

THE HIGH COURT
COMMERCIAL

[2021] IEHC 608
[2021 No. 1364 P.]

BETWEEN

HEADFORT ARMS LIMITED T/A THE HEADFORT ARMS HOTEL

PLAINTIFF

AND

ZURICH INSURANCE PLC

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 24th September, 2021

Introduction

1. In these proceedings, the plaintiff ("HAL") seeks to be indemnified by the defendant ("Zurich") under the business interruption section of a Zurich Commercial Combined Policy in respect of financial losses sustained by it as a consequence of the closure of its hotel premises in the wake of the restrictions imposed by the Government in response to the COVID-19 pandemic. The business interruption section does not expressly cover closure of the premises as a consequence of an outbreak of disease or as a consequence of a Government ordered closure. However, HAL maintains that the terms of the business interruption section of the policy are sufficiently broad to provide cover arising from the closure of its premises following the advice given by the Government on 15th March, 2020 that all public houses and bars should close and as a consequence of the further measures introduced by the Government later in March, 2020 which required the closure of all non-essential shops and businesses.
2. Under the business interruption section of the policy, Zurich agreed to cover HAL "*[i]f Damage by any cause not excluded occurs at the Premises to property used by the Insured for the purpose of the Business and causes interruption of or interference with the... Business at the premises...*" (bold in original). It is acknowledged by HAL that no physical damage occurred at its premises as a consequence of the COVID-19 pandemic or the Government measures introduced in response to it. However, HAL relies on the definition of "**Damage**" in the policy (where it is defined as meaning "*loss or destruction of or damage to the Property Insured*") in support of an argument that "**Damage**" is not confined to physical damage. HAL submits that "*loss*" has a broader meaning than the word "*damage*" and that, in the absence of any relevant exclusion in the policy, "*loss*" extends to the loss of use of the premises or to other non-physical damage suffered.
3. In contrast, Zurich argues that, when the operative language of the business interruption section of the policy is construed in the context of the policy as a whole, it is clear that the policy only responds in respect of business interruption which arises as a consequence of some physical damage to the property insured. Zurich also relies on the relevant factual context in which the policy was put in place. Zurich highlights, in this context, that HAL did not seek cover under any of the relevant business interruption extensions offered by Zurich in respect of its Commercial Combined Policy including extensions which specifically provided cover for business interruption caused by notifiable diseases. Zurich also draws attention to the fact that, at the time the policy was put in place, there were a

number of rival policies available in the market which included extensions (in a variety of forms) which provided cover for business interruption caused by disease (among other things).

4. These proceedings were commenced on 4th March, 2021. HAL initially sought an interlocutory injunction in mandatory terms against Zurich compelling Zurich to provide an indemnity. The proceedings were admitted into the Commercial List on 15th March, 2021. On that occasion, Barniville J. fixed the hearing of the interlocutory application for 18th and 19th May, 2021. However, subsequently, the parties agreed that, instead of spending time on the hearing of an interlocutory application, the court should instead determine the issue of liability on the basis of the facts disclosed in the affidavits exchanged in preparation for the interlocutory hearing. By order of Barniville J. of 30th April, 2021, it was accordingly directed that the hearing of the interlocutory injunction application on 18th and 19th May should be a full and final hearing of coverage liability issues between the parties under the policy on the basis of the existing affidavit evidence. The parties also agreed (and this is reflected in the order of Barniville J.) that the proceedings would be treated 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 Central Bank Framework*").

Relevant facts

5. HAL was incorporated on 29th September, 1972. It is a family-owned company incorporated in order to own and manage the long-established and well-known Headfort Arms Hotel in Kells, County Meath. According to the grounding affidavit sworn by Mr. Vincent Duff on behalf of HAL on 3rd March, 2021, the hotel was built in the mid-eighteenth century as a townhouse for the Headfort family who resided there whilst Headfort House was under construction on their nearby country estate. In 2010, the Headfort Arms won the national gold medal award for best three-star hotel in Ireland. It subsequently achieved four-star status. At the time the policy was put in place, the hotel offered 45 bedrooms, a lounge known as the Headfort Lounge, the Café Therese, the Keltic Bar & Courtyard, the Vanilla Pod Restaurant, the Headfort Spa and the Kenlis Suite Ballroom and Gardens. It is the only hotel in Kells and it offers a social outlet to the local community and also a convenient venue for tourists visiting nearby landmarks such as the Boyne Valley megalithic tombs, Loughcrew Gardens, the ruins of Mellifont Abbey, the Hill of Tara and the site of the Battle of the Boyne. HAL is the largest employer in Kells. At the time of the closure in March, 2020, the hotel employed 139 people.
6. Prior to putting insurance in place with Zurich, HAL had been insured in respect of liability by Aspen Insurance UK Ltd and in respect of material damage by Liberty Mutual. Dolmen Insurance Brokers acted on behalf of HAL in placing insurance with Zurich. The policy (which is described in more detail below) was put in place in respect of the period from 1st October, 2019 to 1st October, 2020. As noted earlier, the policy (reference 01 CCB 4295766) does not contain all of the sections available under the Zurich Commercial Combined Policy document but is confined to five sections, namely "*Material Damage All Risks*", "*Business Interruption All Risks*", "*Money*", "*Glass*" and "*Computer All Risks*".

There are a number of additional endorsements available from Zurich including endorsements BI073 and BI029 which provide cover in respect of notifiable disease, vermin, defective sanitary arrangements, murder and suicide. These are available at an additional premium. However, HAL did not seek cover under either of these endorsements. The premium paid by HAL was €14,512.07.

7. The first cases of COVID-19 in Ireland occurred in March, 2020. On 13th and 14th March, 2020, the office manager of the hotel became extremely ill. She was subsequently diagnosed with COVID-19 and spent seventeen days in hospital. The outbreak on the premises had an impact on other members of staff who became fearful that they too might be infected.
8. On 15th March, 2020, the Government advised that all public houses and bars should close from the evening of 15th March, 2020 until at least 29th March, 2020. Although Zurich contends that the Government advice of 15th March, 2020 did not extend beyond public house use, HAL maintains that, on foot of this advice, the plaintiff closed its premises on the evening of 15th March. It is, however, acknowledged in the statement of claim that the outbreak on the premises and the reaction of staff were also factors in HAL's decision to close. Subsequently, on 27th March, 2020, the Government imposed a national lockdown. This required the closure of all non-essential shops and businesses. These measures were reinforced by the provisions of the Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations, 2020 (S.I. No. 121 of 2020) ("*the 2020 Regulations*").
9. Following the closure, HAL did not immediately make a claim to Zurich under the policy. However, on 1st May, 2020, HAL sent an email to Zurich in which it stated that it wished "*to give notice that it intends to make a claim for losses due to business disruption as a consequence of covid 19 and the governments (sic) request to close our business on march 15th*". Zurich appointed Thornton's Loss Adjustors to investigate the claims.
10. Curiously, while the claim was still under investigation, HAL's broker emailed Zurich to request that the infectious diseases extension should be applied to the policy. The email stated "*please include Infectious Diseases under the BI Section of the above policy with immediate effect if the extension is not already automatically provided*". Zurich responded by email on the same day stating that "*Infectious Diseases Cover is not covered by this policy and nor is it available as an extension*". It appears that between the emergence of COVID-19 as a pandemic and the date of this email, the infectious disease extensions previously available from Zurich were withdrawn from the market. For the avoidance of doubt, I should make it clear that this post-contract conduct on the part of HAL's brokers cannot be taken into account in so far as the interpretation of the policy is concerned. As evidenced by the Supreme Court decision in *Re. Wogans (Drogheda) Ltd.* [1993] 1 I.R. 157, it is well established that post-contract conduct is inadmissible as an aid to the interpretation of a contract.

11. Following investigation of the claim by Thorntons, they were instructed to notify HAL's broker on 19th June, 2020 that coverage of the claim was declined. The relevant notification from Thorntons to HAL to that effect stated:-

"...this Business Interruption cover only operates in the event of Damage occurring at the premises. In the circumstances as described by the Insured there is no Damage and therefore their claim is not covered."

12. The rejection of the claim was not immediately contested by HAL. It was not until 9th February, 2021 that a letter was received from HAL's solicitors asserting a right to coverage and demanding an interim payment. The present proceedings were, thereafter, commenced in March, 2021.

The policy

13. The policy schedule (which, by virtue of para. 1 of the general conditions of the policy is to be read as incorporated in the policy) describes the insured as HAL "t/a *The Headfort Arms Hotel*". The description of its business is given as "*Property Owner*". The period of insurance runs from 1st October, 2019 to 1st October, 2020. Page 1 of the schedule makes clear that the operative sections of the policy are those dealing with material damage all risks, business interruption all risks, money, glass and computer all risks. The same page of the schedule identifies that a number of endorsements apply to all sections of the policy.
14. Page 2 of the schedule provides details of the cover. It identifies the location of the risk as Main Street, Kells, County Meath. With regard to "*Occupancy & Construction Details*", the schedule provides a summary of the business carried on, namely "*hotel incl Spa, Function Room, Bars, Restaurant & Nightclub*". On the same page, details of the sums insured for both the material damage all risks section and the business interruption all risks section are provided. The total sum insured in respect of each element of the buildings, plant and machinery, stock and other items amounts to €18,732,500. This is comprised of ten individual items. The last six of these items appear under the heading "*Miscellaneous*". For completeness, it should be noted that, in the written submission delivered on behalf of HAL, the case was made that "*Miscellaneous*" was itself an individual item which was specifically insured for the sum of €25,000. On that basis, it was submitted that, for example, goodwill would fall within the ambit of this "*Miscellaneous*" category. However, it was very properly conceded by counsel for HAL, in the course of the opening of the case, that this submission was based on a misreading of p. 2 of the schedule and that this aspect of the written submissions was no longer being pursued.
15. Page 2 of the schedule also states that the total sum insured in respect of gross profit for the purposes of the business interruption section of the policy is €4,200,000 and the indemnity period is 24 months. A number of specified endorsements are stated to apply to the material damage section while the business interruption section identifies that endorsement BI046 applies. These endorsements are summarised on the last two pages of the schedule and are not immediately relevant for present purposes.

