

THE HIGH COURT

COMMERCIAL

[2022] IEHC 306

[2021 No. 1867 P]

BETWEEN

COACHHOUSE CATERING IMITED T/A THE OLD IMPERIAL HOTEL

PLAINTIFF

AND

FROST INSURANCES LIMITED T/A FROST UNDERWRITING, UQUOTE

STRATA AND ZAVAROVALNICA SAVA INSURANCE COMPANY D.D.

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 24th May 2022

1. In these proceedings, the plaintiff seeks a declaration that it is entitled to an indemnity from the second named defendant (“Sava”) pursuant to a policy of insurance between the plaintiff and Sava bearing policy number AVASUQ192568090 (“*the policy*”). The claim is made pursuant to the Business Interruption and Loss of Licence sections of the policy following the temporary closure of the plaintiff’s hotel premises on 15th March, 2020 in the wake of the Government measures taken in response to the COVID-19 pandemic.

2. The plaintiff and Sava have agreed to treat the proceedings as a test case for the purposes of para. 14 of the COVID-19 and Business Interruption Supervisory Framework issued by the Central Bank on 5th August, 2020. The parties have also agreed to proceed by way of modular trial on the basis that this first module is intended to deal with the issue of policy interpretation while module two (if required) will address any remaining issues. The parties also agreed that module one would

proceed on the basis of an agreed list of issues and an agreed list of facts. It was further agreed that the participation of the first named defendant in the test case was unnecessary.

Agreed facts

3. For the purposes of this module, the parties have agreed the following facts:-
- (a) The plaintiff is a private limited company incorporated in Ireland under Companies Registration Number 575342 and with a registered address at 72 Copper Valley Vue, Glanmire, County Cork. The plaintiff operates a hotel and restaurant from premises at the Old Imperial Hotel, 27 North Main Street, Youghal, County Cork.
 - (b) The plaintiff holds a 7-day ordinary publican's licence in respect of the premises, i.e. the premises is a licensed premises under the Intoxicating Liquor Acts.
 - (c) Sava is a Slovenian insurer operating in Ireland on a freedom of services basis. It has appointed a managing general agent, Frost Insurances Limited ("*Frost*"), an Irish authorised insurance intermediary, to provide certain services on its behalf to Irish customers including underwriting and claims handling.
 - (d) The plaintiff and Sava entered into the policy in respect of the period from 11th February, 2020 to 10th February, 2021. The policy documentation comprises:
 - (i) The policy schedule;
 - (ii) The Strata Commercial Insurance Policy Document; and
 - (iii) The Strata Commercial Insurance Non-Standard Wording.

- (e) The policy was renewed for a further period of insurance from 11th February, 2021 to 10th February, 2022, with policy reference number RAVASUQ202568090.
- (f) The plaintiff is the named policyholder on the policy.
- (g) The policy was placed with Frost by the policyholder's broker, Murphy Insurances Youghal Ltd. (*"the broker"*). There was no direct contact between the plaintiff and Frost (nor between the plaintiff and Sava). The policy is a commercial insurance policy. It is not industry-specific.
- (h) Section 2 (Business Interruption) of the policy opens with the words:-
"In the event of the Business carried on by the Insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business)"
- (i) The business is described as *"Hotel Licensed"*(sic). The premises is identified as *"27 North Main Street, Youghal, Co. Cork, P36 K006, Ireland"*.
- (j) The Loss Of Licence Extension in the Non-Standard Wording provides:-
"In the event of the licence for the sale of excisable liquors ("the licence / licence") or any part of it which has been granted in respect of the premises being forfeited suspended or withdrawn during the period of insurance, we will indemnify you in respect of all loss that you may sustain.."

- (k) The Loss of Licence Extension is subject to a number of exclusions, including an exclusion in respect of:-
- “any claim resulting from any alteration in the law or statutory guidance or statement of policy affecting the grant, lapse, withdrawal, surrender, forfeiture, suspension, extent of renewal or duration of any licence or the imposition of conditions upon it.”*
- (l) The policy schedule specifies that cover for Business Interruption under the policy is subject to a limit of €915,000 and there is a 12-month indemnity period.
- (m) Notwithstanding that the policy schedule does not include a reference to or a limit for the Loss of License cover, it is nonetheless assumed for the purposes of this module that the plaintiff’s policy included the Loss of Licence Extension (and was subject to the relevant exclusion clauses, if applicable).
- (n) On 12th March, 2020, the Government announced a number of measures to tackle the spread of COVID-19. These measures included advice from the Government to work from home where possible to reduce social interactions. On 15th March, 2020, the Government advised all public houses and bars to close from midnight on 15th March until at least 29th March, 2020. For the purpose of this module it is assumed that on foot of this Government advice, the plaintiff closed its premises.
- (o) There has been no physical damage to the premises or the property used by the plaintiff at the premises for the purpose of the business.

- (p) There was no premises-specific restriction, order, regulation or direction made in relation to the plaintiff's premises (as opposed to general measures imposed nationwide).
- (q) On 18th May, 2020, the plaintiff's solicitor notified Frost of a claim, on behalf of Sava, for Business Interruption losses. The claim was declined by Frost on 26th May, 2020 on the basis that the plaintiff's claim was not covered under the policy.

The issues which I am asked to address

4. The parties have agreed a list of issues to be determined as follows:-

Questions relevant to the Business Interruption cover under s. 2

- (a) Is the term "*DAMAGE*" defined in s. 2 of the policy?
- (b) If the answer to (a) is yes, is the term "*DAMAGE*" defined as "*loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business*", which words appear in parenthesis in s. 2 of the policy?
- (c) If the answers to (a) and (b) are yes, does the definition of "*DAMAGE*" in s. 2 of the policy require physical damage to property in order for cover to trigger under s. 2 or do public health measures introduced in response to the COVID-19 pandemic constitute "*DAMAGE*" as defined within s. 2?
- (d) If public health measures introduced in response to the COVID-19 pandemic constitute Damage under s. 2 of the policy, what measures trigger cover and when?

- (e) Is there any cover for financial losses arising from COVID-19 under section 2 and if so, what is the policyholder required to demonstrate in order for cover to be triggered?
- (f) As a matter of policy interpretation, is the plaintiff entitled to an indemnity under s. 2 dealing with Business Interruption?

Questions relevant to the Loss of Licence Extension

- (g) Does the Loss of Licence Extension require the policyholder's licence to be "*forfeited, suspended or withdrawn*" in order for cover to trigger?
- (h) If the answer to (g) is yes, what constitutes a forfeiture, suspension or withdrawal of the licence for the purposes of triggering cover and what is the policyholder required to establish in order to meet this requirement?
- (i) Do the public health measures introduced in response to the COVID-19 pandemic constitute a forfeiture, suspension or withdrawal of a licence within the meaning of the Loss of Licence Extension?
- (j) If public health measures introduced in response to the COVID-19 pandemic can trigger cover, what measures trigger cover and when?
- (k) Do the public health measures introduced in response to the COVID-19 pandemic constitute an alteration in the law or statutory guidance or statement of policy affecting the grant, lapse, withdrawal, surrender, forfeiture, suspension, extent of renewal or duration of the licence or the imposition of conditions upon it?
- (l) Is the answer to (k) is yes, do any of the exclusions to the Loss of Licence Extension apply to exclude cover? In particular, does the

exclusion for “*any claim resulting from any alteration in the law or statutory guidance or statement of policy affecting the grant, lapse, withdrawal, surrender, forfeiture, suspension, extent of renewal or duration of any licence or the imposition of conditions upon it*” apply to exclude cover.

- (m) As a matter of policy interpretation, and assuming that the plaintiff has Loss of Licence cover, is the plaintiff entitled to an indemnity under the Loss of Licence Extension?

5. It will be seen that the questions posed by the parties can be broken down into two distinct categories. The first series of questions deals with the Business Interruption cover available under s. 2 of the policy while the second series of questions address the Loss of Licence Cover which is provided in para. 82 of the non-standard wording applicable to the policy. It should be noted, however, that, in the circumstances described more fully in para. 74 below, a further issue was debated between the parties, in post-hearing written submissions, in relation to the potential application of the prevention of access extension contained in the policy.

