacturer's instructions. The Australian Register of Therapeutic Good (ARTG) lists all disinfectant products that contain specific claims against SARS CoV 2 on the product label and have been permitted by the Therapeutic Goods Administration (TGA)… [footnotes omitted]

[190] the Shaban Report at [49].

[191] Commonwealth Scientific and Industrial Research Organisation.

[192] the Shaban Report at [49].

148. That COVID 19 infected property (or property suspected of being so) is required to be isolated and, if it is be used for its intended purpose, is required to be remediated by reference to enforced guidelines, points to similarities between the present case and the *Oruja* and *Ranicar* cases.

THE THIRD COMMON ISSUE DAMAGE TO PROPERTY CAUSED BY AN EVENT

149. Chubb asserts that this issue is not satisfied because Section 1 of the Policy includes certain "*Excluded Causes*", relevantly "*contamination or pollution*" and "*disease*". The Policy's General Exclusions do not include an exclusion for "*disease*" nor for "*contamination or pollution*". Chubb relies upon the philological process of substitution and internal reference for its submission on this issue.

150. Market Foods denies the application of the Section 1 exclusions or Chubb's entitlement to rely upon those exclusions on three bases:

    (a) **First**, on a proper construction of the Policy, none of the exclusions in Section 1 including "*Excluded Causes*" are "*picked up*" by the purported incorporation of "*Insured Damage*" in Section 2.

    (b) **Secondly**, in the event there is uncertainty as to whether or not the Section 1 exclusions are incorporated, Market Foods' construction of the Policy ought to be preferred applying the *contra proferentum* principle.

    (c) **Thirdly**, and in the further alternative, ss 13 and 14 of the Insurance Contracts Act operate to preclude Chubb from relying upon the Exclusions in Section 1 because to do so "*would be to fail to act with utmost good faith*".

151. Insofar as Chubb relies on "*disease*" as an "*Excluded Cause*", two additional points may be made:

    (a) **First**, the relevant "*damage*" is not the presence of a "*disease*" but the presence of a pathogen which potentially causes a disease. Although a fine and subtle distinction, it is not one without merit. One might compare, for example, the situation where a location is damaged by becoming radioactive. Radioactivity is a natural phenomenon, which may cause a disease radiation sickness, also known as radiation poisoning but it is not, itself, a disease. Likewise, the virus which causes COVID 19 is not a disease; it is a pathogen which may give the disease to a person who is infected with it.

    (b) **Secondly**, if the "*disease*" exclusion applies, Extension B4 in Section 2 would be rendered substantially, if not wholly, nugatory.

152. However, the most obvious answer to Chubb's contentions is this: On a proper construction of Policy, the Exclusions in Section 1 are not included by the incorporation of the sub definition of "*Insured Damage*". As noted above, Extension B requires a significant degree of linguistic aptitude to incorporate the various referred definitions into the preamble. It first requires the reader to incorporate the definition of "*Business Interruption*" which, itself, incorporates "*Insured Damage*". "*Insured Damage"* requires there to be *"physical loss, destruction or damage … caused by an event insured under [Section 1] …*". The sub definition of "*Insured Damage*" does not specifically **exclude** any causes, it merely refers to the causes in Section 1. In order to incorporate the exclusions, the insured must assume that the "*insured causes*" exclude the "*excluded insured causes*".

153. The incorporated definitions and sub definitions in Extension B appear in the preamble immediately before "*to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below …*". Putting to one side the "*locations*" specifically relied upon by Market Foods, the other "*locations*" include other examples of "*property*" which is not merely property **at** a number of locations.

154. The insured must then return to Section 1 to discover both the insured causes and the insured property. That section includes a wide range of property and causes. At the end of Section 1[193] there is a part styled "*Exclusions*". That part commences with "*The following exclusions apply to Section 1 of this Policy except where expressly varied*". In that part, there are two sub parts, "*Excluded Property*" and "*Excluded Causes*". The Excluded Property and Excluded Causes at the end of Section 1 are, to be frank, legion. Without engaging in a comprehensive review of the Excluded Property and Excluded Causes provisions, they appear, in many respects, to be inconsistent with many of the "*B*" extensions in Section 2. If Chubb's submission is to the effect that all of the exclusions in Section 1 are picked up by the definition of "*Business Interruption*" in the preamble to Extension B in Section 2, then the following are some examples of property or causes which are, by reference, excluded by the Exclusions of Section 1:

    (a) Property whilst in transit outside of the Insured Locations (Excluded Property #1) notwithstanding Extension B2 in Section 2 which specifically extends cover to Business Interference caused by damage to such property.

    (b) Vehicles or trailers registered or licensed to travel on a public road (Excluded Property #7) notwithstanding Extension B2 in Section 2 which specifically extends cover to Business Interference caused by damage to such property (with some qualifications).

[193] at pp 21-22.

(c) Any damage directly or indirectly caused or occasioned by or arising from flood (Excluded Causes #1(a)) which would inevitably include damage caused to: the premises of the insured's suppliers, manufacturers or processors &c. (Extension B8); or to roads, bridges and railway lines by which stock, components and materials are conveyed to and from the Insured Location (Extension B7); or to public utilities and computer installations (Extension B5).

(d) Any damage to the structures described in (c) in the event the insurer could prove that the damage was directly or indirectly caused or occasioned by or arising from error, or omission in design, plan or specification or failure of design (Excluded Cause #2(c)) which would, once again, inevitably extend to such excluded damage to any of the third party property in the B Extensions.

(e) Any damage to the structures described in (c) in the event the insurer could prove that the damage was directly or indirectly caused or occasioned by or arising from the incorrect siting of buildings consequent upon the things set out in Excluded Causes #3(a)(i), (ii) or (iii). Again, that would extend the exclusion to damage to property owned or managed by third parties listed in the B Extensions.

(f) Any damage to the structures described in (c) in the event the insurer could prove that the damage was directly or indirectly caused or occasioned by or arising from mechanical, hydraulic, electrical breakdown or electronic failure or malfunction (Excluded Cause #10).

(g) The cessation of work (total or partial) or the cessation, interruption or retarding of any process or operation as a result of, relevantly, locked out workers (Excluded Cause 6).

155. Moreover, the Section 1 exclusions are expressly limited as "*applying to Section 1 of [the] Policy*" (a caveat which is repeated at the commencement of each of the Excluded Property and Excluded Causes sub parts). When those limitations are read with the inconsistent consequences of the specific examples of exclusions and their putative application to other Sections of the Policy, and more particularly Section 2, the most sensible construction of the Policy leads to the conclusion that the exclusions are restricted to claims made under Section 1 only.

156. If the Policy were to include in Section 2 the exclusions in Section 1, those exclusions on their face would operate in a such a way so as to defeat the very purpose for which the extensions in Section 2 were included. The insurer would be confronted with a business interruption policy so limited by other parts of the Policy (incorporated in the most indirect way imaginable) that any business interruption claim based upon the B Extensions would be rendered inutile. Such an interpretation

invests the insurer with a degree of potential capriciousness that is inconsistent with the purpose of Section 2 and the insurer's statutory duty of utmost good faith.

157. Consistent with principle,[194] the circumstances of this case require a narrow reading of the Policy, in effect to exclude in respect of Section 2 the Exclusions found in Section 1. That is to say, to read the definition of "*Insured Damage*" in the way it appears in Section 2 as meaning, "*physical loss, destruction or damage ... caused by an event insured under [Section 1]*"; and not, as Chubb asserts, "*physical loss, destruction or damage ... caused by an event insured under [Section 1] but excluding those causes specified as 'Excluded Causes' in Section 1*". There could hardly be a plainer case for the application of the principle identified in *HDI Global Specialty SE* and in *Impact Funding* that, where an insurer desires to exclude liability of a specific nature, it must "*do so in clear words*". The words used in this instance are not merely crepuscular but profoundly opaque.

158. If, however, there is doubt as to whether or not the Exclusions are included by virtue of the sub definition of "*Insured Damage*", that doubt ought to be resolved in favour of the insured. That is to say, it ought to read against the *proferentes* namely, the insurer.

159. In the final alternative, Chubb's reliance on the Exclusions in Section 1 is contrary to its acting in the utmost good faith and s 14 of the Insurance Contracts Act prevents such reliance. That is particularly so in circumstances where the Exclusion sought to be relied upon is buried in a quagmire of internally referential clauses requiring a detailed process of interpreting and applying definitional inclusions and potential exclusions without any attempt to bring the full effect of how Chubb proposes those clauses to operate to the attention of Market Foods.[195]

160. On the basis of Chubb's resistance to this element being based entirely on the exclusions in Section 1, this element is otherwise satisfied.