16. Page 3 of the schedule deals with the limits of liability in respect of the Money section of the policy, and the sums insured under the glass and computer all risks sections. Again, a number of specific endorsements are identified with respect to each of these sections. Counsel for Zurich suggested that, in light of the fact that HAL opted for no more than five sections of the policy and in light of the number of specific endorsements attached to the policy, the policy should be regarded as one which was "*made to measure*" and was "*very far removed from a contract of adhesion*". This proposition was strongly refuted by counsel for HAL who argued that the policy was undoubtedly a standard form contract which was entirely drafted by Zurich and in which HAL had no input into the choice of language used in the policy. This is an issue which is relevant to an argument made on behalf of HAL (as outlined in more detail below) that any ambiguity in the policy should be read *contra proferentem*.
17. The policy document itself runs to 67 pages, not all of which are relevant to the five specific sections which are applicable (together with a number of general conditions) to the cover purchased by HAL. Counsel for Zurich stressed that, unlike the policy considered by the court in *Hyper Trust Ltd v. FBD Insurance Plc* [2021] IEHC 78 ("*FBD (No. 1)*"), the policy was plainly not designed to cater to any specific business sector. It is, therefore, not written with the hospitality sector specifically in mind.
18. There are a number of general definitions which are of importance for the purposes of this case. HAL placed particular emphasis upon the definition of "Damage or Damaged" which appears on p. 5 of the policy. That definition is in the following terms:-

*"The words **Damage or Damaged**, shall mean loss or destruction of or damage to the Property Insured."* (bold in original).

It should be noted that references in the remainder of this judgment to "**Damage**" are intended to refer to this defined term.

19. Counsel for HAL argued that this definition extends to three different means by which the property insured can be adversely impacted, namely "*loss*", "*destruction of*" and "*damage to*". Counsel submitted that each of these are separated by the word "*or*" which they submitted should be read in a disjunctive way. According to counsel for HAL, while "*destruction*" may imply physical damage, "*loss*" does not necessarily carry that connotation. As outlined in more detail below, this interpretation of the definition is strongly contested by Zurich.
20. Zurich has stressed that there is a distinction drawn in the policy between damage to the property insured, on the one hand, and the consequential effect of that damage on the business, on the other. Zurich has highlighted the definition of consequential loss given on p. 5 of the policy in the following terms:-

*"The words **Consequential Loss**, shall mean loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in*

consequence of loss or destruction of or damage to property used by the Insured at the Premises for the purposes of the Business.” (bold in original)

21. Counsel for Zurich placed some emphasis upon the way in which, in contrast to the definition of “**Damage**”, the definition of consequential loss expressly refers to the use by the insured of the insured property. This is one of the factors on which Zurich relies in suggesting that loss of use of the insured property was not intended to fall within the definition of “**Damage**”.
22. The term “*The **Business***” is also defined on p. 5 of the policy by reference to the business described in the schedule. The definition also provides that the term shall include (*inter alia*) “*the ownership use repair decoration and the maintenance of property and premises owned or occupied by the Insured in connection with the Business as described in the Schedule...*”. Counsel for HAL placed some emphasis upon the reference here to the word “*use*” but counsel for Zurich suggested that this is to conflate two separate things which the policy treats differently, namely the property insured, on the one hand, and the use of the property insured for the purposes of the business, on the other.
23. Counsel for Zurich also drew attention to the way in which both the general claims conditions and the general exclusions treat material damage claims differently to consequential loss claims in the nature of business interruption. Counsel highlighted, in particular, para. 4 of the general claims conditions and paras. 1 and 3 of the exclusions. Paragraph 4 of the general claims conditions deals with the making of claims by the insured under the policy. Paragraph 4 makes a distinction between claims made “*in the event of **Damage**...*”, on the one hand, and business interruption claims which arise in consequence of such **Damage**, on the other. Paragraph 4.A(a) addresses the former while para. 4.B addresses the latter. Under para. 4.A(a), the insured is required to do a number of things including the following: -

“Deliver to the Insurer at the Insured’s expense

- (i) *Full information in writing of the property lost, destroyed or damaged and of the amount of **Damage**...* (underlining added).

24. Counsel for Zurich submitted that this requirement is of considerable assistance in assessing the ambit of the meaning of the word “*loss*” used in the definition of “**Damage**”. Counsel highlighted that there is no suggestion in para. 4.A(a) that the insured must give full information of loss of use of property. The requirement is to give details of the loss of property. There is a separate requirement to notify the insurer under para. 4.B. It provides as follows: -

“In the event of any Damage in consequence of which may give rise to a claim is or may be made under the Business Interruption Section of this Policy the Insured shall

- *notify the Insurer immediately*

- *deliver to the Insurer at the Insured's expense within 7 days of its happening full details of **Damage** caused by riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances or malicious persons*
- *with due diligence carry out and permit to be taken any action which may reasonably be practicable to minimise or check any interruption of or interference with the business or to avoid or diminish the loss.*
- *... not later than 30 days after the expiry of the Indemnity Period ... deliver .. particulars of his claim ...*
- *Deliver to the Insurer such books of account and other business books ... as may reasonably be required ... for the purpose of investigating or verifying the claim ..."*

25. Counsel for Zurich also submitted that, when one considers the general exclusions, the same distinction between **Damage** and **Consequential Loss** is maintained. General exclusion 1 expressly states that the policy does not cover "**Damage or Consequential Loss** to any property whatsoever or any loss or expenses whatsoever resulting or arising therefrom..." which is caused by a number of specific circumstances such as nuclear explosions, war, riot, civil commotion or insurrection. Counsel for Zurich submitted that, by such language, the policy plainly treats the damage suffered by the property and any loss flowing from that damage as distinct and separate aspects of cover. Similarly, para. 3 of the exclusions expressly states that the policy does not cover "**Damage or Consequential Loss** in the United Kingdom... other than in Northern Ireland by fire or explosion occasioned by or happening through or in consequence directly or indirectly of **Terrorism**...". In contrast, counsel for HAL suggested that the references to "riot" and "civil commotion" in the exclusions and the references also to "riot, civil commotion, strikers, locked-out workers or persons taking part in labour disturbances" in para. 4.A(a)(ii) of the general claims conditions demonstrated that the policy envisages that there could be cover in cases of non-physical loss. Counsel submitted that while riots might cause damage to the insured's property, it was difficult to see how damage caused, for example, by people refusing to pass pickets would not fall within the type of cover envisaged under that section of the policy. Counsel for HAL also stressed that there was no general exclusion excluding non-physical loss.

The Material Damage "All Risks" Section of the policy

26. Although the present claim is made under the business interruption section of the policy, the material damage section is nonetheless relevant in that there is an interrelationship between the business interruption section and the material damage section. Counsel for Zurich argued that even the description of this section of the policy demonstrated that it is concerned with physical damage to property. He referred, in this context, to the definition of "material" in the Cambridge English Dictionary as "a physical substance that things can be made from". It should be noted, however, that the definition cited by counsel for Zurich related to the definition of the noun "material". In this section of the policy, the word "material" is used as an adjective. The definition in the Cambridge English Dictionary of the adjective is "relating to physical objects or money rather than

emotions or the spiritual world". It, therefore, has a wider connotation than was suggested by counsel for Zurich. That said, for reasons which are addressed in more detail below and which were acknowledged by counsel for Zurich in a different context in the course of the hearing, it is not always helpful to commence a consideration of the meaning of words used in a contractual document by reaching for a dictionary. As Lord Hoffmann emphasised in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 913, while the meaning of words is "a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean". Moreover, it would be wrong, in any event, to attribute undue importance to the heading of this section of the policy. One must look at the terms. The relevant insuring clause is in the following terms:-

*"If any of the Property Insured described in the Schedule suffers **Damage** at the Premises by any cause not herein excluded the Insurer will in accordance with the provisions of the insurance pay to the Insured the amount of loss or at its option reinstate or replace such property provided that the liability of the Insurer under this Section shall not exceed... [certain limits]."*

27. Counsel for HAL stressed that this insuring clause plainly refers to a defined term, namely Damage, and, accordingly, the reference to that term in the clause must be read as incorporating each of the three separate and distinct forms of damage envisaged by the definition which, as outlined above, HAL maintains includes loss and is not confined to physical loss.
28. On the other hand, counsel for Zurich argued that there are a number of a features of the material damage section which demonstrate that it is concerned with physical damage:-
 - (a) Counsel highlighted the reference to the option given by this section of the policy to Zurich to reinstate or replace "*such property*" in lieu of making a payment to the insured. Counsel submitted that it was clear that this section was concerned with physical or material damage and not with loss of use. If, as contended by HAL, "**Damage**" could be interpreted as including "*loss of use*", the insurer could not exercise the option to reinstate which is an express contractual entitlement given to it under this section of the policy. Counsel submitted that this is, almost universally, a term of a material damage policy. He suggested that the HAL's interpretation of "**Damage**" would render this aspect of the policy inoperable. Counsel also referred, in this context, to clause 24 of this section of the policy which addresses reinstatement. Essentially, it provides that the basis upon which the amount payable under the policy is to be calculated is "*the reinstatement of the property destroyed or damaged*".
 - (b) Counsel also drew attention to the specific exclusions which apply to this section of the policy. Counsel submitted that they all reflect damage of a physical nature. He instanced, in this context, exclusion 1.1 which relates to damage caused by or consisting of inherent vice, latent and gradual deterioration, among other matters.