Expert evidence

6. For completeness, it should be noted that, at the hearing, both parties called expert evidence. Mr. Peter Mills gave evidence on behalf of the plaintiff while Mr. Alan Grace gave evidence on behalf of Sava. I do not believe that it is necessary or appropriate to make findings arising from that evidence. The issues that require to be resolved in this case relate to the interpretation of the policy. This is a matter for the court. In circumstances where the issues of interpretation do not turn on the meaning of any scientific or technical terms, the evidence as to how the experts would interpret the policy is inadmissible. While some of the evidence related to practice in the

insurance industry, I do not believe that it is of sufficient materiality to require me to make specific findings based on it. To the extent that any of that evidence was of assistance, I will refer to it, where appropriate, at later points in this judgment.

Some preliminary comments about the policy documents

7. As noted in the list of agreed facts, the policy documentation consists of the policy schedule, the Strata policy document and the Strata non-standard wording. It should further be noted that attached to the policy schedule is a statement of fact where it is stated that the statement of fact, together with the policy wording, the schedule and any endorsement that accompanies it, should be read as one document. Nonetheless, in circumstances where the policy is not industry specific, it may well be the case that certain parts of these documents will not be relevant to a hotelier or a publican such as the plaintiff. This is reinforced by the terms of a notice which appears on the contents page of the policy document. That page contains what is described as an *“important notice”* to the effect that the policy is tailored to meet the requirements *“set out at submission stage and therefore some Sections and parts of Sections may not be operative as per the Schedule of Cover”*.

8. It should also be noted that, on the third page of the policy document (i.e. counting the contents page as the first page), it is reiterated that the policy, the schedule, the statement of fact and any endorsement should be read together as one contract and *“unless specially stated to the contrary any word or expression to which a specific meaning has been given shall have such specific meaning wherever it may appear”*. This is of some relevance in relation to the question identified in para. 4(a) above. As outlined further in para. 25 below, there is a definition of *“DAMAGE”* in s. 1 of the policy (dealing with Material Damage) but the language of that definition is different to the words that appear in parenthesis in s. 2 of the policy which Sava

argues constitute a definition of “*DAMAGE*” for the purpose of the Business Interruption cover available under s. 2.

9. There are a number of other oddities or anomalies in the policy and I will address these in due course. There is significant disagreement between the parties as to how these anomalies affect the manner in which the policy should be construed. In this context, the plaintiff strongly contends that any ambiguity in the language of the policy should, in accordance with the decision of the Supreme Court in *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 274, be construed in favour of the plaintiff and against Sava.

10. Having regard to the way in which the issues divide themselves into two distinct categories, I propose to first address the questions relating to s. 2 of the policy dealing with Business Interruption cover. This will require a consideration of a number of provisions of the policy (including its oddities and anomalies). Thereafter, I will address the issues that arise in relation to the Loss of Licence provisions. Finally, I will consider the issue which arose subsequent to the hearing in relation to the prevention of access extension contained in s. 2 of the policy. But, before, I consider the relevant provisions of the policy in relation to these issues, it may be helpful to first summarise the approach to be taken by a court in construing a contract such as a policy of insurance.

The approach to be taken by a court in construing a policy of insurance

11. There is no significant dispute between the parties as to the principles to be applied in construing a policy of insurance. In those circumstances, there is no need to spend time going through the relevant authorities. The parties are agreed that the court should apply what Clarke C. J. has described as the “*text in context approach*”. This requires the court to construe the terms of the policy against the backdrop of the

relevant factual and legal context as it existed at the time the contract was put in place. Subsequent events provide no guide as to what the contract might mean. Accordingly, as O'Donnell J. (as he then was) said in *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31, it is wrong to approach the process of interpretation “*through the lens of the dispute which has arisen*”. Prior negotiations likewise provide no guide.

12. The court is also required to consider the contract as a whole. This means that no clause should be considered in isolation. The process of interpretation is wholly objective. Evidence as to the subjective intention of the parties is therefore inadmissible. Instead, the court approaches the process of interpretation of the contract by placing itself in the shoes of a reasonable person in the position of the parties at the time the contract was made and that person is deemed to be aware of the relevant factual and legal background. In essence, the court tries to work out what the words of the contract would mean to a person in that position, i.e. a person armed with knowledge of the factual and legal background. Subject to anything in the context or in the terms of the contract as a whole which might suggest otherwise, the words used in the contract are to be given their natural and ordinary meaning.

13. At the hearing, counsel for the plaintiff submitted that, for the purposes of the text in context approach, the reasonable person is not to be equated with a lawyer; instead such a person is to be equated with the typical owner of a public house in Youghal or Kerry or Dublin. Subsequently, the plaintiff, in reliance on English authority (addressed in more detail below), argued that, in the context of an insurance policy of this kind, the reasonable person should be taken to be a small or medium sized enterprise (“*SME*”) albeit with a broker to advise it. The English case law makes clear that the reasonable person is not to be equated with a “*pedantic lawyer*”.

I have not been referred to any Irish authority to similar effect. The well-known Supreme Court authorities in this jurisdiction refer to a reasonable person in the position of the parties and, accordingly, that is the approach that I believe that I am bound to take. That said, I am not sure that there is any difference in substance between the two approaches. The SME advised by a broker aptly describes the plaintiff here. Furthermore, I do not think that the Supreme Court would ever have considered that the reasonable person should be taken to be a pedantic lawyer. Nonetheless, it is clear from the decision of the Supreme Court in *Rohan Construction v. Insurance Corporation of Ireland* [1988] ILRM 373 that the court, in construing an insurance policy, must look at the policy as a whole. That process inevitably involves some element of analysis of the language used in a policy. As Lord Mance recently observed in the *China Taiping Insurance* arbitral award, at para. 19, in the context of the significant qualifications contained in most insurance policies, “*much can only be understood and applied by reasonably careful reading.*”

14. In looking at the language of the policy, the court may encounter provisions which are capable of having more than one meaning, one of which is favourable to the insurer and the other to the insured. In such event, the court will apply the *contra proferentem* principle which means that the court will take the meaning least favourable to the draftsman of the contract (in this case Sava) and most favourable to the insured. That principle was reaffirmed in Ireland by the Supreme Court in *Analog Devices* on which the plaintiff relies in this case. The plaintiff accepts that the principle is to be applied only in the case of genuine ambiguity and where other rules of construction fail.

15. A further relevant aspect of the principles relating to the interpretation of contracts is encapsulated in the well-known observation made by Lord Hoffmann in

Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 W.L.R. 896 at p. 913 to the effect that, although the “*rule*” that words are to be given their natural and ordinary meaning reflects the common-sense proposition that we do not readily accept that parties make linguistic mistakes in formal documents, the law does not require courts to “*attribute to the parties an intention which they plainly could not have had.*” That approach can only be taken, however, where it is possible to conclude from the background that something must have gone wrong with the language and where the court can be reasonably certain as to the true intention of the parties. This aspect of the *West Bromwich* principles (which have been accepted by the Supreme Court in both *Analog Devices* and in *Law Society v. Motor Insurance Bureau*) has particular resonance in this case in light of the oddities and anomalies in the Sava policy.

Business Interruption

16. The Business Interruption section of the policy commences with the words:-

“This cover is applicable to the Insured’s Business and Premises specified in the Schedule.

In the event of the Business carried on by the Insured at the Premises being interrupted or interfered with as a consequence of DAMAGE (being loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business) by any of the Contingencies A-R specified as being insured in Section 1 then the Company will pay to the Insured in respect of each item shown as insured in the Schedule the amount of loss resulting from such interruption or interference proved that the liability of the Company shall not exceed:

- i. *In respect of Increase in Cost of Working/income/Gross Profit/Tax Relief/Rent Receivable the sum insured by each item*
- ii. *In respect of each other item its sum insured*

As stated in the Schedule at the time of the DAMAGE”

The arguments of the parties in relation to Business Interruption

17. The basic points advanced by the plaintiff in relation to this section of the policy are (a) that the policy does not require physical damage to property used in the business in order for cover to be triggered under s. 2 and (b) that the public health measures introduced in response to the COVID-19 pandemic constitute “DAMAGE” as understood under s. 2. On that basis, the plaintiff argues that it is entitled to be indemnified under s. 2 in respect of the loss of business suffered by it as a consequence of the closure of the premises following the government decision of 15th March 2020. At first sight, this is similar to the unsuccessful claim made by the plaintiff in *Headfort Arms Ltd. v. Zurich Insurance* [2021] IEHC 608. However, as explained further below, the plaintiff seeks to distinguish *Headfort Arms* on a number of bases.