THE FOURTH COMMON ISSUE DAMAGE TO PROPERTY AT DESCRIBED LOCATIONS

161. The preamble is expressed in such a way that, for Extension B to be engaged, all that is required is that the damage to property simply occur "*at the locations*" specified in Extensions B1 to B8. However, a review of Extensions B1 to B8 reveals the sub clauses do not only identify "*locations*" at which the damage to property must take place but also include a number of further requirements some of which are the subject of Carve Out Issues.

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[194] *Impact Funding* at [7]; *HDI Global Specialty SE* at [29].

[195] *Re Zurich* at 209 [37]; *Re Bradley* at 430.

162. For the purposes of Extensions B1 and B3, the issue requires a finding of damage to property caused by COVID 19, relevantly, "*within 50 kilometres*" of the Market Foods' Insured Locations (B1)[196] or "*in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained*" (B3)[197]. For the reasons explained below, Extension B4 falls into a slightly different category; however, it also has a geographical element insofar as that Extension requires that there be a ***threat*** of damage to property **or** persons "*within 50 kilometres of any Insured Location*"[198].

163. If it is accepted that the subsistence of COVID 19 on property constitutes "*damage to property*", the relevant question is whether there is evidence of COVID 19 on property (or a threat of COVID 19 on property or infecting a person[199]) within 50 kilometres of the Insured Locations or in a commercial complex of which any Insured Location forms a part or is contained. We apprehend that this is the real dispute in the context of Extension B1. For the reasons already canvassed, this is a factual question in respect of which the Court is entitled to draw inferential conclusions. And, with respect, the only possible inferential conclusion is an affirmative one.

164. Extension B3 is locationally confined to damage to property occurring "*in any commercial complex*"[200]. What is meant by the expression "*commercial complex*" in that Extension is in issue between Market Foods and Chubb. By the SOAI, Chubb argues that "*commercial complex*" is limited to "*complexes in the nature of shopping centres or industrial complexes*"[201]. The reference to "*industrial complexes*" is removed in the Chubb Submissions and replaced with "*commercial estate*"[202]. In any event, the Chubb Submissions[203] do not develop why the expression "*commercial complexes*" is to be read narrowly. Chubb baldly asserts the expression "*connotes a shopping centre or commercial estate whereas the Insured Locations are situated in government buildings and on a university campus*".

165. Chubb's narrow interpretation of a "*commercial complex*" being confined to shopping centres and "*industrial complexes*" or "*commercial estates*" and therefore excluding premises like a public hospital, a government office tower, and a university should

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196 NSD138 SOAI, Issues 3(d) and 4.

197 NSD138 SOAI, Issues 8(d) and 10.

198 NSD138 SOAI, Issues 13(d) and 15(b).

199 which, it is submitted, is the most common-sense approach to the words "*damage to persons*" in the context of COVID-19 (a point to which we will return later in this Outline).

200 the preposition "*in*" clearly means "*within*" or "*inside*".

201 NSD138 SOAI, Issue 10(a).

202 the Chubb Submissions at [345].

203 the Chubb Submissions at [345].

be rejected. The expression is not so ubiquitous in the reported cases as would suggest it has an accepted meaning at law. It does not possess, of itself, any scientific or industry specific meaning upon which opinion evidence might inform its proper interpretation. In short, there is nothing within the plain meaning of the words comprising the expression nor in the Policy read as a whole which would suggest the interpretation pressed by Chubb.

166. Indeed, Chubb's narrowing of the expression is inconsistent with the approach to interpretation of commercial contracts, generally; that is to say, "*the policy is to be given a businesslike interpretation, paying attention to the language used by the parties in its ordinary meaning, and to the commercial purpose and object of the contract, in the context of the surrounding circumstances, including the market or commercial context in which the parties are operating, by assessing how a reasonable person in the position of the parties would have understood the language*"[204]. That is so for the following reasons:

(a) The expression "*commercial complex*" is not defined in the Policy. It is unlikely to be a term of art. "*Commercial*" is used as an adjective to qualify "*complex*". It is relevantly defined as[205]:

Shorter Oxford Dictionary definition of "*commercial*"
Commercial *adjective & noun* **A** *adjective*. **1.** Engaged in commerce; of, pertaining to, or bearing on commerce. ... **3**. Interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business.

(b) "*Complex*" is clearly used as a noun. That word is relevantly defined as[206]:

Shorter Oxford Dictionary definition of "*complex*"
Complex *noun* **1.** A complex whole: a group of related elements; an assemblage of related buildings, units &c. ...

[204] *supra*, *MOS Beverages* at [18].

[205] *Shorter Oxford Dictionary*, Oxford University Press, 5th Ed, 2002, Volume I, p 459.

[206] *Shorter Oxford Dictionary*, Oxford University Press, 5th Ed, 2002, Volume I, p 468.

(c) The commercial purpose of the Policy, at least in the context of Section 2, is to provide indemnity against business losses incurred by an interference to the Business of Market Foods at the Insured Locations caused by certain insured perils. It will be immediately obvious to the Court that not one of the Insured Locations is contained in, or is a part of, a "*shopping centre*", an "*industrial complex*" or a "*commercial estate*" (whatever Chubb means by relying on that last expression). In the context of this insured and this Policy, Extension B3 would have no work to do whatsoever, regardless of the insured peril, in the event Chubb's interpretation were successful. In the event Chubb was seeking to limit the expression to those three situations, as the Policy's author, it had unfettered control over defining the term in the narrow way presently propounded; or, alternatively, changing the expression within the body of Extension B3 to the synonymous expressions now relied upon to limit the ordinary and natural meaning of that expression. Chubb did not do either of those things. It chose, instead, to leave the expression as it presently appears, undefined and otherwise unencumbered by express limitations. In those circumstances, Chubb cannot now complain that its drafting omission should be used as a tool to deny liability[207] (a point to which we will return in the context of Extension B4).

(d) The way in which "*commercial*" is used to qualify "*complex*" must be seen in the context of the circumstances known to the parties at the time of the Policy was entered into. Market Foods' Businesses are carried on in buildings which form part of an "*assemblage of related buildings*" which have a mix of retail, medical, office (both commercial and governmental) and educational activities. None of them could be regarded as entirely "*commercial*" in the sense of being "*likely to make a profit*". Seen in this way, the word "*commercial*" is not used to delineate between activities which have a sole or singular purpose (for example, "*retail*"; or, as Chubb has suggested, "*industrial*" or "*shopping*") but to incorporate activities which are likely to be a mix of purposes. Seen in this light, the word is one of expansion and not of limitation.

(e) Another view is that the word "*commercial*" is used as it is, for example, in the real estate industry in contrast with "*residential*". There is no reason why Chubb should be concerned whether the "*complex*", as a whole, is devoted to profit making rather than governmental, charitable, educational or not for profit activities. If the word "*commercial*" is to be construed as one of limitation, the only rational limitation is that the premises are premises where people work and do business, rather than premises where they reside.

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[207] *Re Zurich*; *Re Bradley*.

(f) The expression "*commercial complex*" is wide enough to include the "*assemblage of related buildings*" comprising each of (in diminishing geographical size) the UQ Campus, the UQ Food Court and the UQ Insured Location. Moreover, it would include the various parts of the whole comprising each of the William Street and Herston Buildings.

AN ALTERNATIVE ARGUMENT WITH RESPECT TO EXTENSION B4

167. Extension B4 does not sit well within Extension B as a whole, considering the terms of the other sub clauses, and it is difficult to reconcile that extension with the requirement that there be property damage at all.

168. By its terms, Extension B4 extends to "*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*". The evident problem with this is that Extension B4 appears to include losses being caused by events **unrelated** to property damage. B4 includes, as a "*cause*", "*damage … to … persons*" and even a "*threat of damage to … persons*". Such a requirement cannot logically or sensibly apply to an extension which requires the cause of the loss to be the result of property damage. A threat to a person or persons cannot, without more, be said be "*property damage*".

169. Chubb is clearly alive to this problem. In its Statement of Claim, Chubb contends that Extension B4 should be read as follows: "*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 <u>further</u> damage to property or persons within 50 kilometres of any Insured Location*"[208].

170. Chubb sets out its argument in respect of Extension B4 at [359] [361] of the Chubb Submissions. Paragraph 360 is the elemental essence of its argument. It reads:

Chubb's Elements of Extension B4, [360] of the Chubb Submissions
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;

[208] Chubb's Statement of Claim at [20].

> (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.
>
> [emphasis added]

171. This so called "*analysis*"[209] is, in fact, a rewriting of the Extension. So, for example, Chubb's analysis:

    (a) Narrows the "*property*" alleged to require "*damage*" to "*Contents and Stock, Money or Glass*". For this, there is no support, textually or otherwise.