Similarly, exclusion 1.2 relates to damage caused by or consisting of faulty or defective workmanship. He also cited, for example, exclusion 2.1 which excludes damage caused by or consisting of corrosion, rust, wet or dry rot, dampness, vermin and insects. Counsel also referred to exclusion 4.1 relating to damage caused by or consisting of subsidence, ground heave or landslip. I accept that all of the exclusions cited by counsel envisage damage of a physical type. However, I drew attention, in the course of the argument, to the provisions of clause 4.3 which excludes damage caused by or consisting of "acts of fraud or dishonesty". Counsel for HAL also referred to exclusion 4.4 which relates to damage caused by or consisting of "disappearance, unexplained or inventory shortage, misfiling or misplacing of information". Counsel for HAL submitted that both of these exclusions clearly go beyond a scenario involving physical damage. In response, counsel for Zurich suggested that, by reference to case law (discussed in more detail below), permanent deprivation of property falls within the ambit of "loss... of... the Property Insured" within the meaning of the definition of **Damage** in the policy. Counsel suggested that the exclusions in question were directed at permanent loss of the insured property and could not be said to relate to a temporary loss of use of the property as occurred in this case. That is an issue that I will address at a later point in this judgment.

The "Business Interruption "All Risks" Section"

29. There are a number of elements of this section of the policy that must be considered. In the first place, the insuring clause provides as follows:-

*"If **Damage** by any cause not excluded occurs at the Premises to property used by the Insured for the purpose of the Business and causes interruption of or interference with the Insured's Business at the premises.*

*The Insurer will pay to the Insured in accordance with the provisions of this insurance the amount of loss resulting from the interruption or interference caused by the **Damage**."*

30. The insurance clause must be read in conjunction with the proviso (quoted in para. 32 below) which immediately follows together with the exclusions. There are also detailed provisions addressing the calculation of loss. Before addressing the terms of the proviso and some aspects of the exclusions, it should be noted that HAL places significant emphasis on the use of the defined term "**Damage**" used in the insuring clause. Counsel for HAL stressed that this covers each of the three elements of the defined term, namely loss, destruction of the property, or damage to the property insured. Counsel for HAL submitted that, having regard to the use of the defined term, the parties must have intended that the business interruption cover would extend to the entire definition of "**Damage**". In their written submissions, counsel for HAL had also maintained that the reference to "property" in the insuring clause (which is not independently defined) includes not only physical property but also intangible property such as goodwill. They referred, in this context, to the well-known definition given to "goodwill" by Lord Macnaghten in *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd* [1901]

A.C. 217 at pp. 223-224. However, as noted in para. 14 above, the argument that goodwill is insured under the material damage section of the policy was not pursued. In my view, counsel for HAL were entirely correct in not pursuing that argument. It is quite clear from the schedule to the policy that the only items or species of property that are insured are those specifically enumerated there. Goodwill is nowhere mentioned in the schedule and none of the other items of property which are identified could plausibly be construed as extending to goodwill.

31. Counsel for Zurich submitted that the business interruption section is focused on financial loss following physical damage. Counsel also placed significant emphasis on the proviso which immediately follows the business interruption section. This proviso is a fairly standard feature of a business interruption section of a policy of this kind. Such a proviso has been described in *Riley on Business Interruption Insurance*, 10th Ed., 2016, at para. 2.10 as the “*material damage proviso*”. There, *Riley* explains that the commercial purpose of the proviso is:-

“...to ensure that an insured will be in a financial position to make good any damage to their own property, be it buildings or other assets therein. Otherwise, the reinstatement of a business might be delayed or prove impossible and in that event part of the business interruption loss would not be proximately caused by the damage but by the insured’s lack of financial means to rehabilitate the business.”

32. In my view, the explanation given by *Riley* makes sense. The proviso ensures that the cause of the business interruption will be addressed so that the period of interruption (and, in consequence, the insurer’s exposure under this section of the policy) will be minimised. The proviso in this case continues immediately after the insuring clause and without any punctuation to interrupt the flow of the insuring clause. Not all of the proviso is relevant for present purposes. The following seems to me to be the relevant element of the proviso:-

“...provided that

1. *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*

(i) payment shall have been made or liability admitted therefor, or

(ii) payment would have been made or liability admitted therefor but for the operation of a proviso in such insurance excluding liability for losses below a specified amount.

2. *the liability of the Insurer under this Section shall not exceed*

*(i) in the whole the total sum Insured or in respect of any item its sum Insured at the time of the **Damage***

(ii) ...”

33. Counsel for Zurich submitted that the proviso makes very clear that there must be cover in place to cover physical damage. Consistent with the explanation given by *Riley*, counsel for Zurich submitted that the intention of the proviso was to ensure that the cause of the business interruption will be brought to an end as soon as possible. This was particularly important, counsel suggested, in the context of a policy (such as that in place in the present case) which provides for an indemnity period of 24 months. If there was no insurance in place that enabled the rebuilding of the premises (in the event of its destruction), the insured could sit back and do nothing allowing the business interruption to continue for the full period of indemnity. The proviso ensures that there is cover in place and that the material damage insurance will pay out to enable the premises to be rebuilt so as to bring the business interruption cover to an end. Counsel submitted that there has to be cover for the physical damage and such cover is plainly cover other than business interruption cover. Counsel suggested that, if HAL is correct in its submission that loss of use is to be treated as falling within “**Damage**”, it would mean that the loss of use of property would fall within both the material damage and business interruption sections of the policy. Counsel submitted that this goes against the entire structure of the policy and also goes against all of the exclusions in the policy and could never have been within the reasonable understanding of the parties at the time the policy was put in place.
34. Counsel for Zurich also drew attention to the exclusions to the business interruption section of the policy. These follow immediately after the proviso. Counsel for Zurich submitted that the terms of the exclusions are very similar to those which apply in respect of the material damage section save that the policy is careful to refer to “**Consequential Loss**” rather than to “**Damage**”. Counsel submitted that this supports the view that the policy consistently makes a distinction between property damage, on the one hand, and the consequences that flow from such damage, on the other. Thus, for example, exclusion 1 starts off in the following terms:-
- "1. *Consequential Loss caused by or consisting of*
- 1.1 *inherent vice, latent defect, gradual deterioration, wear and tear, frost...*
- 1.2 *faulty or defective workmanship... on the part of the Insured or... employees*
- 1.3 *...*
- 1.4 *...*
- but this shall not exclude subsequent **Consequential Loss** which itself results from a cause not otherwise excluded."*
35. Like exclusion 4.3 in respect of material damage, para. 4.2 of the exclusions to the business interruption section of the policy excludes consequential loss caused by or consisting of “*acts of fraud or dishonesty*”. Similarly, clause 4.4 excludes consequential

loss arising directly or indirectly from “*disappearance, unexplained or inventory shortage, misfiling or misplacing of information*”.

The Money section of the policy

36. Both parties also referred to the Money section of the policy. Counsel for HAL emphasised that in the relevant insuring clause, there is a specific reference to physical loss. The insuring clause commences with the words “*In the event of physical loss or **Damage** to.. Money...*”. By specially referring to “*physical loss*” as an alternative to “**Damage**” (which is defined to include loss), counsel suggested that this reinforces the view that the reference to “*loss*” in the definition of “**Damage**” must include loss of a non-physical nature. Counsel for Zurich, however, argued that, if anything, the reference to “*physical loss*” in this section of the policy demonstrates that the interpretation placed on “*loss*” by HAL is incorrect. Counsel for Zurich suggested that the reason why the adjective “*physical*” is used in the Money section is that “*loss*” is used as a separate element of risk to “**Damage**”. If the word “*loss*” was used on its own in this section of the policy, counsel suggested that it could be argued that economic loss is enough to trigger cover. The relevant insuring clause in the Money section is in the following terms:-

“Money Section

In the event of physical loss or Damage to

(a) *Money*

(b) *safes or strongrooms which normally contain Money caused by theft or attempt thereat*

occurring within the limits of the Republic of Ireland or the United Kingdom the Insurer will indemnify the Insured against such Damage provided that the liability of the Insurer in respect of any Item Insured shall not exceed the specified Limit of Indemnity...”

37. For this purpose, “*Money*” is defined as including cash, bank and currency notes, postal orders, money orders, cheques, banker’s drafts, bills of exchange and a large range of other items including gift tokens. Clearly, each of the items within the definition of “*Money*” comprise physical items which could obviously be lost. It may, therefore, have been unnecessary to use the term “*physical loss*” in the insuring clause. However, it is unsurprising that the policy would wish to make it crystal clear that the money section was not intended to cover the loss of money in a purely economic sense. Such a “*belt and braces*” approach in drafting an insurance policy is not uncommon. As Hoffmann J. (as he then was) observed in *Arbuthnot v. Fagan* [1995] CLC 1396: “*In a document like this ..., little weight should be given to an argument based on redundancy. It is a common consequence of a determination to make sure that one has obliterated the conceptual target. The draftsman wanted to leave no loophole for counter-attack ...*”.

Relevant principles of interpretation

38. The parties were not in dispute as to the relevant principles by reference to which the policy of insurance is to be construed. For this purpose, the parties adopted the summary of the relevant principles previously given in *Brushfield Ltd t/a The Clarence Hotel v. Arachas Corporate Brokers Ltd* [2021] IEHC 263 at para. 110. That summary of the principles was derived from a number of Supreme Court authorities which are identified in para. 109 of the judgment in the *Brushfield* case. For convenience, the principles can be restated as follows:-
- (a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;
 - (b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;
 - (c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;
 - (d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;
 - (e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document if considered in isolation. As Lord Hoffmann explained in the *Investors Compensation Scheme* case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and, as noted in sub-para. (c) above, it is also necessary to consider the relevant factual and legal context;
 - (f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;
 - (g) As O'Donnell J. made clear in the *MIBI* case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the

prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-

"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.";

- (h) In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the *contra proferentem* rule. This principle was affirmed by the Supreme Court in *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274 and in *Emo Oil Ltd v. Sun Alliance & London Insurance plc* [2009] IESC 2. In the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, "usually be an approach of last resort" albeit that he also stated that it may be "more readily resorted to in respect of routine standard form commercial insurance policies". Later, in *Danske Bank v. McFadden* [2010] IEHC 116, Clarke J. (as he then was) explained the *contra proferentem* principle as follows, at paras. 4.1 to 4.2:-

"4.1 The... contra proferentem rule is... only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question..."