18. In contrast, Sava maintains that there is no cover under this section of the policy. Sava highlights that, as recorded in para. 3 (o) above, it is agreed between the parties that there was no physical damage to the property used by the plaintiff at the premises for the purposes of its business. Sava submits that cover under the Business Interruption section of the policy is available only where the business is interrupted or interfered with as a consequence of loss or destruction of or damage to property used by the plaintiff at the premises for the purpose of the plaintiff’s business. On the basis of the agreed facts, Sava claims that there is nothing to trigger cover under s. 2 of the policy. For this purpose, Sava submits that there is a definition of “DAMAGE” in s. 2

namely the words which appear in parenthesis immediately after that word (spelt in higher case letters) in the opening lines of s. 2 of the policy. Sava accordingly argues that “*DAMAGE*” is defined as: “*loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business*”. Sava maintains that it is clear from this “*definition*”, and the policy as a whole, that the policy only responds in respect of business interruption as a consequence of loss of or destruction of or damage to the property used by the insured at the premises.

19. Sava also relies on what its counsel described in submissions as the “*material damage proviso*”, which makes it a condition precedent to liability under s. 2 of the policy that there should be a policy of insurance in place in respect of “*DAMAGE*”. Such a proviso is common in policies of this kind and it is usually designed to ensure that the insurer will have no liability in respect of business interruption unless there is also insurance in place to cover the physical damage to the insured premises. As explained in *Riley on Business Interruption Insurance* (10th Ed., 2016) at para. 2.10, the function of such a proviso is to ensure that the insured will be in a financial position to repair or reinstate the damage done to the property insured under the Material Damage section of a policy. In that way, the exposure of an insurer under the Business Interruption section of a policy will be kept to the minimum time necessary to repair or reinstate the damage to the insured property. Both of the experts who gave evidence agreed that a proviso of this nature is standard in business interruption policies.

20. The relevant provision in the policy on which Sava relies is headed “*Material Damage Provison* (sic).” The reference to “*Provison*” appears to be a fairly obvious mistake. Having regard to the text that follows, it seems clear that “*Proviso*” is what was intended. The clause then continues in the following terms: “*It is a condition*

precedent to liability under this section that at the time of the happening of the DAMAGE there shall be in force an Insurance covering the interest of the Insured in the property at the Premises against such DAMAGE and that payment shall have been made or liability admitted therefore (sic) under such insurance or would have been made or admitted but for the operation of a proviso excluding liability below a specified amount.” Sava makes the case that the language of this proviso is very similar to that found in the Zurich policy considered in *Headfort Arms*. Sava also highlights the stipulation that the insurance which is required to be put in place as a condition precedent to cover under s. 2 is expressed to be: “*insurance covering the interest of the Insured in the property at the Premises*” (emphasis added). Sava submits that this makes clear that the insurance available under s. 1 of the policy is intended to cover some form of physical damage to the property at the premises rather than consequential loss of use of that property.

21. Sava argues that the language of the insuring clause and of the proviso make very plain that the Business Interruption cover will not be triggered under s. 2 of the policy unless there is physical damage to the property insured under the Material Damage section of the policy. On that basis, Sava submits that the policy does not respond in the event of deprivation of use or loss of use of the property which occurs without damage to or loss of that property. Sava maintains that this is what occurred here. As it is an agreed fact that there has been no physical damage to the property used by the plaintiff at the Premises for the purpose of the business, Sava contends that cover under s. 2 of the policy is not triggered. In this context, Sava relies upon the decision in *Headfort Arms v. Zurich Insurance* where, as noted above, the business interruption claim made by the insured failed in circumstances where it was unable to prove that there had been any physical damage to the insured property. Like the

present case, the business interruption claim advanced in the *Headfort Arms* case was based solely on the closure of the premises following the government decision of 15th March, 2020. There was no physical damage to the insured property.

22. However, the plaintiff argues that, in contrast to the position in the *Headfort Arms* case (where “*Damage*” was specifically defined as meaning “*loss or destruction of or damage to the Property Insured*”), there is no definition of “*DAMAGE*” in the Sava policy. On that basis, the plaintiff submits that the word “*DAMAGE*” must be given its ordinary and natural meaning and that it should not be confined to loss or destruction of property used at the insured premises or damage to such property. The plaintiff argues that the ordinary and natural meaning of the word “*DAMAGE*” is capable of extending to loss of use of property such as occurred in March 2020 when the plaintiff was required to close the premises.

23. In the alternative, without prejudice to its case that there is no definition of “*DAMAGE*” for the purposes of s. 2, the plaintiff also submits that, if the words in parenthesis in s. 2 of the policy (quoted in para. 16 above) are intended to define “*DAMAGE*” as “*loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business*”, that definition is incomplete since it omits the reference to such damage being caused by the contingencies A-R. In the absence of any reference to the contingencies in the “*definition*” of “*DAMAGE*” in s. 2, the plaintiff argues that the policy does not require physical damage to property in order to trigger cover under s. 2 and that the public health measures introduced in response to the COVID-19 pandemic fall within the “*definition*” of “*DAMAGE*” in s. 2. On that basis, the plaintiff argues that this case can be properly distinguished from *Headfort Arms*.

24. In addition, the plaintiff highlights that, in fact, there are no contingencies A-R listed in the policy. The Material Damage section of the policy dealing with contingencies refers solely to contingencies A-E. In this context, it should be noted that, immediately after the opening words of s. 1 of the policy dealing with Material Damage, there is a heading “*Definitions & Contingencies*”. Directly beneath that heading, there are five sub-sections running from A to E. Of those sub-sections, the first four deal with matters other than contingencies. The first three are concerned with definitions, the fourth is concerned with limits of liability. It is only the fifth, sub-s. E that addresses contingencies.

25. Within sub-s. A, the policy defines certain terms including Buildings, Contents, Miscellaneous Property and a number of other items. Sub-section B provides a definition of “*DAMAGE*” in somewhat different terms to the words in parenthesis in s. 2. The definition states that “*The word “DAMAGE” in capital letters shall mean loss or destruction of or damage to the Property insured*”. It will be recalled that s. 2 speaks of “*loss or destruction of or damage to property **used by the Insured** at the Premises for the purposes of the Business*” (emphasis added). Sub-section C contains a further definition which is not immediately relevant. Sub-section D sets out the “*Limits of liability*” and it provides that Sava’s liability “*under contingencies A-M shall not exceed*” certain limits. It should be noted that there are no contingencies “*A-M*”. Sub-section E is headed “*Contingencies*”. It is in turn divided into eighteen different categories which are described in some detail. The description of these eighteen contingencies and their respective exceptions takes up eight pages of the policy. The contingencies specified include fire, lightning, storm or flood and accidental damage. Many of the contingencies are subject to long lists of exclusions or exceptions.

26. Although the contingencies listed in s. 1 of the policy are identified by numbers rather than the letters A to R, it is possible, in one sense, to correlate the numbers used (namely 1-18) with the letters A to R. Notably, the first eighteen letters in the alphabet run from A to R. On this basis, Sava argues that the reference to contingencies A to R in s. 2 of the policy is plainly intended to refer to items 1 to 18 in sub-s. E of s. 1 under the heading “*Contingencies*”.

27. However, the plaintiff argues that the matter is not so clear cut as Sava contends. The plaintiff draws attention to the fact that there are a number of specific definitions in s. 2 of the policy including a definition of “*Contingencies*” which the plaintiff suggests makes it clear that contingencies are given a wider meaning in s. 2 of the policy than in s. 1. The definition of “*Contingencies*” in s. 2 of the policy expressly extends to three things:

- (a) Any loss destruction or damage “*as insured by the Material Damage cover and which is specified under Contingencies A-R therein*”;
- (b) Explosion of any boiler or economiser on the premises; and
- (c) Any other “*Contingency specified and defined in the Schedule*”.