    (b) Inverts the radial limitation within Extension B4, placing it before the balance of the clause. By doing so, it removes the requirement that there be "*damage or a threat of damage to property or persons within 50 kilometres of any Insured Location*" and requires that there is, in fact, actual damage (but only to property) within the 50 kilometre radius as a precondition to other threats of damage to property or persons. The result is to constrain the clause by preconditions:

        (i) **first**, that there be damage to property within a 50 kilometre radius; and

        (ii) **secondly**, that the initial damage to property has the effect of threatening further property damage or threatening people, prompting a response from a legal authority.

        If that were the intention, the clause could easily have been drafted to make that constraint clear on its face. On a plain reading of the clause, it does not do so. It makes the "*threat*" of damage the relevant nexus to the radial limitation; that is to say, that there be a threat of damage to property or persons within 50 kilometres (and not, as Chubb contends, that there be damage to property within 50 kilometres of the Insured Locations).

    (c) Extends the pleaded case from mere "*further damage*" to "*<u>additional or</u> further damage <u>to different</u> property*". This emendation to Extension B4 is dealt with below.

172. As to the last point, Chubb's pleaded emendation to Extension B4 does more to confuse its proper construction than resolving it. Introducing the word "*further*" adds an additional ambiguity: is it to be construed as "*further damage to property or further damage to persons*", or as "*further damage to property or damage (whether initial or*

[209] the Chubb Submissions at [359].

further damage) to persons"? Since Chubb's proposed emendation adds the adjective "*further*" as qualifying the noun "*damage*", and since the noun "*damage*" is then further qualified by the adjectival phrase "*to property or persons*", the natural reading of the expression "*further damage to property or persons*" is "*further damage to property or further damage to persons*".[210] But, needless to say, in the present context such a reading makes no sense whatsoever.

173. In an apparent endeavour to avoid the contextual absurdity inherent in the pleaded case, Chubb has now proposed a complete rewrite of the relevant part of Extension B4 to incorporate an entirely new adjectival clause as element (c), "*that physical damage must bring with it the threat of additional or further damage to different property or the threat of damage to persons*"**.** Chubb's submission seeks to exploit an ambiguity of its own making by introducing a further ambiguity. Moreover, it introduces a further exclusion to indemnity which is not patently evident even on the most creative reading of Extension B4.

174. Insofar as this is advanced as a pretence at "*interpreting*" or "*construing*" Extension B4, it simply makes no sense, commercial or otherwise. Only the most stupefied obscurantist could even contemplate the scenario which Chubb postulates as the true meaning of Extension B4:

    (a) The insured must own property.

    (b) The property must be situated at a "*nominated location*" within 50 kilometres of any of the Insured Locations. (What Chubb means by a "*nominated location*" is anyone's guess.)

    (c) Not just any property will do; it must be "*Contents and Stock, Money or Glass*".

    (d) The property must then "*suffer physical damage*". (Chubb does not explain how "*Money*" can "*suffer physical damage*", although it is easier to imagine in the case of paper or polymer notes than in the case of coins.)

    (e) The "*physical damage*" which the property "*suffers*" must "*bring with it*" either:

        (i) "*the threat of additional or further damage to different property*"**;** or

        (ii) "*the threat of damage to persons*".

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[210] such a reading accords with the ancient legal maxim, "*ad proximum antecedens fiat relatio nisi impediatur sententia*" ("*relative words must ordinarily be referred to the last antecedent, unless by such construction the meaning of the sentence would be impaired*"): *Broom's Legal Maxims*, 10th ed (1939), at p 461.

Apparently, a threat of further damage to the same property is not good enough. Nor is it good enough if there is actual damage to "*different property*", or actual damage to "*persons*". In each instance, the threat must be inchoate.

(f) A "*legal authority*" must then become involved, as a response either:

(i) to "*that physical damage*" presumably the physical damage which has been "*suffered*" by the "*Contents and Stock, Money or Glass*"; or

(ii) to "*the threat of damage to other property or persons*" which "*it*" i.e., "*that physical damage*" "*causes*".

(g) The response from the "*legal authority*" must be such as to have "*prevented or restricted access to the Insured Location*".

175. Admittedly, it is possible to dream up a set of circumstances in which Extension B4 would be engaged, according to Chubb's reading of it, but only by resorting to the most fertile and recondite imaginative faculties. If, say, the insured was a dealer in petrochemicals, so that such products formed part of the insured's "*Contents and Stock*"; if a truck carrying some of these petrochemicals was involved in a collision, occurring (as happenstance would have it) on a bridge within 50 kilometres of an Insured Location; if the petrochemicals exploded as a result of the collision; if the explosion caused no discernible damage to the bridge, but created a threat that the bridge might collapse; if a public authority ordered that the bridge be closed until it could be checked by structural engineers; and if "*the Insured Location*" was located on an island which could only be accessed via that bridge (it must also be assumed that alternative means of access, such as by boat or helicopter, are impossible) then, in these particular circumstances, Extension B4 would, according to Chubb's *soi dissant* "*analysis*", become engaged.

176. But the process of contractual interpretation is not premised on the question of whether "*the ordinary business man*" might conceivably dream up a scenario in which the provision could apply if it were construed in the most abstruse, convoluted and recherché manner imaginable. The question, rather, is (as Justice Benjamin Cardozo put it in *Bird v St Paul Fire and Marine Insurance Company*), "*the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract*". And it is absurd, to the point of demonstration, even to suggest that the construction for which Chubb contends would so much as occur to such a business person, let alone that such a business person would adopt it as the clear and obvious meaning of Extension B4.

177. Chubb's submissions on the proper "*analysis*" of Extension B4 should be rejected. It relies upon its own admittedly deficient drafting of the Policy and a judicial

redrafting of the Extension to favour denying liability. It is inconsistent with the plain language of the clause and Chubb's statutory duty of utmost good faith.

PART VIII – THE APPLICATION OF EXTENSION C

Section A: Overview

178. Extension C comprises what was described in the FCA cases as a "*hybrid*" clause.[211] The elements of this clause are set out in the SOAI, and are discussed below.

Section B: Issue 17

179. It is common ground between the parties that the concept of "*Notifiable Disease*" includes the COVID 19 disease.[212] With that background, a number of sub issues arise.

SUB-ISSUE 17(A): DOES THE TERM "PREMISES" MEAN "INSURED LOCATION"?

180. Market Foods does not accept that the concept of "*premises*" should be taken to mean or embrace the location described in the Policy as "*Insured Location*". Market Foods joins with the submissions made by the insured in the Waldeck proceeding that the concept of an occurrence or outbreak "*at the premises*" is reasonably construed to include an occurrence or outbreak at a premises which the Insured Location is connected to.

181. Further or alternatively, the preferable construction of the Policy is that the concept of "*premises*" is the premises which the Insured Locations forms a part of and, accordingly, in the context of the UQ Insured Location, is referrable to the UQ campus. Market Foods makes this submission on the following bases:

    (a) The starting point is that Extension C uses the word "*premises*" and not "*Insured Location*". This is important because, as a principle of construction, a contract should not be construed to incorporate redundancies.[213] By not adopting the

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[211] FCA (appeal) at [97]-[99]:

> "… It can be seen that each of these clauses contains a series of elements which must all be satisfied to trigger the insurer's obligation to indemnify the policyholder against loss … . The hybrid clauses have been so called because one element of the peril insured against by these clauses is the occurrence of a notifiable disease: unlike the disease clauses, however, this element is combined with other elements which narrow the consequences of disease covered by the clause … ".

[212] NSD138 SOAF at [38].

[213] *XL Insurance Co SE v. BNY Trust Company of Australia Limited* [2019] NSWCA 215 at [72] per Gleeson JA (with whom Bell P agreed):

defined term "*Insured Location*" to delimit the ambit of where the "*occurrence*" or "*outbreak*" is required to occur, it is clear that the parties intended that the concept of "*premises*" should take a different meaning to "*Insured Location*". Against that background, the question arises as to what the Policy envisaged by referencing the concept of "*premises*" (as distinct from the "*Insured Location*").

(b) The ordinary meaning of the word "*premises*", when used in relation to buildings or real property (as in Extension C), is referrable to "*a tract of land with buildings thereon*".[214] In the context of a business interruption policy, it is necessary to recognise that any given business may and often will trade within wider "*premises*" (in the ordinary sense of the word). A common example is a shopping centre complex. In that context, it would be artificial and contrary to common use of the expression "*premises*" to describe the "*premises*" within which the business operates at as anything other than the shopping centre complex.

(c) Accordingly, and to give the concept of "*premises*" work to do under the Policy, the term must be taken to embrace any "*premises*" of which an Insured Location forms part. This makes sense because, as the example given below demonstrates, where a particular adverse event occurs at premises in which a number of businesses are contained, normally all businesses will be adversely affected.

(d) In such a case, where an adverse event occurs at premises in which a number of businesses are contained, there can be no justification for limiting coverage solely to the businesses at which the particular adverse event occurred.