4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: The Law of Insurance Contracts, 5th Ed.,... at para. 15-5:-

"In the past some courts were quick to find ambiguity in policies of insurance in order to apply the canon of construction contra proferentem, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentem ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First, there must be genuine ambiguity."";

- (i) Where an insurer seeks to rely upon an exemption clause or exclusion clause in a policy, the insurer will bear the onus of establishing that the relevant exclusionary exemption applies. This was treated by the Supreme Court in *Analog Devices* as a separate principle to the *contra proferentem* rule. At pp. 283-284, Geoghegan J. explained the position as follows:-

"The second important general principle in relation to exclusions is that the onus is on the insurer to establish the application of the exclusion or exemption. Counsel for the plaintiffs cite in their written submissions... a passage from the judgment of Hanna J. in General Omnibus Co Ltd v. London General Insurance Co Ltd [1936] I.R. 596 which is in the following terms, at p. 598:-

"The first defence depends upon the interpretation and construction of the exclusions or exceptions as stated in exemption (e). The policy starts by giving an indemnity in general terms and then imposing exceptions. The law is that the Insurance Company must bring their case clearly and unambiguously within the exception under which they claim benefit, and if there is any ambiguity, it must be given against them on the principle of contra proferentes."

On appeal the Supreme Court took a different view on the interpretation of the policy but it was not suggested that the general principle stated by Hanna J. was incorrect. In the same written submissions there is a passage from the standard work Ivamy, General Principles of Insurance Law (6th ed.) which is worth quoting... at p. 286:-

"Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness. It is the duty of the insurers to accept their liability in clear and unambiguous terms."

- (j) In the case of an insurance policy, it is also well settled that the use of words such as "as a result of" or "resulting from" are ordinarily construed as connoting proximate cause. This is consistent with the provisions of s. 55(1) of the Marine Insurance Act, 1906 ("the 1906 Act") which provides that, in the absence of an indication to the contrary in the terms of the policy, the insured must prove that his or her loss was proximately caused by an insured peril. Section 55 (1) states:-

"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

The meaning of "proximate cause" was explained as follows by Maguire C.J. in *Ashworth v. General Accident Fire and Life Assurance Corporation* [1955] I.R. 268 at p. 289:-

"...proximate cause has a special connotation in marine insurance cases. It does not mean the cause nearest in time. The cause which is truly proximate is that which is proximate in efficiency..."

In that case, the Supreme Court adopted the approach taken by the House of Lords in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd* [1918] AC 350 where Lord Shaw explained at p. 369 that proximate cause was not to be construed in a temporal sense. He said:-

"What does "proximate" here mean? To treat proximate as if it was the cause which is proximate in point of time is... out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

39. While each of the above principles must be borne in mind, the overall approach of the court to the interpretation of any contract (including a policy of insurance) is to apply what Clarke C.J. has described as the "text in context" approach. That requires consideration both of the terms of the contract as a whole and the relevant factual and legal background against which the contract was put in place. Insofar as the context or background is concerned, counsel for HAL has submitted that the nature of the business carried on by HAL is clearly relevant. Counsel stressed that this involves the presence of members of the public on the premises. Counsel observed that the nature of HAL's business is that of a:-

"high footfall business in terms of the volume of people coming in. That applies to both the restaurant element of the business as well as to the spa and the nightclub element... where people congregate in different ways."

I accept that the nature of the business carried on by HAL is a relevant element of the factual background against which the meaning of the policy is to be assessed. However, it is also important to bear in mind that this policy (unlike, for example, the FBD policy the subject of *Hyper Trust Ltd v. FBD Insurance Plc* [2021] IEHC 78) was not written specifically with the hospitality industry in mind. In my view, that is also a relevant element of the factual background. Counsel for HAL also submitted that the susceptibility of the hospitality industry to public health measures (either at a local or a national level) is relevant. However, while I accept that the susceptibility of the hospitality industry to such public health measures is a relevant consideration in this context, I do not believe that it significantly assists the interpretation of the policy urged by HAL. If anything, it may undermine the case which HAL seeks to make. This is particularly so in circumstances where, as counsel for HAL correctly acknowledged, the availability in the Irish market of specific infectious disease extensions in policies of this kind is also a very relevant element of the factual matrix. This includes, of course, the specific extensions which were available from Zurich at the time the policy was put in place. It also includes the rival policies available on the market several of which contained extensions providing cover, in certain specified circumstances, for business interruption arising from outbreaks of infectious disease or analogous situations.

40. Counsel for HAL also submitted that the “*reputational element of the hospitality trade*” is something that should “*be factored into the factual matrix in terms of the recognition... that goodwill can represent a proprietary asset*”. However, as previously noted, goodwill is not a species of property which is insured under the material damage section of the policy. The opening words of the material damage section make this clear. The opening words are confined to damage to “*any of the Property insured described in the Schedule*”. As noted in para. 30 above, goodwill is nowhere described in the schedule and, as outlined in para. 14 above, counsel for HAL has very properly withdrawn the argument previously made on HAL’s written submissions at “*goodwill*” could be said to fall under the “*Miscellaneous*” heading on p. 2 of the schedule. I, therefore, do not believe that there is any basis upon which one could plausibly suggest that the susceptibility of a hotel business to reputational damage as a consequence of a closure order could be said to be a relevant element of the factual background to the policy in this case that might assist the interpretation of the policy advocated by HAL.
41. As noted in paras. 38 (c) and 39 above, in addition to the factual background, the legal context is also relevant. The relevant legal context can include an established construction of a standard provision of a commercial agreement. As Lord Bridge said in *The Chikuma* [1981] I W.L.R. 314: “*the ideal at which courts should aim, in construing such clauses, is to produce a result that, in any given case, both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer ... and neither of them will be tempted to embark on long and expensive litigation The idea may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles and steadfastly refuse to be blown off course by the supposed merits of individual cases*”. That said, this principle must not be applied in an automatic or unthinking way. The fact that a formula of words in common use in a particular species of contract is included by the draftsman in an individual contract does not necessarily mean that it must be given a precisely similar interpretation in that contract. In accordance with the principles outlined in para. 38 above, the meaning to be given to the words used must always be interpreted in light of the contract as a whole and in light of all other relevant aspects of the background.

Interpreting the Zurich policy

42. Bearing the matters discussed in paras. 38 to 41 above, it is necessary to consider the terms of the policy, approaching the matter in an entirely objective way by reference to the meaning which the terms of the policy would convey to a reasonable person having all of the background knowledge outlined above. Before doing so, I should address the dispute which exists between the parties as to whether, for the purposes of the application of the *contra proferentem* principle, the policy should be considered to be a contract of adhesion. While I accept that there was an element of choice in the decision taken by HAL in relation to the ambit of cover available under the Commercial Combined Policy and the extensions offered by Zurich, I cannot agree that the policy should be considered to be a “*made to measure*” contract as submitted by counsel for Zurich. The reality is that every term of the policy was drafted by Zurich. There is no suggestion that HAL had any input in the drafting of the language in those parts of the policy which are

operative in this case. In the circumstances, I believe that the policy is properly characterised as a standard form policy such that the principle summarised in para. 38 (h) above applies. In other words, if there is any genuine ambiguity a term of the policy, that ambiguity will be construed in favour of HAL and against Zurich. As Kingsmill Moore J. observed in *Re Sweeney and Kennedy's Arbitration* [1950] I.R. 85 at p. 99 (in turn, expressly approved by the Supreme Court in *Analog* at pp. 282-283):-

"The wording of the... policy was chosen by the underwriters... If, then, they choose to adopt ambiguous words it seems to me good sense, as well as established law, that those words should be interpreted in the sense which is adverse to the persons who chose and introduced them... There is no justification for underwriters, who are carrying on a widespread business and making use of printed forms either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language. Any competent draughtsman could carry out the intention which [counsel] imputes to this document..."

43. That said, it is very important to bear in mind that, as noted in para. 38 (h) above, the Supreme Court in *Emo Oil Ltd v. Sun Alliance and London Insurance Plc*, the *contra proferentem* principle will "usually be an approach of last resort" in commercial cases although it may be "more readily resorted to in respect of routine standard form commercial insurance policies". As also noted in para. 38 (h), it has also been clarified in *Danske Bank v. McFadden*, at para. 4.1, that the principle is only to be applied where other rules of construction fail.
44. Having set out the relevant principles, and having identified the only elements of the background which have been suggested to be relevant, I now turn to the terms of the policy as a whole.
45. The definition of "**Damage**" has already been set out in full in para. 2 above. General condition 1 of the policy makes clear that any word to which a specific meaning "*has been attached in any part of any Section shall bear such meaning wherever it may appear in such Section*". That might suggest that the meaning to be attributed to the word "**Damage**" might be different depending on which section of the policy is under consideration. However, I do not believe that such an interpretation is reasonably open in light of the general definition given to the word "**Damage**" on p. 5 of the policy. Each of the general definitions given on p. 5 appear to be designed to explain the meaning of the terms there defined wherever those terms appear in the policy. It seems to me that general condition 1 does not undermine this view. General condition 1 obviously deals with cases where specific meanings are attached to words or expressions used in a particular section of the policy which have not been defined in the general definition. Thus, for example, clause 18 of the clauses applicable to the material damage section of the policy makes clear that the insurance on buildings and machinery and plant extends to include items tanks, flues, pipes, ducting, tunnels and other similar property. Thus, in

the material damage section of the policy, the references to buildings and machinery and plant must be read in that way.