28. The plaintiff submits that, even if the reference to “*Contingencies A-R*” is to be construed as though it read “*Contingencies 1 -18*”, the language and structure of this definition of “*Contingencies*” plainly envisages that, in s. 2 of the policy, references to contingencies are not confined to those specified at 1 to 18 of s. 1, sub-s. E, but extend also to any contingency specified in the Schedule. The plaintiff points in this context to the fact that the Schedule expressly includes Business Interruption as an element of Material Damage. In the course of submissions on Day 2 of the hearing, counsel for the plaintiff argued that, since Business Interruption is listed in the schedule in that way and since Sava chose to draft the policy in that way, a reasonable

person reading the policy would conclude that Business Interruption is a contingency covered by s. 1 of the policy and that it therefore falls within the language of the insuring clause in s. 2. I do not believe that this argument is sound and I believe I can dispose of it at this point. Business Interruption is not a contingency. It is a form of cover. More importantly, there is nothing in the schedule to suggest that it is being treated as a contingency. Oddly, it is listed as an item of “*Property/Material Damage*” but, crucially, there are no contingencies at all listed in the Schedule. Thus, on a straightforward reading of the documents, the reasonable person would have no reason to think that the third element of the definition of “*Contingencies*” in s. 2 of the policy was operative in this case. In these circumstances, I do not believe that the reasonable person would look beyond the first two elements of the definition. In my view, such a person would conclude, in light of the terms of the Schedule, that the third element is simply inapplicable.

29. That does not dispose of the issue relating to the reference to the non-existent contingencies A to R. The plaintiff argues that there is genuine ambiguity in the language of the policy such that it should be construed in the policyholder’s favour. The plaintiff argues that, in failing to identify on the face of the policy the full list of contingencies, Sava, as the party responsible for drafting the policy, has created a genuine ambiguity rendering the insured incapable of proving damage which it would otherwise be required to prove. The plaintiff makes the case that the policy should therefore be construed *contra proferentem* with the result, so the plaintiff argues, that cover should be available in the absence of any relevant exclusion. In this context, the plaintiff highlights that there is no exclusion in respect of a pandemic.

30. A further point made by the plaintiff in relation to the “*definition*” of “*DAMAGE*” in s. 2 of the policy is that the words in parenthesis are not identical to

the definition on the Zurich policy at issue in the *Headfort Arms* case. Again without prejudice to its argument that there is no definition of “DAMAGE” for the purposes of s. 2 of the policy, the plaintiff highlights that, in contrast to the language used in the Zurich policy considered in the *Headfort Arms* case, the words in parenthesis which immediately follow the reference to “DAMAGE” in s. 2 of the Sava policy are not confined to loss or destruction of or damage to property but instead refer to the loss or destruction of or damage to property “*used by the Insured at the Premises for the purpose of the Business*”. The plaintiff relies in particular on the express reference to “*use*” which it stresses was not found in the policy in the *Headfort Arms* case.

31. In response to Sava’s attempted reliance on the proviso, counsel for the plaintiff drew attention to a number of features of the proviso which are striking. In the first place, the proviso does not immediately follow the insuring clause in s. 2 of the policy. Remarkably, one has to turn to four pages later in the policy before the proviso appears. Even more remarkably, the proviso appears under the general heading of “*definitions*” albeit that, as previously noted, it has its own sub-heading “*Material damage provison*” (sic). Secondly, counsel for the plaintiff submitted that, since the proviso appears in s. 2 of the policy, the word “DAMAGE” must be given its meaning within s. 2 of the policy rather than by reference to the definition in s. 1. As noted in para. 22 above, the plaintiff argues that the word “DAMAGE” as used in s. 2 of the policy must be given its ordinary and natural meaning. The plaintiff submits that it cannot be confined solely to physical damage to the property insured.

32. In the course of the hearing, the plaintiff also sought to rely on the terms of the declinature letters sent on behalf of Sava in response to the making of a claim by the plaintiff. Although not pleaded, the plaintiff sought to rely, in particular, on the email of 16th March, 2020 sent by Frost which purported to rely on a notifiable disease

exclusion as the basis for declining cover. In fact, that exclusion is applicable only in respect of a claim made under s. 3 of the policy dealing with liability insurance. While the declinature evidences a lack of understanding of Sava's own policy on the part of the writer, I do not believe that any regard can properly be had to the email in so far as the interpretation of the policy is concerned. The Supreme Court has made it clear in *Re: Wogan's (Drogheda) Ltd.* [1993] 1 I.R. 157 that evidence of the conduct of parties subsequent to the conclusion of a contract is inadmissible as an aid to the construction of a contract.

33. Having set out the principal arguments of the parties in relation to the interpretation of s. 2 of the policy, I now turn to consider the questions identified in para. 4 (a) to (f) above.

Is the term “DAMAGE” defined in s. 2 of the policy?

34. As noted in para. 25 above, there is a definition of “DAMAGE” in s. 1 of the policy. Section 1, sub-s. B makes that very clear. As further noted in para. 8 above, page 3 of the policy expressly states that the policy, the schedule, the statement of fact and any endorsements should be read together as one contract and that “*unless specially stated to the contrary any word ... to which a specific meaning has been given shall have such specific meaning wherever it may appear*”. On that basis, one would expect that, in the absence of some express statement to the contrary, the word “DAMAGE” in s. 2 of the policy should be read by reference to the specific definition of that term in s.1. This is especially so in circumstances where the definitions’ page of s. 2 contains no definition of “DAMAGE”. At first glance, those factors, taken together, all strongly suggest that the word “DAMAGE” in s. 2 of the policy should be construed by reference to the express definition of that word in s. 1 of the policy.

35. However, the policy must be read as a whole and that requires that regard be had to the language used in the description of the business interruption cover available under s. 2. That language has been already been quoted in para. 16 above. Sava points to the language which appears in parenthesis immediately after the word “*DAMAGE*” in the opening lines of s. 2. Construed on its own, that language reads as though it was intended to function as a definition of “*DAMAGE*”. The use of the word “*being*” immediately after the word “*DAMAGE*” points strongly to that conclusion. The ordinary and natural understanding of the word “*being*”, when used in that way, is to signify what constitutes “*DAMAGE*”. Furthermore, the words which follow are, by any standard, readily recognisable as a species of damage namely loss or destruction of or damage to property used by the insured. It is therefore perfectly logical and natural to construe the words that follow as a definition of the word “*DAMAGE*”. The fact that this language is framed in parenthesis immediately adjoining the reference to “*DAMAGE*” further reinforces this impression.

36. All of that said, it has to be acknowledged that this “*definition*” of “*DAMAGE*” in s. 2 of the policy is not expressly stated to be “*specially stated to the contrary*” which page 3 of the policy suggests is necessary in order to displace the specific definition of the word “*DAMAGE*” in s. 1 of the policy. On the other hand, the ordinary and natural meaning of the language used in parenthesis in s. 2 so strongly and plainly functions as a definition, that I cannot conceive that the reasonable person in the position of the parties would not read it as a definition of “*DAMAGE*” for the purposes of s. 2. On the contrary, it seems to me that any reasonable person reading s. 2 of the policy would readily conclude that the words in parenthesis were intended to operate as the relevant definition of “*DAMAGE*” for the purposes of this section of the policy. While the policy must be read as a whole, the

specific language in parenthesis is so plainly redolent of a definition that I believe the reasonable person would treat it as such and would disregard the earlier definition in s. 1.

37. I have not lost sight of the plaintiff's reliance on the *contra proferentem* principle. However, I do not see any scope for the application of this principle in the immediate context of the definition of "DAMAGE". While I accept that, for the reasons discussed in paras. 34 and 35 above, there is an internal conflict or tension within the policy as to how the word "DAMAGE" is to be understood for the purposes of s. 2, I do not believe that this conflict can properly be characterised as giving rise to ambiguity. In my view, this is a case of internal inconsistency rather than ambiguity.

38. Courts regularly have to deal with inconsistencies between contractual terms. One of the principles which the courts employ in this situation is encapsulated in the maxim *generalia specialibus non derogant*. Broadly speaking, where a contract contains general provisions and specific provisions and there is a conflict between them, the specific provisions will be given greater weight than the general conditions. That principle has been applied by the Supreme Court in *Welch v. Bowmaker* [1980] I.R. 251 and by the Court of Appeal in *Holloway v. Damianus* [2015] IECA 19. It might be suggested that such a principle has no place in the context of the meaning which this policy would convey to the reasonable person rather than the pedantic lawyer. But that overlooks the fact that many of the principles employed by the courts are rooted in common sense. Indeed, Henchy J. in *Bowmaker* described the *generalia specialibus non derogant* principle as "*but a commonsense way of giving effect to the true or primary intention of the draftsman*". In the present case, it seems to me that the s. 1 definition of "DAMAGE" was intended to operate generally in the policy but

that when one comes to the opening words of s. 2, the passage in parenthesis suggests that a more specific definition was to be used in the context of s. 2. Again, the use of the word “*being*” points strongly to that conclusion. That word is plainly used to signify what the word “*DAMAGE*” is intended to mean in the specific context of s. 2. All of that said, I believe, for the reasons outlined in para. 37 above, that the reasonable person would arrive at the same conclusion even without recourse to the *generalia specialibus non derogant* principle.