182. Adopting this construction, in the context of the William Street and Herston Businesses it can be accepted that the concept of "*premises*" is no wider than the buildings in which the Insured Locations are sited. However, in the context of the UQ Insured Location, a different construction is appropriate because the UQ Insured

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"…The applicable principles with respect to redundancy of words in a contract were summarised … as follows: 'The general principle is that the words of a contract should be *interpreted* in a way which gives them an *effect* rather than a way in which makes them *redundant* …' …".

[214] refer, eg, to https://www.merriam-webster.com/dictionary/premise.

The present is perhaps not the appropriate occasion to lament the tendency, in contemporary Australian society, to use "*premise*" as the singular and "*premises*" as the plural when referring to one, or more than one, tract of land with an appurtenant building or buildings, as in the expression "*fibre to the premise*" (abbreviated as "*FTTP*") which has been popularized in connexion with the National Broadband Network.

Location is part of wider "*premises*" comprising the UQ Campus. This is how the word "*premises*" should be construed in the context of the Policy.

183. Additional support for such a construction is provided by the following considerations:

(a) **First**, any ambiguity in the Policy connected with the meaning of the term "*premises*" should be construed *contra proferentum* against the insurer.

(b) **Secondly**, a narrow construction of "*premises*" is unattractive as it would substantially undermine the cover provided for by Extension C. For example, on Chubb's construction, if there were numerous COVID 19 cases identified within a shopping centre which caused the shopping centre to be shut down, an insured shop would not be covered unless the insured could prove that a COVID 19 infected person actually entered their shop. There is no justification for construing a business interruption policy so narrowly and so as significantly to undermine its coverage.

(c) **Thirdly**, the construction for which Chubb contends begs the question why Chubb as author of the Policy wording used the word "*premises*" rather than the defined term "*Insured Location*". The whole point of defining a term like "*Insured Location*" is to avoid ambiguity when that term is used. And using a different term as a synonym for the defined term as Chubb contends that it did entirely defeats that purpose.

SUB-ISSUE 17(B): REQUIREMENTS TO ESTABLISH AN OCCURRENCE OF COVID-19 AT THE PREMISES

What is an "occurrence… at the premises" of COVID 19?

184. The word "*occurrence*" and its proper interpretation was the prominent point of divergence between a number of the Judges in FCA (1s instance) and FCA (appeal). A narrow view was adopted by the plurality[215] decision in FCA (appeal) whereas, by contrast, a broad view was adopted in FCA (1s instance) and the dissenting judgments of Lords Briggs and Hodge in FCA (appeal).

185. Under the narrow view, an "*occurrence*" was considered to consist of an instance or individual case of COVID 19 such that, for the purposes of the policies, there were

[215] Lords Hamblen and Leggatt (with whom Lord Reed agreed).

thousands of "*occurrences*".[216] By contrast, the broad view treated the COVID 19 pandemic, as a whole, as being an "*occurrence*".[217]

186. The narrow view is best explained by the plurality's decision in FCA (appeal) at [61] [74]. In particular, their Lordships' decision primarily turned on the ordinary meaning of an "*occurrence*" being akin to or synonymous with an "*event*". Consequently, an occurrence was interpreted as "*something which happens at a particular time, at a particular place, and in a particular way*" ([67]). On that basis, their Lordships concluded the concept of an "*occurrence*" (in the context of the policies) "*refer[red] to an occurrence of illness sustained by a particular person at a particular time and place*" ([71]). This reasoning was recently applied by the Chief Justice in *Star Entertainment Group Ltd v Chubb Australia Ltd*.[218]

187. In the context of the plurality decision in FCA (appeal), their Lordships did not consider that it could be said that a disease which spreads would come within the concept of being an "*occurrence*" ([69]). It is helpful to set out [69] in respect of this point:

FCA (appeal) at [69]
A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving differing symptoms of greater or less severity. Nor for that matter could an "*outbreak*" of disease be regarded as one occurrence, unless the individual cases of disease described as an "*outbreak*" have a sufficient degree of unity in relation to time, locality and cause. If several members of a household were all infected with COVID 19 when a carrier of the disease visited their home on a particular day, that might arguably be described as one occurrence. But the same could not be said of the contraction of the disease by different individuals on different days in different towns and from different sources. Still less could it be said that all the cases of COVID 19 in England (or in the United Kingdom or throughout the world) which had arisen by any given date in March 2020 constituted one occurrence. On any reasonable or realistic view, those cases comprised thousands of separate occurrences of COVID 19. Some of those occurrences of the disease may have been within a radius of 25 miles of the insured premises whereas others undoubtedly will not have been. The interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence. On this basis

[216] FCA (appeal) at [69].

[217] FCA (appeal) at [322].

[218] [2021] FCA 907 at [174].

there is no difficulty in principle and unlikely in most instances to be difficulty in practice in determining whether a particular occurrence was within or outside the specified geographical area.

188. By contrast, the reasoning underpinning the broad view is best seen in the reasons of Lord Briggs (with whom Lord Hodge agreed) in FCA (appeal):

FCA (appeal) at [322]-[324] (Lord Briggs)

[322] My main reasons for thinking that the alternative construction, which treats COVID 19 as a whole as falling within the insured perils once it spreads within the specified radius, is as persuasive as that of the majority, are as follows. First, construction requires the court to put itself into the mind of the reasonably informed reader of the contract in issue, so as to understand what that hypothetical person (rather than an insurance lawyer) would think that the parties meant by the words which they have used, in the relevant context. To my mind, that person would ask: do clauses with the radius limitations provide cover for the adverse business consequences of a national reaction to a national pandemic disease? They would likely answer yes or no. But I am less confident that they would answer: No, there is cover only for the consequences of individual cases within the radius, but since they are each as causally potent as any other case or cases, cover is in practice provided for the national consequences of a national outbreak, because of the law about non excluded concurrent cause. They might find it as easy to conclude that the parties meant that cover for the national disease was there, provided it reached, spread, encroached or extended (call it what you will) within the radius.

[323] Secondly, I would not be confident that the hypothetical reader would necessarily attribute the case by case specificity to the word "*occurrence*" or its synonyms given to it by the majority. Depending upon context, the word "*occurrence*" can properly be applied to happenings which do not take place at a single specified time, in a particular way and at a particular location. Thus a hurricane, a storm or a flood may properly be described as an occurrence even though each may take place over a substantial period of time, and over an area which changes over time. It is not in my view an inappropriate word to use about a pandemic disease as a whole, although I accept that it may be a pointer of some weight to an individual case analysis.

[324] Thirdly, the reasoning adopted by the majority might be regarded by the hypothetical reader as somewhat circuitous. Its end product is, as already noted, that cover is effectively provided for business interruption caused by a national reaction to a national pandemic, provided that it extends within the radius. If so, the reader might ask, why not interpret it as doing so directly? An illustration of

> the length of that journey may be provided by reading the majority judgment, but stopping at para 95. At that point in the analysis, the reader might think that the policyholders with radius limited disease clauses had lost.

189. It is submitted that the better view is the broad view for the reasons canvassed by Lord Briggs in FCA (appeal) and that this view should be adopted by this Court.

190. The distinction between the narrow and broad views of "*occurrence*" is less relevant for this element of Extension C.[219] Under either approach, it is necessary for it to be established that a person who was infected with the COVID 19 disease was "*at the premises*"; but it does not matter whether that person was diagnosed with having the disease and the person may be asymptomatic. That arises for the following reasons:

(a) The definition of "*Notifiable Disease*" in Section 2 of the Policy makes it apparent that there will be an "*occurrence*" of COVID 19 if there is an "*illness sustained by any person resulting from [COVID 19]*". This is similar to the QBE 2 policy which the Courts dealt with in the UK test cases.

(b) In respect of the QBE 2 policy in FCA (1st instance), the Court considered that an "*occurrence*" simply required that a person had COVID 19 (whether or not it was diagnosed and whether or not it was symptomatic).[220] That view was not challenged on appeal as was made clear in [53] of FCA (appeal):

FCA (appeal) at [53]
… in order for illness resulting from COVID 19 to be "*sustained by any person*" within the meaning of the "*Notifiable Disease*" definition, the court below found that it is not necessary for the person concerned to have been diagnosed as having the disease or to have manifested symptoms of illness: it is sufficient that the person should in fact have contracted the disease, whether or not the disease is symptomatic or has been diagnosed. The manifestation of symptoms and the making of a diagnosis are therefore relevant only to questions of proof. There is no challenge to that finding … .

[219] this issue is of particular relevance to the issue of causation – refer to [207(a)] below.

[220] FCA (1st instance) at [234]:

> "… We accept that, for the purposes of QBE 2, there will be an "*occurrence*" of COVID-19 within the radius when a person has the disease within the area, whether symptomatically or not, because that person has then "*sustained*" the illness within the definition in Clause 18.67. However, as we have said, the terms of Clause 3.2.4 show that there is cover only if there is business interruption as a result of the "*event*" of the person(s) sustaining that illness within the area. It is difficult to see how there could be such consequential interference if the disease was asymptomatic and undiagnosed…".