46. In circumstances where, in my view, general condition 1 does not apply to the definition of "**Damage**", it must follow that that term must be interpreted in the same way wherever it appears in the policy unless, of course, there is something in the context of a particular provision of the policy which clearly suggests otherwise. Thus, subject to identifying any such provision, the references to "**Damage**" in either the material damage section of the policy or the business interruption section of the policy must be read as meaning "*loss or destruction of or damage to the Property Insured*". There is no definition of "*loss*" or of "*destruction*" or of "*damage*" (when used with a lower case "d"). However, it is important, in my view, to have regard to the straightforward syntax used in the definition of "**Damage**". That syntax makes clear that none of the terms "*loss*", "*destruction*" or "*damage*" is intended to be read as a freestanding concept. The language shows that each of them is used in a way that relates them to the property insured. Thus, in the case of the word "*damage*", it must be read with the words: "*to the Property Insured*". The preposition "to" is clearly used in the context of the noun "*damage*". Thus, to the extent that "*damage*" (with a lower case "d") is used in the definition of "**Damage**", it is not intended to refer to damage in a self-standing sense but solely to damage the property insured. Similarly, with regard to the words "*loss*" and "*destruction*", the use of the preposition "*of*" must be borne in mind. That preposition plainly relates to both the noun "*destruction*" and the noun "*loss*". Just as "*damage*" is not intended to be a self-standing concept, the references to "*loss*" and "*destruction*" refer, respectively, to the loss of the "*Property Insured*" or destruction of the "*Property Insured*". On the basis of the syntax used in the definition, that seems to me to very clearly be the intention of the definition of "**Damage**".
47. Of course, as all of the case law demonstrates, one cannot look at any provision of a contract in isolation. Each provision must be considered in the context of the contract as a whole. However, in the absence of any other aspect or feature of the policy which suggests the contrary, it seems to me that the plain effect of the definition of "**Damage**" is that it covers three things, namely (a) loss of the property insured, (b) destruction of the property insured and (c) damage to the property insured. In turn the definition must be read with the very specific description of the property insured contained in the schedule – i.e. the buildings, plant and machinery, stock debris removal, fire brigade charges, food, wine, spirits, cigarettes, general stock, client personal effects, employers' personal effects and the generator. Loss of, destruction of, or damage to any of these specific items constitute "**Damage**" within the meaning of the policy.
48. Counsel for Zurich has strongly argued that the word "*loss*" as used in the definition should be read consistently with the words "*destruction of ... the Property Insured*" and "*damage to the Property Insured*". I agree that the words "*loss ... of the property*" should be read in context and that, read in that way, the words are coloured to some extent by the words that surround them. But I do not believe that those words can plausibly be read solely as a synonym for "*damage to the Property Insured*" or "*destruction of ... the*

Property Insured". It seems to me that the concept of the loss of the insured property is capable of having a different meaning to either destruction of or damage to the property. This is particularly so when one considers the range of items of property described in the schedule such as stock and personal effects. The definition of "**Damage**" appears to me to be designed to capture the range of events by which the items listed in the schedule can suffer some form of impairment capable of giving rise to a claim. One can readily see that items such as stock or personal effects could well be lost in a number of ways without suffering any form of physical damage or destruction. Stock and personal effects could be lost by disappearing from the premises or by being swept away in a flood (in circumstances where it was not possible to prove that they had suffered physical damage in the flood). I do not think that there could be any controversy that, in such circumstances, there would have been a loss of the insured property within the meaning of the definition of "**Damage**" even where there is no proof of physical damage or destruction. Absent an appropriate exclusion, such loss would be covered by the material damage section of the policy.

49. For completeness, before leaving the definition of "**Damage**", I should address the submissions made on behalf of HAL in which particular focus was placed on the use of the word "loss" as though it were a freestanding concept divorced from the other words used in the definition. Counsel for HAL submitted that the natural and ordinary meaning of the word "loss" extends to loss of use and that it is therefore capable of extending not just to loss of items of personal property but also to loss of use of items of real property such as the hotel. I do so subject to the caveat that, as outlined above, it seems to me that it is wrong to consider the meaning of that word on its own. I reiterate that the definition is concerned with "loss... of... the Insured Property" which, as previously noted, refers to the property described in the policy schedule.
50. In canvassing for a broad meaning to be given to the word "loss", counsel for HAL placed some reliance on an observation made by Asher J. in the New Zealand Court of Appeal in *Kraal v. Earthquake Commission* [2015] NZCA 13 where he said:-
- "38. The word "loss" has a broader meaning than the word "damage". When used as a noun it is not in its dictionary definition normally associated with the word "to" (although it can be), but is often coupled with "of". It carries as a particular meaning the concept of deprivation of a thing. The word "loss" is broad enough to cover conceptually what has happened to Ms Kraal, in the sense that she had suffered a loss, namely the ability to use her property, and other associated losses. However, the definition refers to loss "to the property", and not loss to the insured person."*
51. It is important to consider para. 38 of the judgment of Asher J. in context. While Asher J. clearly acknowledged that the word "loss", when used on its own, has a broader meaning than the word "damage" and extends to loss of use of property, it is clear from his judgment as a whole, that the New Zealand Court of Appeal was concerned to consider the meaning of the word "loss" in the broader context of the relevant statutory provision

in which it was used (the case being concerned with statutory rather than contractual interpretation). It also emerges from the judgment that, although Asher J., in para. 38 of his judgment, suggested that the inability of the plaintiff to use her property might constitute a "loss" of her property if the meaning of that word were considered in isolation, the loss of use suffered by the plaintiff was not some temporary loss but, in reality, a permanent loss of the property. As earlier case law (examined below) makes clear, a permanent loss of property (or something approaching such a loss) – in contrast to a temporary deprivation of property – has long been regarded as a "loss" for the purposes of property insurance.

52. *Kraal* was concerned with a New Zealand statute which required that every policy of fire insurance of residential buildings should, by law, extend to cover against "natural disaster damage" for the replacement value of the building. For this purpose, the statute defined "natural disaster damage" as meaning (*inter alia*) "any physical loss or damage to the property occurring as the direct result of a natural disaster". In turn, a "natural disaster" was defined as including an earthquake. In that case, a severe earthquake occurred near the plaintiff's home. The home was not destroyed by the earthquake but, following the quake, it was condemned as unsafe. The plaintiff was required to leave the property by order of the local authority made under civil defence emergency powers. There was a concern that the property would be subject to rock falls and the possibility to a collapse of a nearby cliff. The order requiring the plaintiff to leave the property was made in March, 2011. A seismic profile was undertaken which did not anticipate a reduction in risk to pre-earthquake levels until 2021. Even then, the profile suggested that the risk from rock fall might be of such an order of magnitude that it was possible that the order prohibiting the occupation of the property would be continued beyond 2021. The evidence was that, as a consequence, the plaintiff had abandoned any hope of moving back into the property and had since purchased another home. Thus, the case was not concerned with a temporary loss of use of the property. Instead, it was concerned with what was, in substance, a permanent loss of property. The observations of Asher J. in para. 38 of his judgment about the plaintiff's "ability to use her property" must be seen in that light. The extent of the loss of use in that case was very similar to a total loss of property. Against that backdrop, I do not believe that the observations made by Asher J. (on which counsel for HAL has sought to rely) are directly relevant to the closure of the hotel in this case which was temporary in nature.
53. Significantly, the plaintiff's claim failed in *Kraal*. Asher J. took the view that the word "loss" must be read in context and that, when read in that way, it clearly pointed to loss of a physical nature. In reaching that conclusion, Asher J. drew attention to the use of the adjective "physical" and to the way in which the word was used in close conjunction with "damage". He explained that there are some circumstances where, even in the context of a physical impact, "loss" is an appropriate word to describe what has happened. At para. 39, he said:-

"We see the word "loss" ... as having a belts and braces purpose... there will be cases where "loss" is the more natural word to apply, even when the event is of a

physical nature. Thus, if a house or land is swept away in a tsunami or lahar flow it is physically "lost". In our view the word "loss" in the context of the definition can be seen as adding, to the concept of damage, the concept of total destruction. Both involve a physical event happening to the building."

54. That said, Asher J., in para. 41 of his judgment, drew a distinction between "loss... to the property" and "loss... of the property". He took the view that the use of the preposition "to" clearly signified that "it is loss or damage that reaches and touches the house and not loss or damage to objects other than the property, such as the insured person or that person's enjoyment of the property, that is covered". In the same paragraph, he contrasted the effect of the use of the preposition "to" with the effect the use of the preposition "of" might have. He said:-

"It was open to those who drafted the definition if they wished to cover loss in its broadest sense to use the phrase loss "of" the property, and to avoid prescriptive words such as physical. But they did not do so. They specified "physical" loss "to" the property."