39. Even if I am wrong in that conclusion, I do not believe that this would assist the plaintiff. As noted above, it is an important plank of the plaintiff’s case that there is no definition of “*DAMAGE*” in s. 2 of the policy. That is one of the principal bases by reference to which the plaintiff seeks to distinguish the terms of the Sava policy from the Zurich policy addressed in *Headfort Arms*. However, I cannot see any ground on which it could plausibly be said that there is no applicable definition of “*DAMAGE*” for the purposes of s. 2 of the policy. In this context, I cannot accept the argument that the s. 2 definition is incomplete because the words in parenthesis make no reference to Contingencies A to R as the cause of the “*DAMAGE*”. In my view, that argument conflates two separate things namely the cause of “*DAMAGE*”, on the one hand, and the definition of “*DAMAGE*”, on the other. There is no requirement that a definition of damage must include specific reference to the cause of that damage. One of the ways in which insurers cut down on the scope of cover under a policy is to limit cover to specified causes of loss. That must, of course, be made clear in the policy terms but it does not have to be included in any definition of damage. Thus, for example, the definition of damage in the Zurich policy considered in the *Headfort Arms* case made no reference to cause.

40. I therefore reject the plaintiff's argument that there is no definition of "DAMAGE" for the purposes of s. 2 of the policy. If I am wrong in my view that there is a specific definition of "DAMAGE" for the purposes of s. 2, the consequence would be that the s. 1 definition of that term would apply. That follows from the terms stated on p. 3 of the policy which I have already highlighted in para. 34 above. The s. 1 definition is not hugely different to the s. 2 definition save that it makes no reference to property "used by the Insured". The plaintiff makes a separate argument that those words are significant and that, in contrast to *Headfort Arms*, they extend the meaning of "DAMAGE" to loss of use. That is an issue that I consider further when I come in para. 51 below to address the question posed in para. 4 (c) above.

41. For all of the reasons discussed in paras. 34 to 38 above, I have come to the conclusion that the term "DAMAGE" is defined in s. 2 of the policy in terms of the words which appear in parenthesis in the opening paragraph of s. 2 (quoted in para. 16 above).

Is the term "DAMAGE" defined in the terms of the words in parenthesis in s.2 of the policy?

42. This is the question posed in para. 4 (b) above. In substance, I have already answered this in paras. 34 to 38 above. For the reasons outlined in those paras. I have come to the conclusion that the words in parenthesis would be understood by the hypothetical reasonable person in the position of the parties as a definition of "DAMAGE" for the purposes of s. 2.

43. If I am wrong in that conclusion, then, as explained in paras. 39 to 40 above, it appears to me to follow that the definition of "DAMAGE" in s. 1 of the policy would apply. In my view, that would not assist the plaintiff. The s. 1 definition is on all fours with that in *Headfort Arms*. The lack of any reference to "property used by the

Insured” in the s. 1 definition would deprive the plaintiff of one of the main bases on which it seeks to distinguish *Headfort Arms*. In particular, the plaintiff would not be in a position to mount the argument addressed in para. 51 below in the context of the question posed in para. 4 (c) above.

Does the definition of “DAMAGE” in s. 2 of the policy require physical damage to property in order to trigger cover under s. 2? Do the public health measures introduced in response to the COVID-19 pandemic constitute damage as defined in s. 2?

44. It should be noted that, in *Headfort Arms*, it was held that there had to be physical damage to or permanent loss of the insured property before a claim could be made under the business interruption section of the equivalent Zurich policy. It was held that the material damage section of the Zurich policy was concerned with events which cause damage to or the loss or destruction of the insured property while the business interruption section was intended to address the effects which those events have on the business carried on at the property. It was also held that loss of use was clearly intended to be covered by the business interruption section and that it would make no commercial sense that loss of use could also be treated as falling within the definition of “*Damage*” so as to simultaneously bring it within the material damage section of the policy. The argument to the contrary made by the plaintiff in that case was rejected on the basis that it would have the entirely unlikely and circular effect that the material damage section of the policy would also operate as providing cover for loss of use, thus making the business interruption section redundant. It was made clear by counsel for the plaintiff in this case that the plaintiff does not challenge the decision in *Headfort Arms* but seeks to distinguish it. One of the principal arguments made by the plaintiff in this context is that, in contrast to *Headfort Arms*, “*DAMAGE*”

is not defined in s. 2 of the policy and should accordingly be given its ordinary and natural meaning. On that basis, the plaintiff argues that “*DAMAGE*” is not confined to loss or destruction of property used at the its premises or damage to such property. The plaintiff contends that it would also extend to loss of use of property. However, in light of the views expressed in paras. 24 to 41 above, this argument on the plaintiff’s part must be rejected.

45. That does not dispose of the plaintiff’s case based on s. 2 of the policy. The plaintiff has a number of other arguments in its armoury. In the first place, as noted in para. 29 above, the plaintiff has highlighted that, in the operative language of s. 2 of the policy, reference is made to non-existent contingencies A to R. The plaintiff submits that this creates an ambiguity rendering the insured incapable of proving damage. The plaintiff contends that the policy must therefore be construed *contra proferentem* with the result that cover should be available in the absence of any exclusion in respect of pandemics.

46. I entirely accept that the reference to non-existent contingencies A to R raises a significant issue. But I am not convinced that it can properly be characterised as an ambiguity. An ambiguity arises where a provision of a contract has two or more meanings. That is not what has occurred here. In my view, the difficulty with the language in s. 2 is that the reference to contingencies A to R is, on the face of it, meaningless. No such contingencies exist. That creates a problem because the cover under s. 2 is expressed to be limited to “*DAMAGE ... by any of the Contingencies A-R specified as being insured in Section 1...*” It is well settled that the use of the word “*by*” in this context denoted causation. Thus, on the basis of the words used in s. 2, there would only be cover where the “*DAMAGE*” is caused by Contingencies A to R. In turn, that would have the remarkable consequence that, if one were to interpret this

element of s. 2 of the policy literally, the insured would be left without business interruption cover at all. The insured would never be able to prove causation by a non-existent contingency.

47. It is impossible to believe that the policy was not intended to provide business interruption insurance. In the first place, the policy contains detailed provisions in relation to such insurance in s. 2. There would have been no point in including those provisions if such cover was to be unattainable in any circumstances. Secondly, the schedule identifies business interruption cover up to €915,000 (albeit, rather bizarrely, under the heading “*Property/Material damage*”). Other species of insurance (such as Term Life) are expressly excluded by the Schedule but not business interruption. The clear intention therefore appears to be that business interruption cover should be available to the plaintiff. It must also be borne in mind that the plaintiff paid a substantial premium of €7,369.10 (together with taxes and a significant underwriting fee of €1,122.17) for the entire package of insurance offered by Sava. Against that backdrop, it makes no sense that the availability of business interruption cover would be subject to a condition that is impossible to satisfy.