Was there an "occurrence [of COVID 19] at the premises"?

191. Market Foods accepts, that for there to be an "*occurrence at the premises*", it is necessary for a COVID 19 infected person to be "*at the premises*". Market Foods accepts this on the basis of the interpretations of "*occurrence*" expressed in the UK cases, whether the broad or narrow view is adopted.

192. However, Market Foods submits that this element of the insuring clause is satisfied for two reasons.

    (a) **First**, as canvassed above, the concept of "*at the premises*" should not be construed as involving a narrow definition of where the "*occurrence*" needs to take place (namely, by being confined to the Insured Locations) and should be seen to include the situation where there is an "*occurrence*" at a premises in the vicinity of the Insured Location, or of which it forms a part. If that is accepted, then this Court can comfortably infer on the evidence that there was an "*occurrence at the premises*" (particularly in the context of the UQ Insured Location).

    (b) **Secondly**, even if the concept of "*premises*" was equated with "*Insured Location*" (which is disputed), on the evidence before the Court it can be inferred that at least one COVID 19 infected person came to each of the Insured Locations at the relevant time.

SUB-ISSUE 17(C): PROOF OF AN OUTBREAK OF COVID-19 AT THE PREMISES

193. The questions posed by this sub issue is:

> *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?*

    This question should be answered "*yes*".

194. Chubb's arguments with respect to the proper interpretation of "*an … outbreak at the premises*" rely upon the proposition that there must be a reported case of COVID 19 within the four walls of an Insured Location. It would be a surprising interpretation of that phrase if, for example, should there be 10,000 reported cases immediately outside the doors of an Insured Locations but no reported case from within, Extension C would not be engaged. This example may be appear extreme; however, it would follow if Chubb's interpretation were accepted. For the following reasons, Chubb's arguments ought to be rejected.

195. The definition of "*outbreak*" advanced in [16(c)] of Chubb's Defence to the Cross Claim is as follows: "*the definition of outbreak applied by the Queensland Department of Health in respect of the COVID 19 Disease is that a cluster or outbreak is the occurrence of several cases of COVID 19 in a specific place or group of people (who do not reside in the same household) over a given period of time and if the illness is associated with a common source (such as an event or within a community) it is referred to as an outbreak*". In the context of an "*outbreak*" of disease, that is consistent with the ordinary dictionary meaning of "*outbreak*" which is defined to mean "*a sudden rise in the incidence of a disease [e.g.] an outbreak of measles*".[221]

196. In this case, the most appropriate definition to adopt is that provided by expert evidence. In this regard, the definitions apparently considered most accurate by Professor Shaban are set out below (at [72]):

The Shaban Report at [72]
… In contemporary international settings, the World Health Organization (WHO) defines an outbreak as 'the occurrence of more cases of disease than it would normally be expected in a defined community, geographical area or season, over a particular period of time'. Similarly, the US Centers for Disease Control and Prevention (CDC) defines an outbreak as 'the occurrence of more cases of disease than expected in a given area or among a specific group of people over a particular period of time …

197. With that background, an issue arises as to whether, on a proper construction of the Policy, an "*outbreak*" is said to occur "*at the premises*" if the premises is in an area where there has been an outbreak or whether the "*outbreak*" needs to occur within the four walls of the "*premises*". As to this issue, Market Foods makes the following submissions:

    (a) The reason why the Policy's drafter might have included the word "*outbreak*" as an alternative to "*occurrence*" is not immediately clear. If an "*outbreak*" is a wider phenomenon but requires, as an essential part, a number of occurrences which are linked in some otherwise unspecified manner, the word "*outbreak*" then becomes redundant because the Extension requires no more than a single "*occurrence*", whereas an "*outbreak*" requires multiple occurrences.[222] As a

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[221] https://www.merriam-webster.com/dictionary/outbreak.

[222] phrased slightly differently, because an "*outbreak*" requires more than one "*occurrence*", but a single "*occurrence*" is sufficient to satisfy this element in the Extension, the word "*outbreak*" is superfluous. If there is no "*occurrence*" there will be no "*outbreak*". If there is an "*occurrence*" then Extension C is satisfied without recourse to the alternative, "*outbreak*".

matter of contractual interpretation, it ought not be inferred that commercial parties purposely incorporate redundancies into written documents.[223]

(b) Chubb suggests an answer to the abovementioned problem: that, as a matter of ordinary language, some of the relevant events which must be the subject of an outbreak or occurrence in order for Extension C to be engaged are less compatible with the word "*outbreak*" (for example, Chubb says that the concept of murder or suicide is more compatible with there being an "*occurrence*" of murder or suicide as opposed to an "*outbreak*" of murder or suicide)[224]. That should not be accepted for three reasons.

(i) **First**, if the meaning of "*outbreak*" was akin to a number of linked occurrences (as Chubb suggests), there is no reason why there could not be an outbreak of murder or suicide (it would just be less common than an occurrence of murder or suicide).

(ii) **Secondly**, the meaning of "*outbreak*" in Extension C has to be understood in a flexible way and in the context of the specific event which is said to give rise to indemnity. In this regard, in order for indemnity to arise under Extension C it is necessary that there be an "*occurrence or outbreak*" of one of six events or matters. In respect of each of those six events/matters, the concept or relevance of "*outbreak*" inevitably differs in meaning and relevance. For example, the idea that there has been an "*outbreak*" of "*the discovery of vermin or pests*" is a nonsense. Viewed through that prism, it is apparent that the meaning of "*outbreak*" must be understood in the context of the particular event which triggers indemnity here, the "*outbreak … [of] a Notifiable Disease*". Accordingly, analogies with there being an "*outbreak*" of murder or suicide are less than helpful for the purpose of construing the Policy.

(iii) **Thirdly**, Chubb's suggestion actually supports the opposite conclusion to that for which Chubb contends. The question is whether, on Chubb's interpretation, the word "*outbreak*" is rendered nugatory, since every "*outbreak*" must involve one or more occurrences. The observation that some of the relevant events are less compatible with the word "*outbreak*" than the word "*occurrence*" does not alleviate the redundancy of the

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[223] *XL Insurance Co SE v. BNY Trust Company of Australia Limited*, [2019] NSWCA 215 at [72] per Gleeson JA (with whom Bell P agreed):

> "…The applicable principles with respect to redundancy of words in a contract were summarised … as follows: 'The general principle is that the words of a contract should be *interpreted* in a way which gives them an *effect* rather than a way in which makes them *redundant* …' …".

[224] the Chubb submissions at [195]-[196].

former term; it actually exacerbates that redundancy. Chubb effectively adds weight to the argument that, if Chubb's interpretation is adopted, the term "*outbreak*" is left with no work to do.

(c) Returning to the point made in [(a)] above, in the context of disease the meaning of "*outbreak*" is superfluous if it is just referrable to a number of linked "*occurrences*". However, the concept of there being an "*outbreak [of COVID 19] … at the premises*" is given real and substantial meaning and operation if it is understood to encompass the situation where the premises is in an area where there has been a COVID 19 outbreak. This the preferable construction of the phrase "*outbreak at the premises [of a Notifiable Disease]*" for six reasons:

(i) **First**, the concept of "*outbreak*" is an area focussed concept when used in the context of diseases. One speaks of an "*outbreak*" in a locality, a town, a city, a state or a country; one does not speak of an "*outbreak*" within the four walls of a building.

(ii) **Secondly**, a construction that there was an "*outbreak at the premises*" if the premises are situated within an area where an outbreak occurred would not render the concept of "*outbreak*" as redundant; it would give the term work to do under Extension C.

(iii) **Thirdly**, the language of the Extension employs the prepositional phrase "*at the premises*" to define the locational limits of the outbreak. Chubb imposes an interpretation on that phrase which requires there to be an outbreak within the four walls of the Insured Locations. That should be rejected. The drafter could have, but chose not to, limit the phenomenon to one which occurred "*within*" or "*inside*" the premises; instead, Extension C merely requires the outbreak to be "*at*" the premises. Seen in context, "*at the premises*" is more distributive than "*within*", "*in*", "*inside*" or even "*from*"; it is a broader concept than the interpretation favoured by Chubb because it embraces a situation in which the premises are situated in an area where an outbreak has occurred. Hence, it is broad enough to encompass the situation in which there is an outbreak on the UQ campus, or at the suburb in which the any of the Insured Locations is located; accordingly, if there is an outbreak at UQ and Market Foods UQ Business is closed in response to the outbreak, there is an outbreak "*at the premises*".

(iv) **Fourthly**, to the extent that the expression "*outbreak at the premises*" is attended by ambiguity insofar as there are two possible meanings which

could be applied to it[225], the Policy ought to be construed *contra proferentum* against Chubb.