55. Although HAL has not highlighted this aspect of the judgment of Asher J., it is clear from this passage that the New Zealand Court of Appeal regarded the phrase "loss of property" as having a broad meaning. I should, therefore, bear this in mind in considering the meaning to be attributed to the policy provisions. I must also bear in mind that, as counsel for HAL emphasised, the word "loss" in the text considered in Kraal was expressly qualified by the adjective "physical" which is wholly absent in the definition of "**Damage**". That said, it is also necessary to bear in mind that, as noted above, the observations made by Asher J. must be seen against the backdrop of the facts of that case where, in substance, the plaintiff had been permanently deprived of the use of her property as a consequence of the relevant closure order. The observations were also made in the context of an issue that arose solely in relation to real property. While Asher J was able, in the passage quoted in para. 53 above, to identify two circumstances (particularly relevant to phenomena experienced in New Zealand) where a property such as a house could be said to be "lost", the word "loss" is not often used in the context of such a property. That issue does not arise with the same force in the present case. The use of the word "loss" in the Zurich policy is more readily understood in the context of the range of property covered by the policy which, as previously noted, can more easily be envisaged to become lost such as stock, wines, spirits, cigarettes and personal effects.
56. In the context of the Zurich policy, it is striking that the definition of "**Damage**" makes no express reference to loss of use of property. As noted above, counsel for Zurich has stressed that the definition of "**Damage**" should be contrasted with the definition of "**Consequential Loss**". The relevant definition has been set out in para. 20 above and it is unnecessary to repeat it here. Notably, in contrast to the definition of "**Damage**", the definition of "**Consequential Loss**" expressly refers to the concept of the use of the property by the insured. What is covered within the definition is loss resulting from interference with the business carried on by the insured at the premises "in consequence

of loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business". That definition clearly envisages that there could be an interference with the business carried on at the premises in consequence of loss of property used by HAL at the premises. That seems to me to make a distinction between loss of property, on the one hand, and the use made of the property (i.e. the carrying on of the hotel business), on the other. It raises a question as to whether the reference to "loss... of... property" could, of itself, include loss of use of that property. The definition of "**Consequential Loss**" appears to be concerned with the inability of the insured to use some element of the insured property as a consequence of something which has happened to that property either by way of loss of the property, destruction of the property or damage to the property. The loss or destruction of the property or the damage to the property is what triggers the consequential loss. Thus, the policy appears to draw a distinction between the event that gives rise to the impairment of the item of property, on the one hand, and the consequences that flow from it, on the other.

57. As noted in para. 23 above, counsel for Zurich also relied on general claims condition 4 in support of Zurich's case that "loss" within the definition of "**Damage**" does not include loss of use of the property. General claims condition 4A(a) addresses the steps the insured must take in the event of "**Damage**" – i.e. where the insured has a basis for making a material damage claim. Among the steps which the insured is obliged to take is to deliver to Zurich "full information in writing of the property lost destroyed or damaged and of the amount of Damage". Counsel highlighted that there is no reference here to loss of use of property. Consistent with the definition of "**Damage**", this provision speaks solely of the loss or destruction of the property (or damage to it) itself rather than loss of use. This seems to me to be an important consideration. Had it been the intention of the policy that loss of use of property would fall within the ambit of the definition of "**Damage**", one would expect to see a specific requirement in condition 4A(a) that full information in relation to such loss of use should be furnished to Zurich.
58. The relevant terms of the business interruption section of the policy have already been set out in paras. 29 and 32 above and it is unnecessary to repeat them here. In order to come within the business interruption cover available under this section of the policy, HAL must prove the following:-
- (a) In the first place, it must be proved that **Damage** (as defined previously) has occurred at the premises "to property used by the Insured for the purposes of the Business...". Counsel for HAL, at one point, sought to argue that the use of such a broad term as "property" in this part of the policy must mean that it is intended to cover both tangible property and also intangible property such as goodwill. Counsel emphasised that there is no definition of "property" in this section of the policy and that, in its natural and ordinary meaning, the word is sufficiently broad to cover both tangible and intangible property. However, that argument overlooks the existence of the proviso (quoted in para. 32 above). The proviso makes clear that the property in question must be covered by material damage insurance and the only such insurance which exists is that set out in the material damage section of

the policy. There can be no dispute that the nature of the property insured under the material damage section of the policy is confined to the property listed in the schedule. Goodwill is not listed in the schedule and, therefore, is not covered. As a consequence, the reference to "*property*" in this part of the business interruption section of the policy does not assist HAL. However, there is one further element of the language used here which should be noted, namely the use of the preposition "*to*". For this section of the policy to apply, there must be Damage caused "*to property*" used by the insured. The observations of Asher J. in *Kraal* at para. 41 are very relevant. As he explained in that paragraph, the preposition "*to*" relates to what is reached, approached or touched. That seems to me to coincide with the ordinary meaning of the preposition. As Asher J. explained, the use of the preposition suggests that it is damage that reaches and touches the property insured – not the insured's enjoyment of the property – that is covered.

- (b) Secondly, the insured must prove that the **Damage** arose by a cause which is not excluded under the policy. There was considerable debate at the hearing in relation to the exclusions both to the business interruption section and the material damage section of the policy in support of the respective contentions of the parties. I will return to the subject of the exclusions in more detail below.
- (c) Thirdly, the **Damage** to the property used by the insured must cause an interruption of or interference with the insured's business at the premises.
- (d) Fourthly, as the proviso makes clear, there has to be, at the time that the **Damage** occurs, material damage insurance cover in place with payment having been made or liability admitted. As outlined in para. 31 above, the purpose of that proviso (as explained by *Riley*) is to ensure that the damage to the property will be repaired so as to stem the ongoing loss of business with a view to minimising the time period for which the insurer will be liable to indemnify the insured in respect of the business interruption. In addition, this requirement highlights the distinction between the material damage cover, on the one hand, and the business interruption cover, on the other. While the latter could be said to be complementary to the former, they both cover separate species of loss suffered by the insured. The material damage section of the policy is intended to deal with what has happened to the property of the insured while the business interruption section is intended to address the consequences of what has happened to the property to the extent that the business of the insured is interrupted or interfered with, as a consequence. Counsel for Zurich strongly made the point that, if the case made by HAL is correct as to meaning of "**Damage**", the fact that the same definition is used in both sections of the policy must inevitably mean that the loss of use of property could constitute loss under both sections. Counsel submitted that this goes against the structure of the policy which is plainly intended to provide two separate species of cover namely material damage cover and business interruption cover arising from such damage. Counsel argued that this is the very obvious commercial purpose of

the policy considered as a whole. In my view, there is considerable force to that submission.

59. In addition to the use of the preposition "to" in the opening words of the business interruption section of the policy, there are two further features of the business interruption section which assist in understanding what the policy was intended to cover:-
- (a) In the first place, the language used in para. 1 of the proviso is interesting. It requires that there should be insurance in place covering "*the interest of the Insured in the property...*" (emphasis added). To my mind, this strongly suggests that what is in contemplation here is insurance relevant to physical property. It does not refer to or use language consistent with use of the property;
 - (b) The exclusions are also relevant. There are nine exclusions in total. Seven of those explicitly address **Consequential Loss** rather than **Damage**. The observations made above in para. 56 in relation to the definition of consequential loss should be borne in mind. It is true that two of the exclusions (namely exclusion 3 and 5) do not refer explicitly to **Consequential Loss** but simply to "loss". However, both of these exclusions are still concerned with losses which result from particular types of damage and, in my view, they are not inconsistent with the scheme of this section of the policy which is essentially concerned with losses which flow from **Damage** to property used by the insured for the business which is insured under the material damage section of the policy. This underscores the point made by counsel for Zurich that it is the business interruption section of the policy that is concerned with loss of use.
60. As explained in para. 58 (a) above, there can be no claim under the business interruption section of the policy unless there is **Damage** to property used by the insured which in turn is covered by the insurance available under the material damage section of the policy. It is, therefore, necessary to consider the relevant terms of the material damage section. Insofar as relevant, the insuring clause covering material damage has been quoted in para. 26 above. The clause will apply where any of the property described in the schedule suffers **Damage** (as defined) by any cause which is not excluded. As noted previously, counsel for Zurich has highlighted that, under the terms of the insuring clause, Zurich has the option either to pay to the insured the amount of its loss or "*at its option reinstate or replace such property...*" subject to certain limitations which are not immediately relevant. Counsel for Zurich submitted that, if loss of use of the insured property fell within the ambit of **Damage**, the clause could not operate in accordance with its terms in that the insurer could not exercise its right to reinstate. Counsel accordingly argued that the interpretation of the policy urged by HAL would make the option expressly given to the insurer inoperable. Again, I believe that there is considerable force in the submission made by counsel for Zurich. The right given to insurers in this context is not qualified in any way. It is clearly intended to apply in respect of "*any of the property insured ... in the Schedule..*" (emphasis added) suffering "**Damage**". That must mean that it can be exercised whenever any of that property is

lost, damaged or destroyed. This strongly suggests that “*loss ... of ... property*” was not intended to extend to loss of use of that property.

61. As noted in para. 28 (b) above, counsel for Zurich also placed significant reliance on the exclusions to the material damage section. He suggested that each of them was concerned solely with physical damage. Thus, for example, exclusion 1.1 deals with inherent vice, latent defect, gradual deterioration, wear and tear, frost and other types of physical damage. Exclusion 1.3 deals with the bursting of a boiler. Exclusion 2.1 deals with corrosion, rust, wet or dry rot and similar dangers to property. Exclusion 2.4 deals with matters such as leakage, failure of welds, cracking, collapse or overheating of boilers. However, as noted in para. 28(b), there are some exclusions which, on their face, could be said to go beyond physical damage. These include exclusion 4.3 “*acts of fraud or dishonesty*” and exclusion 4.4 “*disappearance, unexplained or inventory shortage, misfiling or misplacing of information*”. Counsel for HAL submitted that, plainly, neither of the risks identified in exclusions 4.3 and 4.4 involved any physical damage. While counsel for Zurich argued that these exclusions are aimed at losses in the sense of permanent deprivation of property, counsel for HAL contended that this was a “hopeless” argument in that, for example, fraud could involve matters that involve no deprivation of property such as falsification of records or abuse of trade secrets. Counsel for HAL was obviously correct in suggesting that fraud or dishonesty (if read in isolation), could extend to circumstances such as falsification of records or abuse of trade secrets. However, those words cannot be considered in isolation. They must be read in the context of the material damage section, as a whole, and of the policy, as a whole. When read in that way, I do not believe that exclusions 4.3 or 4.4 were intended to cover matters such as falsification of records or abuse of trade secrets. There was no need to exclude such matters in circumstances where it is clear from the material damage section of the policy that cover would not be available in respect of such risks even if there were no exclusion of the kind described in exclusions 4.3 and 4.4. In my view, the material damage section of the policy is clearly concerned solely with circumstances where the property insured (as described in the schedule) suffers **Damage** (as defined). Thus, the section would only apply where there is either a loss or destruction of the property listed in the schedule or damage to that property. It, therefore, appears to me to be clear that exclusions 4.3 and 4.4 are dealing with circumstances where there is a loss of the insured property as a consequence of acts of fraud or dishonesty (for example, where cigarettes or drink on the premises are stolen by customers or members of staff) or where (in the case of exclusion 4.4) some of the property insured (again most likely stock) has disappeared in unexplained circumstances. However, that does not resolve the question at issue in these proceedings as to whether loss requires permanent deprivation of the insured property or whether it would also include circumstances where the property is unavailable to the insured for a period of time preventing the insured from using the property for that period. That is the issue to which I now turn. There are a number of English authorities that are relevant in this context.