48. In light of the considerations outlined in para. 47 above, it seems quite obvious that, to paraphrase Lord Hoffmann in the *West Bromwich* case, something has gone wrong with the language used in s. 2 of the policy in so far as it refers to non-existent contingencies A to R. I believe that any reasonable person, with knowledge of the underlying facts and faced with the language of the policy and the schedule, would so conclude. As part of the process of contractual interpretation, obvious mistakes of this kind can be corrected by a court where it would be clear to the hypothetical reasonable person what the correction ought to be. That follows from the approach taken in *East v. Pantiles (Plant Hire) Ltd.* (1981) 263 E.G. 61, the *West Bromwich*

case and *Chartbrook v. Persimmon Homes Ltd.* [2009] 1 A.C. 1101. In *Moorview Developments Ltd. v. First Active plc* [2010] IEHC 275, Clarke J. (as he then was) confirmed that this line of authority represents the law in this jurisdiction. As Clarke J. explained in para. 3.6 of his judgment: “... *a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake.*”

49. It is clear from the case law cited in para. 48 above that two conditions must be satisfied before the approach suggested by Clarke J. can be taken. In the first place, the mistake must be obvious. I have already explained why I believe the reference to contingencies A to R satisfies that condition. It is clear from the text of the policy itself that it is a mistake. Secondly, it must be equally obvious what words ought to have been used. In my view, that condition is also satisfied here. It emerges from a reading of s. 1 of the policy that cover under that section is available in respect of “*DAMAGE*” as defined therein caused by “*any of the Contingencies in force as specified in the Schedule...*”. As previously noted, there are no contingencies specified in the Schedule. However, there is a heading immediately beneath those words in s. 1 of the policy that refers the reader to “*Definitions & Contingencies*”. Furthermore, if one turns the page, one comes to sub-s. E headed “*Contingencies*” and the start of a long list of contingencies which take up the next eight pages of the policy. In those circumstances, I believe that it would be very obvious to any

reasonable person reading the policy that, notwithstanding the reference to the “*Contingencies ... as specified in the Schedule*”, s. 1 provides cover in respect of “*DAMAGE*” caused by any of the contingencies described in sub-s. E of s. 1. In my view, it would be fanciful to suggest otherwise. In turn, it seems to me that it would be equally obvious to a reasonable person confronted with the reference to “*Contingencies A-R*” in s. 2 of the policy that those words are intended to refer to the self-same contingencies described in sub-s. E of s. 1 running from para. 1 to para. 18. That seems to me to be patently so in circumstances where it is clear from the opening words of s. 2 that, in so far as the relevant contingencies are concerned, the business interruption cover is intended to dovetail with material damage cover. In my view, the latter point plainly follows from the use of the words “*by any of the Contingencies ... specified as being insured in Section 1 ...*” (emphasis added). In addition, I believe that the reasonable person would also be struck by the fact that, just as there are 18 letters running from A to R, there are 18 paras. within sub-s. E each addressing a separate contingency.

50. I appreciate that, in coming to this view, it may appear that Sava is being forgiven for its frankly appalling carelessness in the choice of language used by it in its own policy. However, it is important to keep in mind the principle, stressed by O’Donnell J. in the *MIBI* case, that it is wrong to seek to construe a contract through the prism of the dispute between the parties. While the interpretation taken above may appear unfavourable to the plaintiff in the context of the current dispute as to whether the policy provides cover for the pandemic related losses suffered by the plaintiff, it is, in fact, a favourable interpretation to the insured more generally since it ensures that the policy which the plaintiff has taken out with Sava will be given meaning and will be available to provide cover in respect of all of the many contingencies

described in s.1. If one did not take this interpretation of the policy, it would be very difficult, if not impossible, to identify the cover available to policyholders under it. The cover available in respect of the contingencies listed in paras. 1 to 18 of sub-s. 3 would be very valuable to any policyholder. Subject to the exceptions specified, they extend to a range of very serious events capable of doing significant damage to the policyholder including fire, flood, storm, theft and impact by a vehicle. Each of those events is not only capable of doing physical damage to the insured property but that damage is, in turn, capable of causing significant interruption to the policyholder's business.

51. Turning to the next argument made by the plaintiff, it will be recalled that, as outlined in para. 30 above, the plaintiff places emphasis on the fact that, unlike the clause considered in the *Headfort Arms* case, the definition of "DAMAGE" in s. 2 of the policy expressly refers to property used by the insured at the premises. The plaintiff submits that this reference to the concept of use is significant. The plaintiff argues that the reference to use gives rise to ambiguity. The plaintiff accepts that the definition could be read as confined to use of property but, equally, counsel for the plaintiff argued that it could "*just as easily refer, in the terms of business as distinct from premises as the actual use of the premises, the use by the insured in the course of his business*". Counsel argued that the latter interpretation is supported by the way in which this part of s. 2 of the policy goes on to deal with annual income and loss of profits. On the basis that both interpretations are open, the plaintiff makes the case that the court should adopt the interpretation most favourable to it.

52. I do not accept that there is any such ambiguity in the definition of "DAMAGE" in s. 2 of the policy. There is nothing in the terms of the definition to suggest that it was intended to extend to loss of use of the insured property. As noted

previously, “*DAMAGE*” is defined as constituting “*loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business*”.

While the word “*used*” is an integral part of the definition, it is plainly not deployed in the manner suggested by the plaintiff. Instead, it is deployed to delineate the property which must be lost, destroyed or damaged in order to trigger the business interruption cover. The definition requires that the property in question is property which is used by the insured at the insured premises for the purpose of its business. On a straightforward reading of the language, the word “*used*” is very obviously deployed in that sense. I cannot see how, on any reasonable interpretation of the words in question, a reader of the policy could come to the conclusion that the word “*used*” conveys the impression that loss of use of the property would itself fall within the definition of “*DAMAGE*”. Other than its assertion to that effect, the plaintiff has not provided any adequate explanation as to how the word “*used*” could reasonably give rise to such an impression on the part of a reader of the policy. The subsequent references to loss of profits and loss of income do not support its contention. It is unsurprising that s. 2 of the policy providing business interruption cover should contain such references. Both concepts are relevant to a business interruption claim. However, the concepts are not relevant to the definition of “*DAMAGE*” for the purposes of s. 2 and there is nothing in terms of that definition to suggest otherwise.

53. The terms of the material damage proviso reinforce the conclusion that s. 2 of the policy is intended to address the consequences for the insured’s business that flow from damage to the insured’s property at the premises. While counsel for the plaintiff rightly criticised the curious location of the proviso and its inclusion under the “*definitions*” heading, the fact remains that the proviso is an inherent part of s. 2 of the policy and, in accordance with standard principles of contractual interpretation,

the hypothetical reasonable person is taken to have read the whole policy including the proviso. I appreciate that such a person may scratch his or her head on finding the proviso four pages after the relevant insuring clause. Nonetheless, the terms of the proviso are clear and the plaintiff has not identified any ambiguity in its language. There is no reason to suppose that the reasonable person would not be able to work out what it means. By its terms, the proviso expressly stipulates that it is a condition precedent to liability under s. 2 of the policy that “*at the time of the happening of the DAMAGE there shall be in force an insurance covering the **interest of the insured in the property at the Premises against such DAMAGE...***” (emphasis added). The reference to the insured’s interest in the property at the Premises is key. There is nothing in that language to suggest that loss of use of property is in mind. The focus is on the property itself, not on loss of use of that property.

54. Save that the definition of “*DAMAGE*” in s. 2 of the Sava policy is in different terms to the definition of the same word in the Zurich policy considered in *Headfort Arms*, the language of this part of the proviso is in identical terms to that in the Zurich policy. Consistent with the view expressed in para. 32 of the *Headfort Arms* judgment, it seems to me that the proviso makes clear that, before cover under s. 2 of the policy can be triggered there must be cover in place against damage to the insured property – i.e. there must be material damage cover in place. The rationale for this is clearly explained in the passage from *Riley* summarised in para. 19 above. I can see no basis to take a different view of the proviso in this case to that previously taken in *Headfort Arms*.

55. For all of the reasons outlined in paras. 46 to 54 above, I have come to the conclusion that there must be physical damage to property in order to trigger cover under s. 2 of the policy. It follows that the public health measures introduced in

response to the COVID-19 pandemic do not constitute “*DAMAGE*” within the meaning of s. 2. For completeness, it should be noted that, as found in *Headfort Arms*, the physical loss of property would also trigger cover if it amounted to a permanent loss. However, that does not assist the plaintiff here since none of its property was permanently lost as a consequence of the public health measures.

56. In the circumstances, it is unnecessary to address the question posed in para. 4 (d) above as to what public health measures triggered cover and when they did so.

Is there any cover for financial losses arising from COVID-19 under s. 2?

57. For all of the reasons outlined above, it seems to me that the answer to this question must be that there is no such cover. However, there is a further argument made by the plaintiff that must be addressed. The plaintiff draws attention to the general provisions of the policy which are expressly stated to be “*applicable to all sections*”. Among the general conditions is an obligation placed on the insured to take reasonable precautions to “*prevent death bodily injury shock **illness disease** loss or damage and to maintain all vehicles premises plant and everything used in the business in proper repair and to act in accordance with all Statutory obligations and regulations ...*” (emphasis added). The plaintiff highlights the reference to disease and argues that this demonstrates that the policy contemplates that disease is covered under s.2. The plaintiff also stresses that there is no exclusion in respect of pandemics.