(v) **Fifthly**, there is authority supporting a contention that the concept of an "*outbreak*" is more readily categorised as a "*state of affairs*", rather than an event or incident, or an "*occurrence*" in the narrow sense.[226] This is more readily compatible with a construction of "*outbreak … at the premises*" encompassing the situation where the premises are in an area where the relevant state of affairs exists.

(vi) **Sixthly**, as a matter of common sense, when the word "*outbreak*" is ordinarily used to describe the state of affairs arising from a disease and leaving to one side "*outbreaks*" caused by contaminated foodstuffs, which involve quite different considerations the description is employed to describe a phenomenon within a geographic area rather than within the four walls of a single site. The size of that site will usually be defined by the vector for transmission: if the vector is rodent borne fleas (as in the case of the "*Black Death*"), it is likely to be a larger area than if the vector is human to human contact (as in the case of the so called "*Spanish Flu*" of 1919), and the area is likely to be smaller still if the vector is intimate personal contact involving the exchange of bodily fluids (as in the case of the "*AIDS epidemic*").

(d) It follows that, regardless of the nature of the transmission vector, the relevant geographical area will be the area within which transmission may be anticipated: an "*outbreak*" on a cruise ship is likely to affect the entire ship; an "*outbreak*" on a coastal island may extend to the entire island; an "*outbreak*" in a small town or village is likely to affect the entire town or village. When the "*outbreak*" occurs in a metropolitan area, it may be difficult to define the precise geographical range of the "*outbreak*", and since the pandemic began there have been instances where public health authorities have attempted to do so in respect of cities like Sydney, Brisbane and Adelaide by defining "*hot spots*" with reference to a finite list of local government areas. It might be equally sensible, in some circumstances, to do so by reference to specific suburbs, specific postcode areas or specific topographic features (e.g., all of Brisbane south of the Brisbane River or all of South East Queensland east of the Clifton Range and south of Mt Goomboorian). For present purposes, it is not necessary to identify the outer limits of the relevant "*outbreak*" area: it suffices that the Insured Locations or, more accurately, the premises containing the Insured

[225] Chubb submits that in the Chubb Submissions at [396].

[226] Refer to the Irish case at [138].

Locations 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.

198. If this construction is accepted, there can be no doubt that the Insured Locations were each situated within an area where there was an outbreak. To the extent any further evidence of that is needed, Professor Shaban expressly deposes that there was a COVID 19 outbreak in the Brisbane area[227]. Moreover, by reference to Part III of this Outline (Material Facts), prior to the Public Health Interventions there were reported COVID 19 cases in each of the suburbs in which the Insured Locations are situated. It is therefore unnecessary to explore the rhetorical question posed by Chubb of whether or not an outbreak can be considered to have occurred in wider or different geographical areas[228].

SUB-ISSUE 17(D): WAS THERE "AN OCCURRENCE OR OUTBREAK AT THE PREMISES"?

199. The question posed by this sub issue is:

> *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?*

200. For the reasons set out above, Market Foods says that this question should be answered "*yes*" on the following three bases:

(a) **First**, the concept of "*occurrence… at the premises*" should be construed as providing indemnity where there are COVID 19 cases in the premises connected to the Insured Locations or, further or alternatively, where there are COVID 19 cases in the premises of which the Insured Location forms a part (which, in this case, would have the consequence of the "*premises*" being the UQ Campus in respect of the UQ Insured Location). If this is accepted, then the unchallenged evidence is that there has been an "*occurrence … at the premises*".

(b) **Secondly**, even if the concept of "*occurrence … at the premises*" were to be construed as meaning that a COVID 19 infected person needed to be present within the Insured Location before indemnity could be triggered, the evidence sufficiently enables the Court to draw an inference that this occurred.

(c) **Thirdly**, the concept of an "*outbreak … at the premises*" should be construed such that indemnity is triggered if the premises is in an <u>area</u> where there has been a

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[227] the Shaban Report at [76].

[228] the Chubb Submissions at [398].

COVID 19 outbreak. If that is accepted, then the evidence before the Court is clear that there has been an "*outbreak … at the premises*".

Section C: Issue 18

SUB-ISSUE 18(A): WERE THERE "INTERVENTION[S] OF … PUBLIC BOD[IES] AUTHORISED TO RESTRICT OR DENY ACCESS TO THE INSURED LOCATION"?

201. The question posed by this sub issue is:

> *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"?*

202. Chubb accepts that this issue is satisfied in relation to the Queensland Government Directions but not the UQ Direction[229].

203. Chubb's argument concerning the UQ Direction centres around the contention that the UQ Direction did not "*operate… to restrict or deny access to the Insured Location*"[230].

204. That contention conflates two issues. This issue concerns whether UQ has the ***authority*** (power) to restrict or deny access to the Insured Location not whether, in fact, the UQ Direction had the ***effect*** or ***consequence*** of restricting or denying such access. UQ plainly possessed the relevant power or authority.

SUB-ISSUE 18(B): DID INTERVENTIONS "DIRECTLY ARIS[E]"?

205. The question posed by this sub issue is:

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

206. Chubb's answer to this is largely to adopt a "*but for*" approach to causation and say that, because the interventions were not directly responsive to occurrence/outbreaks at the premises (but, rather, wider and more large scale occurrences/outbreaks), the causative link is not satisfied[231].

207. There are two things to say about that:

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[229] the Chubb Submissions at [403].

[230] the Chubb Submissions at [403].

[231] the Chubb Submissions at [404]-[406].

(a) **First**, if this Court accepts that the concept of "*occurrence*" or "*outbreak*" should be construed consistently with the broad approach in the FCA cases[232], then the question of causation answers itself[233].

(b) **Secondly**, a "*but for*" approach to causation is inappropriate in the circumstances of this case. The plurality explained why this was the case in FCA (Appeal):

FCA (appeal) and the "*but for*" test – [194] to [197]
194. In deciding between these competing interpretations, we consider that the matters of background knowledge to which the court below attached weight in interpreting the policy wordings are important. The parties to the insurance contracts may be presumed to have known that some infectious diseases including, potentially, a new disease (like SARS) can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision. 195. We do not consider it reasonable to attribute to the parties an intention that in such circumstances the question whether business interruption losses were caused

[232] discussed in [188] above.

[233] FCA (appeal) at [160]:

> "… We noted at para 59 above that, on the interpretation of the disease clause in RSA 3 (and most of the other sample wordings) accepted by the court below, questions of causation largely answered themselves. That is because, if the insured peril is COVID-19 (from the date when a case of the disease occurs within the specified distance of the insured premises), it follows that, from the date when such a case occurs, the policy covers all effects of COVID-19 on the policyholder's business. It is not in dispute that the measures taken by the Government in response to the disease and the business interruption consequent on those measures were caused by COVID-19 whatever the precise nature of the required causal link. It makes no difference for these purposes whether the occurrence of the disease within the specified area is seen as part of an indivisible cause, constituted by COVID-19 (the analysis preferred by the court below), or whether each of the individual cases of the disease is treated as a separate but equally effective cause of the actions taken by the Government and ensuing business interruption (the court's alternative analysis) …".

> by cases of a notifiable disease occurring within the radius is to be answered by asking whether or to what extent, but for those cases of disease, business interruption loss would have been suffered as a result of cases of disease occurring outside the radius. Not only would this potentially give rise to intractable counterfactual questions but, more fundamentally, it seems to us contrary to the commercial intent of the clause to treat uninsured cases of a notifiable disease occurring outside the territorial scope of the cover as depriving the policyholder of an indemnity in respect of interruption also caused by cases of disease which the policy is expressed to cover. We agree with the FCA's central argument in relation to the radius provisions that the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius.
>
> 196. This conclusion is reinforced by the other matter to which the court below attached particular importance in interpreting the disease clauses. This is the fact that the relevant wordings do not confine cover to a situation where the interruption of the business has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere. As leading counsel for the FCA, Mr Edelman, pointed out, to apply a "but for" test in a situation where cases of disease inside and outside the radius are concurrent causes of business interruption loss would give the insurer similar protection to that which it would have had if loss caused by any occurrence of a notifiable disease outside the specified radius had been expressly excluded from cover. If the insurers had wished to impose such an exclusion, it was incumbent on them to include it in the terms of the policy.
>
> 197. We accordingly reject the insurers' contention that the occurrence of one or more cases of COVID 19 within the specified radius cannot be a cause of business interruption loss if the loss would not have been suffered but for those cases because the same interruption of the business would have occurred anyway as a result of other cases of COVID 19 elsewhere in the country.

208. Having rejected the appropriateness of a "*but for*" approach to causation, the Court in FCA (appeal) considered the requisite causation existed on a "*multiple concurrent causes*" basis. In this regard, the Court reasoned that "*all the [COVID 19] cases were equal causes of the imposition of national measures*"[234] and that, where the relevant COVID 19 case was a separate, but equal, cause of the relevant peril, the requisite causal nexus existed[235]. Relevantly, the plurality said:

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[234] FCA (appeal) at [176].