The English authorities

62. In *FCA v. Arch Insurance* [2021] 2021] UKSC 1, the U.K. Supreme Court has recently addressed the interpretation of a wide range of business interruption insurance policies in the specific context of the COVID-19 pandemic. In that case, like *FBD No. 1* in this jurisdiction, the policies in issue were more obviously referable to the impact of a pandemic or to Government measures taken in response to such a pandemic than the Zurich policy here. It is not surprising in the circumstances that very little reference was made by either side, in the course of argument, to the approach taken in the *FCA* case. However, counsel for Zurich submitted that there is a long line of English authority which is directly relevant to the interpretation of the meaning of "loss" of property in an insurance context. Counsel submitted that this line of authority establishes that "loss" in the context of a material damage section of a policy usually means permanent deprivation of property or something substantially similar. Counsel referred, in this context, to the recent decision in *TKC London Ltd v. Allianz Insurance Plc* [2020] EWHC 2710 (Comm). That case concerned very similar facts to the present case and a policy which was also quite similar in its terms to the present case and where the deputy judge held, by reference to earlier authority and to the terms of the policy as a whole, that temporary loss of use of property was not covered.

63. In the *TKC* case, the plaintiff was insured by Allianz under a "Commercial Select" policy which included business interruption cover. The plaintiff operated a café restaurant known as the Kensington Creperie in London. With effect from 21st March, 2020 until 4th July, 2020, the café was closed in response to measures introduced by the British Government to address the COVID-19 pandemic. The plaintiff made a claim under the business interruption section of the policy and this was declined by Allianz on the basis that the policy did not respond to a closure of that kind. The business interruption section of the policy provided cover for business interruption by any "Event" (as defined). Subject to the use of the additional word "accidental" an "Event" was defined in very similar terms to "Damage" in the Zurich policy as:-

"Accidental loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business"

Similar to the Zurich policy, the Allianz policy provided that the insurer would pay to the insured any claim for business interruption provided that, at the time of any "Event", there was insurance in force covering the property at the premises against such "Event". Furthermore, similar to the present case, the material damage section of the policy provided cover for buildings, contents, stock and certain other items described in the schedule. The exclusions from cover were also very similar to those in the Zurich policy here.

64. There was no specific cover for the impact of infectious disease but the plaintiff made a claim under the business interruption section of the policy on the basis that it had suffered a loss of use of the premises as a result of the forced closure by order of the Government. Thus, the basis for the claim is also very similar to that advanced by HAL here. It was argued that the words "loss... of... property" in the policy included a

temporary loss of use of that property. Again, that is very similar to the argument made on behalf of HAL in this case. It was also argued that the deterioration of the restaurant stock during the period of closure constituted a loss of property.

65. In his judgment, the deputy judge accepted the submission made on behalf of the plaintiff that a generous construction should be given to the policy with regard to the extent of coverage. However, he also observed, at para. 107 of the judgment that this could not "*however, on its own justify giving a strained or unnatural construction to the words of the Policy*". In para. 110, the deputy judge rejected the argument that the deterioration in stock caused any relevant interruption or interference with the plaintiff's business. He observed that the deterioration of the stock during the period of closure did not cause the business to be interrupted or interfered with. It occurred at a point at which the business was already closed as a result of the government measures. It was, thus, a consequence of the interruption or interference, not its cause. Counsel for Zurich correctly observed that this would be equally relevant to the alternative argument previously advanced on behalf of HAL (but no longer pursued) in relation to goodwill. Any damage to the goodwill of HAL did not cause the business interruption. It arose as a consequence.
66. The deputy judge also rejected the argument made on behalf of the plaintiff that loss of property extended to a temporary loss of use of property. Given the similarity between the Zurich policy and the Allianz policy in issue in the TKC case, it is worth quoting the findings of the deputy judge in some detail. Before doing so, it should be noted that counsel for HAL sought to distinguish the relevant definition of "*Event*" in the Allianz policy on the basis that it includes the use of the word "*accidental*". That might appear, at first sight, to be important. However, I do not believe that this creates a significant point of distinction. In my view, counsel for Zurich was correct in his submission that the inclusion of the word "*accidental*" only renders explicit that which is implied by law in any event. In support of this submission, counsel for Zurich referred to the decision of Kelly J. (as he then was) in *Analog Devices B.V. v. Zurich Insurance* (High Court, Unreported, 20th December, 2002) in which Kelly J. adopted the following passage from Clarke "*The Law of Insurance Contracts*" (3rd Ed., 1997, para. 17-3) as a correct summary of the law in this jurisdiction, where the author said:-

*"All risks cover does not mean cover literally against all risks. First, there is a practical limit to those risks to which the particular subject matter in its particular location is exposed... Second, there is usually a contractual limit; an all risks policy usually contains an express exception of particular risks. **Third, there is a conceptual limit: English law imposes limits as part of the definition of all risks cover. These limits which are sometimes called implied exceptions, are that loss must be fortuitous, and lawful to insure...**"*

67. Having regard to the well-established position that, for cover to be triggered under a policy of insurance, the loss must be fortuitous or accidental, I do not believe that the addition of the word "*accidental*" in the definition of "*Event*" in the Allianz policy constitutes a basis upon which one could plausibly distinguish the terms of the Allianz

policy considered by the deputy judge in the *TKC* case from the Zurich policy in this case. For that reason, the following observations of the deputy judge seem to me to be particularly helpful:-

"118. I accept [the insurer's] argument that the meaning of the word "loss" in property damage insurance usually (though not invariably) has a physical element. Like the word "accident", the word "loss" takes its colour from its context. In the Property Damage Section, the immediate context for the word "loss" includes the words "destruction" and "damage". That, in my judgment, provides a pointer that "loss" here is intended to refer to physical rather than economic loss. As to the wider context, it includes the... clause in the Property Damage Section, whose wording (which, inter alia, gives the Insurer the option to "reinstate or replace" the relevant property) is also more consistent with a physical loss. The wider context also includes the Business Interruption Section. That, rather than the Property Damage Section, is the part of the Policy intended to deal with the consequences of temporary interruptions or interferences with the insured's business.

119. Taken as a whole, these matters in my judgment show that mere temporary loss of use is not "Damage" as that expression is defined... and so is not covered... I accept [the insurer's] argument that, to amount to "loss... of... Property Insured"... the insured must show that it has been physically deprived of that property in circumstances (where it is not plainly irrecoverable) making its recovery uncertain. That is not what is alleged to have happened here...

120. ...

*123. ...The crucial issue is... whether the enforced closure can properly be said (as *TKC* alleges) to be "accidental loss... of... property" within [the definition of "Event"].*

124. As I have already said, the word "loss" takes its colour from its context. The immediate context of the word "loss" within the definition of "Event" is that it is followed by the words "or destruction of or damage to". I again accept [the insurer's] submission that those words strongly suggest that "loss" here is similarly intended to have a physical aspect.

125. The wider context of this phrase within the Business Interruption Section includes the requirement in the proviso... that there must be "an insurance in force covering the interest of the Insured in the property... against such Event". It follows that, for the purposes of this section of the Policy, an "Event" – i.e. the "accidental loss or destruction of or damage to property" which has caused the interruption of or interference with the business – must be something against which the insured can (and must) also insure itself.

*126. I do not accept [*TKC's*] argument that the parties can have intended that that insurance could itself be business interruption insurance, much less that that insurance could be the Business Interruption Section itself. Such a requirement*

would serve no useful commercial purpose within the Policy. Moreover, in relation to the Business Interruption Section itself, the requirement would be circular. To interpret the proviso... in that sense would be to render it wholly redundant, since it would by definition be satisfied in the case of every otherwise valid claim under the section.

127. ...

128. *Taking these contextual matters into account as a whole, it therefore seems to me that the expression "loss... of... property" in the definition of "Event" cannot sensibly be interpreted as including mere temporary loss of use of property."*

68. In reaching the view set out in those paragraphs, the deputy judge also had regard to a succession of earlier cases in which English courts had held that the word "loss" in the context of property insurance was not regarded as being sufficiently wide to embrace a temporary loss of use of property. The first such authority is that of the Court of Appeal of England & Wales in *Moore v. Evans* [1917] 1 K.B. 458. In that case, a London firm of jewellers, in the course of June and July, 2014 had consigned pearls on sale or return terms to trade customers in Germany and Belgium. Following the outbreak of the First World War and the occupation of Belgium by the Germans in August, 2014, it was impossible for the jewellers to recover possession of the pearls. There was, however, no evidence that the pearls had been seized by the German authorities. Furthermore, there was no evidence that the pearls sent to Germany had not remained in the possession of the trade customers to which they had been sent. On the contrary, the evidence was that the pearls had been placed by the customers in a bank for safekeeping. The pearls were insured against "loss of and/or damage or misfortune to" them. The jewellers claimed under the policy. Their claim was upheld by Rowlett J. in the High Court but his decision was reversed by the Court of Appeal and its decision, in turn, was upheld by the House of Lords. At pp. 472-473, Bankes L.J. considered the meaning of the word "loss" and said:-

"The word "loss" in such a policy... may have a very different meaning when applied to perishable goods, or to goods warehoused at a heavy rent, from what should be attributed to it when applied to such goods as pearls and jewellery when detained under the circumstances of the present case.