58. I do not believe that this argument assists the plaintiff. The reasonable precautions condition is drafted to apply to all sections of the policy. For that reason, it is very widely drafted requiring the insured to take reasonable precautions to prevent many of the species of damage that might give rise to a claim under the policy. The condition covers everything from bodily injury to “*loss or damage*”, the latter having a very wide ambit. It is unsurprising that it refers to “*illness*” and

“*disease*”. They are very relevant to s. 3 of the policy which provides cover for employers’ liability and public liability for, among other things, death, bodily injury, illness or disease.

59. I would not exclude the possibility that disease could be relevant to a business interruption claim under s.2 in certain limited circumstances. As the *Transco* case (discussed in paras. 78 to 79 below) illustrates, property can be said to be damaged (if only temporarily) where it is contaminated with a deleterious substance that necessitates decontamination works to be carried out. Thus, for example, if the insured premises were contaminated with the causative pathogen of a dangerous disease, one could see that a business interruption claim might arise where the premises (or the affected part) has to be closed for a period of time until the necessary decontamination exercise has been completed. But, that is not what has occurred here. It is accordingly unnecessary to consider the point any further.

The questions relating to the Loss of Licence Extension

60. In so far as relevant, the Loss of Licence extension provides: “*In the event of the licence for the sale of excisable liquors ... or any part of it which has been granted in respect of the premises being forfeited suspended or withdrawn during the period of insurance, we will indemnify you in respect of all loss that you may sustain in respect of ... loss of profit ...*”. The cover available under this extension is subject to a large number of exceptions including in respect of: “*any claim resulting from any alteration in the law or statutory guidance or statement of policy affecting the grant, lapse, withdrawal, surrender, forfeiture, suspension, extent of renewal or duration of any licence or the imposition of conditions upon it*”.

61. The plaintiff maintains that the effect of the government announcement in March 2020 and the subsequent Regulations was to give rise to a suspension of the

licence. In closing submissions, counsel for the plaintiff acknowledged that there was no withdrawal or forfeiture of the licence. In my view, counsel was entirely correct in taking that course. The plaintiff argued that the exclusion did not apply because the government announcement and the regulations did not purport to alter the law or statutory guidance or “*statement of policy*” affecting the licence.

62. No relevant authority was cited to me in relation to an extension of this nature. However, in the submissions on behalf of Sava, it was noted that in *TKC London Ltd. v. Allianz Insurance* [2020] EWHC 2710 (Comm), the Allianz policy contained a similar extension subject to a similar exclusion. At para. 21 of his judgment, the deputy judge recorded that counsel for the plaintiff there had accepted in the course of his argument that, in light of the terms of the exclusion, the plaintiff was unable to assert a claim under the extension. Beyond noting that concession, the deputy judge did not address the argument any further.

63. In this case, Sava argues that the closure of the hotel did not involve any forfeiture, suspension or withdrawal of the licence. In the alternative, the case is made that, in order for the plaintiff to contend that its licence has been forfeited suspended or withdrawn, the plaintiff has to rely upon the government announcement of March 2020 and the subsequent regulations; if those measures amount to a suspension of the licence, the plaintiff “*ineluctably*” falls within the exclusion. Sava contends that, if those measures are the reason that there has been a suspension of the licence, it necessarily follows that the claim results from the change in the law effected by those self-same measures. Sava maintains that, even if the government announcement of March 2020 falls short of constituting a change in the law, it amounts, at minimum, to an alteration of policy and therefore falls within the ambit of the exclusion.

64. Having set out the arguments of the parties in relation to the Loss of Licence Extension, I now turn to the individual questions posed in para. 4 (g) to (m) above.

What must happen to the licence to trigger cover?

65. The first question asks whether it is necessary that the licence must be forfeited, suspended or withdrawn in order to trigger cover. The answer to that question seems to me to be self-evident. The language of the extension clearly stipulates that, subject to the extensions which follow, cover is only available where the licence is forfeited, suspended or withdrawn. These are the relevant triggers although, in this case, the only potentially relevant one is suspension. As noted previously, counsel for the plaintiff accepted that there was no forfeiture or withdrawal of the licence.

What is the policyholder required to establish in order to show that there has been a suspension of the licence?

66. I was not addressed in any detail on this specific question and therefore do not propose to address it. The plaintiff merely relied on the fact that the measures required the closure of the its premises. Sava merely argued that the plaintiff was required to adduce evidence of the suspension. In my view, more extensive argument was required before the court would be in a position to address this question.

Do the public health measures constitute a suspension of the licence within the meaning of the extension?

67. Neither of the parties engaged in any detailed analysis of the government announcement of 15th March 2020 or of the subsequent regulations. In my view, if the plaintiff wished to pursue its case that the public health measures gave rise to a suspension of the licence, it would be necessary to carefully consider and analyse the terms of the licence, the pre-existing law governing the operation of the licence and

the precise impact of the announcement and of the regulations upon that licence. It would be equally important to analyse the terms of the announcement and the regulations. Such an exercise was not carried out. In the circumstances, I do not have sufficient material before me to reach any concluded view on the issue.

68. The most that can be said is that the effect both of the announcement and the regulations was to require that the premises should close (at least in so far as its public house trade is concerned). In this context, it may, at first sight, seem odd that a government announcement could amount to a legally enforceable requirement to close premises but it has been accepted by the parties in all of the previous COVID-19 cases that have come before the Commercial Court that the announcement had the same effect as an order to close public houses within the meaning of the policies in issue in those cases. Furthermore, in *Financial Conduct Authority v. Arch Insurance* [2021] 2 WLR 123 (*“the FCA case”*) at pp. 157-158, the U.K. Supreme Court has held that an equivalent statement by the British Prime Minister on 20th March 2020 instructing premises to close down was *“a clear mandatory instruction given on behalf of the U.K. Government ... which both the named businesses and the public would reasonably understand had to be complied with without inquiring into the legal basis ... for the instruction.”*

69. In light of the lack of any detailed analysis or argument on this issue, I will refrain from expressing any view (even of a tentative nature) on the question as to whether closure of the premises could be equated with suspension of the licence.

Do any of the exclusions to the Loss of Licence Extension apply?

70. In the circumstances described in paras. 67 and 69 above, it is, strictly speaking, unnecessary to consider the remaining issues raised in relation to the Loss of Licence Extension. However, I would add that, if it be the case that an equation

could plausibly be made between imposed closure of the premises and suspension of the licence, I cannot see how the exception described in para. 60 above would not apply. If the closure on foot of the March 2020 announcement or the subsequent regulations gives rise to a suspension of the licence, it follows that the claim in respect of that suspension results from “*an alteration in the law or ... statement of policy affecting the grant, ... suspension, ... or duration of any licence or the imposition of conditions upon it*”. In so far as the regulations are concerned, there can be no doubt that they constitute an alteration of the law, such that, if the closure required thereunder constitutes a suspension of the licence, the suspension results from “*an alteration of the law ...affecting the grant ...suspension ... or duration of ...*” that licence “*or the imposition of conditions upon it*”. The language of the exception is plainly wide enough to cover such an event. At minimum, the “*suspension*” effected by the closure imposed by the regulations affects the grant of that licence. The suspension of the operation of the licence clearly interferes with the grant of the licence in so far as it is inconsistent with the terms of the grant. In that way, the “*grant*” of the licence is “*affected*”.

71. It may appear less likely that the announcement of 16 March 2020 falls into the same category in so far as it may be said to fall short of altering the law. However, it is important to keep in mind that the exception is to be construed through the eyes of the reasonable person in the position of the parties and, having regard to the approach taken in the *FCA* case, such an announcement is likely to be considered by such a person to have mandatory effect and, in that sense, to have the same effect as an alteration in the law. Even if it is going too far to equate the announcement with an alteration in the law, it seems to me that a reasonable person considering the terms of this exception would conclude that an announcement of that kind represents, at

minimum, an alteration in the policy of the State in relation to the operation of licenced premises requiring them to close in circumstances where, previously, under the licensing laws in force, they would be entitled to stay open. Those licensing laws can reasonably be regarded as representing the pre-existing policy of the State in so far as the operation of licensed premises are concerned such that the announcement represents a change in that policy.

72. In the circumstances outlined in paras. 70 to 71 above, I conclude that, if the Loss of Licence Extension had been shown to be otherwise applicable, the plaintiff's claim would fall within the exception in respect of alterations in the law or statements of policy.