[235] FCA (appeal) at [189]-[191] and [206]-[212].

FCA (appeal) and the "*but for*" test – [212]
212. We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID 19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID 19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID 19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "*following*" or some other formula such as "*arising from*" or "*as a result of*". It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case.

209. The present case is slightly different from the UK test cases insofar as the primary causation issue in the UK cases was whether or not there was a causal link between the business interruption and the disease. In the present case, the relevant issue is the causal link between a COVID 19 occurrence or outbreak and the public authority intervention. However, such a distinction is, in itself, not significant in the context of the analysis of this causation issue. That is because, in FCA (appeal), the causation principles applicable to the disease clauses were held to be equally applicable to the analogous causation questions that arose in respect of the hybrid clauses.[236]

210. Chubb seeks to advance an alternative contention that the FCA (appeal) line of reasoning should not be applied because of the requirement in the Policy that the interventions "*direct[ly] arise from*" the relevant occurrences of outbreaks.[237] That should not be accepted.

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[236] FCA (appeal) at [213]:

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

[237] the Chubb Submissions, [204]-[215] and [404]-[406].

211. As a starting point, it can be accepted that the requirement that causation be "*direct*" might (in an appropriate case) narrow the causation test.[238] However, in the context of this case, the word "*directly*" in Extension C of the Policy does not have such a consequence. That is because, in the context of the causation issue in this case, the distinction between "*direct*" and "*indirect*" causes is irrelevant. The concept of "*multiple concurrent causes*" operates regardless of whether each concurrent cause is required to be direct or permitted to be indirect; and, in the present case, each was a direct cause.

212. Understood in that light, the public authority interventions are properly considered to be caused by multiple concurrent causes which are separate and equally effective direct causes of the interventions. Hence, each COVID 19 case is a "*cause*" (a direct cause) of the interventions and it is not easy to understand how a particular COVID 19 case could be said to have an "*indirect*" role in causing such interventions.

Section D: Issue 19

213. The question posed by Issue 19 is:

> *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"?*

Again, this raises some sub issues.

SUB-ISSUE 19(A): DID INTERVENTIONS "LEAD TO THE RESTRICTION OR DENIAL OF … USE"?

214. The question posed by sub issue 19(a) is:

> Did the Queensland Government Directions and UQ Direction "*lead to the restriction or denial of the use of the Insured Location*"?

215. This issue is conceded by Chubb in relation to the Queensland Government Directions but not the UQ Direction[239].

216. As to the UQ Direction, Market Foods says that the Vice Chancellor and President of UQ issuing a direction pausing all coursework teaching at UQ, including lectures and tutorials in person and online from 16 March 2020, had the consequence of "*lead[ing] to the restriction or denial of the use of the [UQ] Insured Location*".

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[238] *Sutton on Insurance Law*, electronic database, at < https://www.westlaw.com.au >, accessed 27 August 2021, at [15.90].

[239] the Chubb Submissions at [408].

217. Critical, in this context, are the words "*lead to*". There is no requirement that the intervention be expressed in terms prohibiting use of an Insured Location; the requirement is that the intervention has that effect.

218. Self evidently, a direction which has the effect of removing the whole or a substantial part of clientele of a business has the effect of (at least) restricting, if not denying, the "*use*" of the Insured Location for the purpose of selling foodstuffs to that clientele.

SUB-ISSUE 19(B): ORDERS OR ADVICE OF A COMPETENT AUTHORITY

219. The question posed by sub issue 19(b) is:

> *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"?*

220. Chubb concedes that this issue should be answered favourably to Market Foods[240].

Section E: Issue 20

221. The question posed by Issue 20 is:

> *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]"?*

222. Insofar as this issue concerns the Queensland Government Directions, Chubb concedes that it should be answered favourably to Market Foods[241].

223. Insofar as this issue concerns the UQ Direction, Chubb again adopts the position that the UQ Direction did not place any limits on the "*use*" of the UQ Insured Location. This argument is flawed in the same way as Chubb's argument that the UQ Direction did not "*lead to the restriction or denial of the use of the [UQ] Insured Location*" is flawed.

224. On this occasion, however, the argument is even weaker. Although "*use*" of the Insured Location was substantially restricted, it was not entirely prevented: the Insured Location could be used, for example, to store furniture and equipment and non perishable stock. Accordingly, there can be no genuine dispute that there was "*interruption of or interference with the Insured Location*".

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[240] the Chubb Submissions at [409].

[241] the Chubb Submissions at [410].

Section F: Issue 21

225. The question posed by Issue 21 is:

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

226. Chubb says that this issue cannot be determined because of the complexity of the counter factual involved[242].

227. That is correct only if Chubb is right that the relevant counter factual is that posited by Chubb that is, by comparing Market Foods' actual position with the position it would have been in if the directions were never issued but the effects of COVID 19 are still taken into account[243]. However, this is not the correct construction of the Policy.

228. A similar question arose in FCA (appeal). In that case, the insurers argued that, in relation to the Hiscox hybrid clauses, the critical element was the restrictions imposed by the public authority (and not, for example, the disease itself) resulting in an inability to use the premises. On that basis, the insurers contended that, for the purpose of ascertaining what business interruption loss had resulted, the appropriate counterfactual required a comparison between the insureds' actual positions and the position they would have been in even if they had been able to continue to use the premises[244] with the pandemic extant but absent governmental intervention.

229. The Court rejected that contention, considering that such a construction of the proximate cause requirement would render the policies wholly uncommercial and (further) that, if the proximate cause between the losses and insured perils in the hybrid clauses were to be construed in such a way, they would need to use clear words indicating as much[245]. The Court also found such a contention to be problematic from the perspective that it sought to advance a "*but for*" approach to causation which had been rejected by the Court.

230. In terms of the Hiscox policies, the Court expressed the following relevant conclusions:

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[242] the Chubb Submissions at [411]-[413].

[243] the Chubb Submissions at [413].

[244] FCA (appeal) at [227].

[245] FCA (appeal) at [227]-[228].

FCA (appeal) on the issue of recoverable loss – [243] and [244]
243. The conclusion we draw is that, properly interpreted, the public authority clause in the Hiscox policies indemnifies the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss; but it does so regardless of whether the loss was concurrently caused by other (uninsured but non excluded) consequences of the COVID 19 pandemic which was the underlying or originating cause of the insured peril. 244. This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the COVID 19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

231. This reasoning should be applied in the present case.

232. Indeed, having regard to the way that Extension C is drafted, there is another and, arguably, even more powerful reason why the same conclusion should be reached:

(a) On its face, Extension C offers indemnity for business interruption losses flowing from a number of causes, including "*a) Notifiable Disease*" and "*b) the discovery of an organism likely to cause Notifiable Disease*".

(b) On any view of the construction of Extension C, in order to qualify for such indemnity, the relevant loss must involve:

(i) "*an occurrence or outbreak at the premises*" of any of the relevant causes;

(ii) "*intervention of a public body*"; and

(iii) "*interruption of or interference with the Insured Location in direct consequence of the intervention of a public body*".

(c) The normal expectation is that "*intervention of a public body*" will at least in the long term, if not with immediate effect mitigate rather than exacerbate both

the public health and business interruption consequences of a "*Notifiable Disease*".

(d) However, according to Chubb's argument, indemnity is provided only in those cases where the "*intervention of a public body*" has the opposite effect: where the outcome of the intervention is worse than the outcome of the disease would have been, absent intervention; literally, where the treatment (mandated by "*the order*" or adopted on the "*advice*" of either "*the local health authority or other competent authority*") is more harmful than the malady which it is intended to treat.

(e) So understood, the relevant cover offers no indemnity for business interruption losses caused by a "*Notifiable Disease*"; at best, it offers indemnity for business interruption losses flowing from an ill conceived or over enthusiastic intervention by a public authority.

(f) Nobody reading Extension C, unaided by Chubb's proposed interpretation of it, would imagine for a moment that this is the intent. Indeed and for obvious reasons insurers do not usually provide cover against incompetent local authority decisions. Aside from what an ordinary business person would understand from the clause, it seems improbable in the extreme than even an ordinary insurer would attribute to the clause such a bizarre interpretation.

(g) To the extent that the *contra proferentum* rule applies, it militates powerfully against such a construction.

(h) Otherwise, this may be taken as a definitive instance of unconscionable reliance on the "*black letter*" of the policy wording, in breach of Chubb's duty to exercise the uttermost good faith.

PART IX: THE TRENDS CLAUSE

Section A: The Function and Purpose of a Trends Clause

233. Generally speaking, a "*trends clause*" is a clause which provides for business interruption loss to be "*quantified by reference to what the performance of the business would have been had the insured peril not occurred*".[246] Such 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*".[247]

[246] FCA (appeal) at [4(iv)].