The remaining issues posed in relation to the Loss of Licence Extension

73. In light of the conclusions reached by me in paras. 67, 69 and 71 above, it is not necessary to address any of the remaining questions posed in para. 4 in respect of the Loss of Licence extension.

The additional argument in relation to the potential application of the prevention of access extension

74. The final issue which requires to be considered arises in the wake of the decision of Cockerill J. in *Corbin & King Ltd. v. Axa Insurance* [2022] EWHC 409 (Comm) which I brought to the parties' attention after judgment had been reserved in this case. In the *Corbin & King* case, the owners of the Wolseley and Delaunay restaurants in London brought proceedings against Axa Insurance seeking an indemnity under a Denial of Access (Non Damage) ("NDDA") clause arising from the closure of the restaurants under measures taken by the U.K government in response to the pandemic. The NDDA clause in issue was identical to that considered by me in *Brushfield Ltd. v. Arachas Corporate Brokers Ltd.* [2021] IEHC 263 at

paras. 169 to 218. In her judgment, Cockerill J. took a different interpretation to the NDDA clause than I had in *Brushfield*. It should be noted that the prevention of access clause contained in the Sava policy is not in the same terms as the NDDA clause addressed in *Corbin & King*. Nevertheless, when the decision of Cockerill J. came to my attention in February 2022, I decided that, given the approach taken to the interpretation of an insurance policy in that judgment, I should bring it to the attention of the parties and invite them to make further submissions in relation to the decision, should they so wish. I was subsequently informed that the parties proposed to address the issue by way of further written submissions. The plaintiff's submissions were furnished on 21st March 2022 and Sava responded to these on 1st April 2022.

75. In the plaintiff's written submissions, it is suggested that the *Corbin & King* decision is of potential relevance in respect of the prevention of access clause in the Sava policy. That clause is not the subject of any of the agreed questions which the court has been asked to address. The clause was mentioned in passing in the written submissions delivered on behalf of the plaintiff in advance of the trial but only in support of the plaintiff's argument in relation to the list of agreed issues. It has never been a basis on which the plaintiff claims a right to be indemnified under the policy. In those circumstances, I do not believe that the plaintiff is entitled to invoke it now. Nonetheless, I propose to address the issue for completeness. For reasons which I explain below, I do not believe that the clause would be of any assistance to the plaintiff even if it had been invoked in the statement of claim.

76. The prevention of access clause provides cover where access to the insured premises is prevented or hindered as a consequence of the destruction of or damage to property in the vicinity of the premises. A classic example would be if a building next door to the premises was destroyed by fire and became unstable resulting in a

requirement to close public access to the relevant part of North Main St. in which the premises is situated. The clause is in the nature of an extension of Business Interruption cover. It extends cover as follows: “*Property in the vicinity of the Premises destruction of or damage to which shall prevent or hinder the use of the Premises or access thereto whether the Premises or property of the Insured therein shall be damaged or not but excluding destruction of or damage to property or any public utility from which the Insured obtains supplies or services.*” It will be seen from its terms that the extension is only triggered where there is destruction of or damage to property in the vicinity of the insured premises which prevents or hinders access to or use of the insured premises. It is therefore different to the NDDA clause in issue in *Corbin & King* or the relevant element of the NDDA clause addressed by Lord Mance in the *China Taiping Insurance* award (to which the plaintiff refers in its March 2022 submissions). In the *Corbin & King* case, the NDDA clause was triggered by an interference with access to the premises caused by action taken either by the police or by another statutory body in response to a danger or disturbance within a one-mile radius of the premises. In *China Taiping*, the NDDA clause, in so far as relevant, was triggered either by action taken by the police or another competent local authority for reasons other than the conduct of the insured or alternatively by action taken by the police or a local authority in response to an emergency threatening life or property in the vicinity of the premises.

77. In *Corbin & King*, Cockerill J. came to the conclusion that one or more COVID-19 cases within the one-mile radius specified in the NDDA clause fell within the concept of “*danger*” and were accordingly sufficient to trigger cover. She disagreed with my finding that the clause was directed solely at localised dangers but that is not relevant for present purposes. In *China Taiping*, Lord Mance came to the

conclusion that the two paras. of the NDDA clause in issue in the arbitration were intended to deal with localised events and did not extend to government measures taken on a nationwide basis. However, it appears from his award that he considered that disease was capable of falling within the ambit of the clause. Crucially, for present purposes, he did so solely in the context of para. (b) of the NDDA clause (dealing with action taken for reasons other than the conduct of the insured) and in the context of para. (c) (dealing with an emergency threatening life or property in the vicinity). Given the reference in para. (c) to an emergency threatening life, it is unsurprising that the COVID-19 pandemic might be regarded as falling within that category. It is noteworthy that para. (a) of the NDDA clause was not addressed at all in *China Taiping*. Paragraph (a) is in somewhat similar terms to the prevention of access clause found in the Sava policy; cover is triggered under it where damage to property in the vicinity of the insured premises prevents or hinders the use of or access to the insured premises. There is no suggestion in Lord Mance's award that para. (a) could be triggered by an outbreak of COVID-19 or that COVID-19 could fall within the scope of damage to property.

78. Nonetheless, the plaintiff, in its March 2022 submissions, has sought to argue that: "*In asking would the reasonable SME owner understand 'damage' to a property other than their own to include a contamination of pests, virus or outbreak of disease, the answer must be yes.*" The plaintiff cites in this context the decision of Mance J. (as he then was) in *Losinjaska Plovidba v. Transco Overseas Ltd.* [1995] 2 Lloyd's Rep. 395. In that case, there was leakage from a drum of hydrochloric acid shipped by the first defendant on board the plaintiff's ship in the course of a voyage from East Greenwich to Benghazi. The vessel had to be cleaned and the plaintiff sued for damage to the ship. However, the defendants argued that, in circumstances where the

ship had been successfully decontaminated, the plaintiff had no cause of action save in respect of the cost of the decontamination work. The defendants sought to dismiss the proceedings on that basis. Mance J. rejected the application, saying at p. 399:

“Here, specialist contractors were engaged in undertaking the decontamination work using soda to neutralise the acid before washing the deck ... with fresh water; further it is pleaded ... that the vessel was required to be decontaminated of the ... acid before she could sail from the special berth to which she had been directed after discovery of the leakage. Of these alleged facts, I would have no hesitation in concluding that the vessel should be regarded as having suffered damage by reason of her contamination”.

79. I do not believe that the *Transco* case assists the plaintiff. The crucial difference is that, in that case, there was damage to property (if only temporary) as a consequence of the spillage of acid which required the ship to be decontaminated. In the present case, there is no evidence that any property in the vicinity of the insured premises was similarly affected by COVID-19. In this context, I would be prepared to accept, for the sake of argument, that property might be affected by COVID-19 to the extent that, for example, its causative pathogen, the SARS-CoV-2 virus is detected on surfaces in such premises. Likewise, I am prepared to accept that such premises might have to be decontaminated. For instance, one could envisage a situation where the causative pathogen of a highly infectious and deadly disease is found on nearby premises and the authorities decide as a precaution to close North Main St., Youghal until the pathogen is neutralised. I could see that, in such circumstances, the prevention of access clause could be triggered.

80. However, for the prevention of access clause in the Sava policy to be triggered, it would be necessary to show:

- (a) that some nearby property was infected with the causative pathogen of COVID-19;
- (b) that, as a consequence of that infection, access to or use of the insured premises by the plaintiff was prevented or hindered.

81. There is nothing to show that either of these conditions are satisfied in this case. There is no evidence at all in relation to any nearby premises. Likewise, there is no evidence to show that the closure of the plaintiff's premises was required in response to any "*infection*" of any premises in the vicinity of the insured premises. Thus, even if the plaintiff was entitled on the pleadings to put forward an argument based on the prevention of access clause, it is clear that the argument would fail.

Conclusion

82. In light of the views which I have formed in relation to the questions posed in para. 4 above, I believe that all of the claims made by the plaintiff in this module of the proceedings must be dismissed. I will list the matter remotely for mention before me at 10.30 a.m. on Thursday 2 June 2022 with a view to making such orders as may be appropriate on foot of this judgment.

Practice Direction HC 101

83. Finally, in accordance with the above practice direction, I direct the parties to file their respective written submissions (subject to any redactions that may be permitted or required by the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.