[247] FCA (appeal) at [260].

234. In [253] to [254] of the plurality's decision in FCA (appeal), the Court explained the function and purpose of a trends clause in the following way:

FCA (appeal) – trends clauses – [253] and [254]
253. The standard method used in business interruption insurance to quantify the sum payable under the policy takes an earlier period of trading for comparison purposes. In most wordings this is the calendar year preceding the operation of the insured peril. A "*standard turnover*" or "*standard revenue*" is derived from the turnover of the business in this period. This figure is then compared with the actual turnover or revenue during the indemnity period. The results of the business in the comparator period are also used to derive a percentage of turnover that represents gross profit. The rate of gross profit is then applied to the reduction in turnover to calculate the recoverable loss. Increase in the cost of working during the indemnity period is also typically covered. 254. Whilst the basic comparison between the turnover of the business in the prior period and in the indemnity period will produce a rough quantification of the lost revenue, there may be specific reasons why a higher or lower figure would be expected for the indemnity period apart from the operation of the insured peril. For example, the general trend in the business may be such as to make it likely that there would have been increased or decreased turnover during the indemnity period in any case compared with the previous year. Equally, there may be specific reasons why the turnover during the prior year was depressed, such as a strike that affected the business, or why it would be expected to have been depressed anyway during the indemnity period, such as a scheduled strike. The purpose of the trends clause is to provide for adjustments to be made to reflect "*trends*" or "*circumstances*" such as these. The aim is to achieve a more accurate figure for the insured loss than would be achieved merely by a comparison with the prior period and to seek to arrive at a figure which, consistently with the indemnity principle, is as representative of the true loss as is possible. The adjustment may work in favour of either the policyholder or the insurer, but it is meant to be in the interests of both.

Section B: The Relevant Policy Provisions

235. The Policy indemnifies Market Foods for loss "*resulting from interruption of or interreference with*"[248] Market Foods' business subject to the satisfaction of the requirements of Section 2. The loss is to "*… be calculated in accordance with the Basis of*

[248] see "***Cover***" at p 24 of the Policy.

Settlement, and subject to the Indemnity Period and applicable Sum Insured"[249]. The "*Basis of Settlement*" provision is set out on pp 24 and 25 of the Policy, in the following terms:

The Basis of Settlement – Section 2 of the Policy (Basis of Settlement)
Basis of Settlement **A. Gross Profit** Loss will be calculated by: a) applying the Rate of Gross Profit to the difference between Turnover during the Indemnity Period and the Standard Turnover; b) adding the Increased Cost of Working incurred during the Indemnity Period, but only to the extent that the reduction in Gross Profit is reduced; and 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. If the Sum Insured for Gross Profit at the beginning of each Policy Period is less than the sum produced by applying the Rate of Gross Profit to eighty percent (80%) of the Annual Turnover (or its proportionately increased multiple where the Indemnity Period exceeds twelve months), We will pay a proportion of the loss of Gross Profit. The proportion that We will pay will be the same as the proportion that the Sum Insured for Gross Profit bears to eighty per cent (80%) of the Annual Turnover (or its proportionally increased multiple if appropriate). This provision will not apply if Your claim is for less than 10% of the Sum Insured for Gross Profit. If You hold a salvage sale during the Indemnity Period, the Turnover from the salvage sale shall be deducted from any reduction in Turnover.

236. The following definitions found in Section 2 are relevant to the interpretation and application of the Basis of Settlement clause:

Definitions relevant to the Basis of Settlement – Section 2 of the Policy
Definitions Wherever appearing in this Section 2 Business Interruption, the following definitions apply:

[249] *ibid.*

…

Gross Profit

means the amount by which:

- the sum of the amount of the Turnover and the amounts of the closing Stock and work in progress shall exceed;
- the sum of the amounts of the opening Stock and work in progress and the amount of the Uninsured Working Expenses.

The amounts of the opening and closing Stock and work in progress shall be arrived at in accordance with the Insured's normal accountancy methods due provision being made for depreciation. The words and expressions used in this definition that are not defined in this Policy shall have the meaning usually attached to them in the books and accounts of the Insured.

…

Increased Cost of Working

means the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the:

1. reduction in Turnover, if Gross Profit is the applicable Basis of Settlement in the Schedule;
2. reduction in Gross Revenue, if Gross Revenue is the applicable Basis of Settlement in the Schedule; or
3. reduction in Rent Receivable, if Rent Receivable is the applicable Basis of Settlement in the Schedule;

and which, but for that expenditure, would have taken place during the Indemnity Period.

…

Rate of Gross Profit

means the rate of Gross Profit earned on the Turnover during the financial year immediately before the date of the Insured Damage allowing for the Trend in the Business.

…

Standard Gross Revenue

The Gross Revenue during that period in the twelve months immediately before the date of the Insured Damage which corresponds with the Indemnity Period allowing for the Trend in the Business.

Standard Weekly Revenue

> The Weekly Revenue during that period in the twelve months immediately before the date of the Insured Damage which corresponds with the Indemnity Period allowing for the Trend in the Business.
>
> **Standard Rent Receivable**
>
> means the amount of the Rent Receivable during the period corresponding with the Indemnity Period in the twelve months immediately before the date of the Insured Damage, allowing for the Trend in the Business.
>
> …
>
> **Standard Turnover**
>
> means the Turnover during that period in the twelve months immediately before the date of the Insured Damage, which corresponds with the Indemnity Period.
>
> **Trend in the Business**
>
> 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.
>
> …
>
> **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).

Section C: Analysis

237. At the outset, it is noted that the trends clause is anomalous in that it is based on the existence of "*Insured Damage*" (a concept which is unworkable in the context of Extension C). Chubb says that, consistently with FCA (appeal) at [257],[250] this should be read as a reference to "*insured peril*". Market Foods does not cavil with that.

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[250] FCA (appeal) at [257]:

> "… The reference to "*damage*" is inapposite to business interruption cover which does not depend on physical damage to insured property such as the cover with which these appeals are concerned. It reflects the fact that the historical evolution of business interruption cover was as an extension to property damage insurance. It was held by the court below, and is now common ground, that for the purposes of the business interruption cover which is the subject of these appeals, the term "*damage*" should be read as referring to the insured peril …".

238. Chubb argues that the trends clause in the Policy "*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*".[251]

239. A similar argument was advanced by the insurers in FCA (appeal) and was rejected ([251] [288]). The Court held that the proper construction of the trends clauses was that quantum figures were "*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*" ([287]).

240. The Court's critical reasoning underling that conclusion are set out in [259] [264] of the plurality's reasons (extracted below):

FCA (appeal) at [259]-[264]
Approach to interpretation 259. In considering the proper interpretation of the trends clauses, we would emphasise the following points. 260. First, 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. 261. Second, in accordance with the general principle referred to earlier (see para 77 above), the trends clauses should, if possible, be construed consistently with the insuring clauses in the policy. 262. Third, 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 effectively transform quantification machinery into a form of exclusion. 263. A similar point was made by the court below (at para 121 of the judgment) when discussing the trends clause in RSA 3, where the court stated that the clause is: "… part of the machinery for calculating the business interruption loss on the basis that there is a qualifying insured peril. Where the policyholder has therefore prima facie established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the

[251] the Chubb Submissions at [464].

> assessment of what the position would have been if the insured peril had not occurred."
>
> 264. In the present case that means 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.

241. Chubb's submissions involve a detailed complaint about the reasons given by the Court in FCA (appeal)[252]. However, Chubb's ultimate complaint comes back to the fact that the language of the trends clause specifically requires there to be a trends adjustment "*but for*" the insured peril[253].

242. What that argument fails to grapple with is a number of parts of the reasoning given by the Court in FCA (appeal) as to why notwithstanding the language of the trends clause a literal construction of the trends clause was not the preferable construction. Market Foods supports the analysis of the Court in FCA (appeal) and says that there is no good reason for departing from that line of reasoning in this case.

243. Again, for the reasons canvassed above, if the "*trends clause*" were to be construed as Chubb suggests, the indemnity for business interruption whether under Extension B or Extension C would become largely, if not entirely, a chimera and a delusion. Whilst there is the <u>appearance</u> of indemnity for business interruption caused by a range of phenomena, including (relevantly) "*Notifiable Disease*", the indemnity is limited to what would have occurred assuming the existence of a pandemic of the same "*Notifiable Disease*". This construction:

    (a) is not one which would ever occur to an ordinary business person;

    (b) in negated by the *contra proferentum* rule; and

    (c) amounts to another instance of unconscionable reliance on the "*black letter*" of the Policy wording, in breach of Chubb's duty to exercise the uttermost good faith.

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[252] the Chubb Submissions at [414]-[464].

[253] the Chubb Submissions at [417].

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