As applied to this last-mentioned class of goods the first and natural meaning of the word "loss" seems to me to be the being deprived of them. It is manifest, however, that it is not every kind of deprivation which was within the contemplation of the parties. Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie...

...The most, I think, that can be said in relation to these goods is that during the currency of the policy a state of things was set up in consequence of the war which rendered it impossible for the plaintiffs either to obtain access to their goods, or for

the persons in whose hands they were to return them; and that, forming the best opinion that could be formed at the time of action brought, it was probable that that state of things would continue for some considerable time. Does this constitute a loss within the meaning of the policy? I think not."

69. The decision of the Court of Appeal was subsequently upheld by the House of Lords ([1918] AC 185) where Lord Atkinson said that the decision was "*absolutely right*" and Lord Parker, at p. 198 said that it was "*impossible to say that the goods in question were during the currency of the policy "lost" within the ordinary meaning of that word...*". The reference by Bankes L.J. to "loss" being capable of having a different meaning in the context of perishable goods is obviously very relevant when one considers the property insured in this case which includes, for example, the stock. Loss of the stock could occur in a number of different ways and, as noted in para. 48 above, the use of the word "loss" is readily understandable against that backdrop. That is undoubtedly why, for example, exclusions 1.1 and 4.4 have been included in the material damage section of the policy to make sure that the insurer is not liable for stock which has deteriorated or disappeared or been misfiled or where there is an unexplained shortfall in stock when compared to any relevant inventory. Absent such an exclusion, loss of stock by any of those means would *prima facie* fall within the ambit of an all risks property damage policy. The fact that stock can be lost through deterioration does not assist HAL because, as outlined in para. 65 above, the loss of stock through deterioration during the period of closure did not cause the interruption to the business.
70. The deputy judge in *TKC* also had regard to the decision of Roche J. in *Holmes v. Payne* [1930] 2 K.B. 301. In that case, a pearl necklace was insured under a policy of insurance "*against all loss wheresoever which the assured may sustain by the loss of or damage to*" certain specified items of property including the necklace in question which was valued at £600. On 20th November, 1928, the owner of the necklace, Mrs. Payne, missed the necklace. On the following day, she wrote to the insurers' representative stating that it had been lost. She made extensive searches for the necklace at her home but was unable to find it. The insurers agreed to replace the necklace with jewellery of equivalent value. On that basis, between December, 1928 and February, 1929, Mrs. Payne obtained articles of jewellery to the value of £264. She was in the process of selecting further items of jewellery when, on 27th February, 1929, the necklace was found by her sister who was trying on an evening cloak which Mrs. Payne was proposing to discard from her wardrobe. As she tried on the garment, the necklace fell out from the fur collar of the cloak. When this was discovered, the underwriters brought proceedings seeking a declaration that the necklace was never lost and the return of the items of jewellery which Mrs. Payne had already received. In response, Mrs. Payne argued that the necklace had in fact been lost within the meaning of the policy. She gave evidence that thorough searches had been made for the necklace but that she had been unable to find it. Roche J. rejected the underwriter's claim. At pp. 308-309, he said:-

"These contentions of the underwriters are... not well founded either in fact or in law. My reasons... are as follows:... I am satisfied... that the defendant, Mrs. Payne, made a thorough search..."

As to the law, no authority was cited to me which justified the rescission... of the settlement made between the underwriters and the assured...

These grounds are sufficient to dispose of the action and it is unnecessary... to decide whether there was in November and December 1928 and down to February 27th 1929, a loss of the necklace... I desire, however, to avoid the impression that... the contention that there was no loss is well founded. It was at one time contended that a thing cannot be lost when it is in the owner's house. The contention is not supported by experience. It would be as unwise, as it is unnecessary, that I should attempt a definition of the word "loss" under a policy such as this. Losses are of many kinds and happen under diverse circumstances: see Bankes L.J. in Moore v. Evans... The Marine Insurance Act has now defined losses for the purposes of marine insurance and..., in doing so has made some change from the common law rule..., unlikelihood of recovery being substituted for uncertainty as to recovery as the test. Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters the main consideration on the question of loss. In this connection it is, of course, true that a thing may be mislaid and yet not lost, but, in my opinion, if a thing has been mislaid and is missing or has disappeared and a reasonable time has elapsed to allow for diligent search and of recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain and, I should say, unlikely.

In this case... a reasonable time elapsed before [the underwriters] settled and, as I have already found, diligent search was made and was fruitless. Subsequent discovery or recovery of the thing assured is, of course, of itself no disproof of the loss..."

71. A similar approach was subsequently taken by Parker J. in *Webster v. General Accident Fire & Life Corporation* [1953] 1 Q.B. 520. In that case, the issue was whether a motor vehicle insured under a motor policy had been lost. The insured had been induced to part with his car as a result of a fraudulent misrepresentation. The fraudster sold the car at auction in his own name and misappropriated the proceeds. The insured did not pursue the return of the car in circumstances where he was advised by the police that any attempt to recover the car would be fruitless. He, therefore, made a claim under the policy on the basis of that the car had been lost. His claim was upheld by an arbitrator and the decision of the arbitrator was, in turn, upheld by the court. Parker J. considered both the decision of Roche J. in *Holmes v. Payne* and the judgment of Bankes L.J. in *Moore v. Evans*. At pp. 531-532, Parker J. said:-

"An additional point is... made that... there is, on the facts, no loss proved, because the claimant at all times knew where the chattel was, and that he has not shown that it was irrecoverable. In this connection, it is important to bear in mind that we

are dealing here with a non-marine policy and no questions of constructive total loss or of such principles of marine insurance apply... At the same time it is clear from... the judgment of Bankes L.J. in Moore v. Evans that it is never necessary for a claimant to prove that in all circumstances the chattel is irrecoverable. Every case depends upon its own facts. An assured is not entitled to sit by and do nothing. Equally, he is not bound to launch into legal proceedings... The test... is whether, after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain..."

72. It seems to me that, while the judges in all three of these cases have emphasised that each case must turn on its own facts (which, of course, include the individual terms of the insurance policy at issue), the decisions nonetheless strongly support the view that, absent anything to the contrary in the terms of a policy (construed in context), property will not be regarded as lost unless, at minimum, its recovery is uncertain. While those cases were concerned with personal rather than real property, the observations of Asher J. in *Kraal* (discussed in paras. 50 to 55 above) suggest that a similar approach would also be taken in that context. It will be recalled that Asher J., in that case, suggested that real property, such as a house, could be "lost", for example, where it is swept away in a tsunami or in a lahar flow (both events being not inconceivable in seismically active New Zealand).

The U.S. authorities

73. I was also referred to a number of US authorities. HAL sought to rely on a decision of Hudson J. in the *North Carolina Courts in North State Deli v. The Cincinnati Insurance Company* (9th October, 2020). In that case, the plaintiffs operated a number of restaurants. They were insured under all risks policies written by the defendant. The plaintiffs made a claim arising from the closure of their premises by order of the North Carolina authorities in the context of the COVID-19 pandemic. Under the relevant policy of insurance, business interruption was covered arising from a suspension of business caused by "direct loss to property at a premises...". The policy defined "loss" to mean "accidental physical loss or accidental physical damage". Hudson J. looked a number of dictionary definitions of "loss" including Merriam Webster where one of the meanings attributed to the word "loss" was "failure to gain, win, obtain or utilize". Without considering any other provisions of the policy, the judge reached the following conclusion at p. 6 of his judgment:-

"Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause... In the context of the Policies... "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These

decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss" and the Policies afford coverage."

74. Hudson J. also held that, to the extent that a different meaning could be given to the word "loss", the policies were "at least ambiguous" and, therefore, should be construed against the insurance company and in favour of the policyholder. However, as the case law discussed in paras. 75 to 77 below illustrates, the approach taken by Hudson J. appears to be something of an outlier. In most of the cases to which I was referred, the U.S. courts reached a different conclusion notwithstanding that the language of the relevant insuring clauses was very similar to the Cincinnati policy at issue in *North Deli*.
75. I was referred to a large number of other US authorities including a number of decisions of federal courts. These included *Santo's Italian Café v. Acuity Insurance Company* (21st December, 2020), *Henderson Road Restaurant v. Zurich American Insurance Company* (2021 WL 168422), *Water Sports Kauai v. Fireman's Fund Insurance Company* (9th November, 2020), *Family Tacos v. Auto Owners Insurance Co* (2021 WL 615307) and *Tria v. American Automobile Insurance Company* (2021 WL 1193370). In all of these cases, a different view was taken by the courts to that adopted by Hudson J. in *North State Deli*. In each of those cases, similar claims by businesses, closed as a consequence of the COVID-19 pandemic in various parts of the United States, failed. Most of the policies contained similar provisions to those considered in the North State Deli case. The most recent of those decisions is the decision of Beetlestone J. in *Tria v. American Automobile Insurance Company*. The plaintiff there was also a restaurant operator forced to close its business in Philadelphia as a consequence of a closure order made by the Governor of Pennsylvania following the emergence of the COVID-19 pandemic. Beetlestone J. looked at the same dictionary definitions as Hudson J. had considered in the *North State Deli* case. At p. 4, she continued as follows:-

"Plaintiffs are thus correct that a "loss" of property could include the inability to possess or utilize the property for its intended purpose. But when modified by the terms "direct" and "physical," the term "loss" is no longer reasonably susceptible to Plaintiffs' proffered definition. Given its ordinary meaning, the phrase "direct physical loss of" property requires that the property be rendered unusable by some physical force. This in turn requires that the insured's "loss of use" bear some causal connection to the condition of the premises, such as where a fire burns down an insured restaurant or a thief steals all of the restaurant's cooking equipment, thereby rendering the property unusable for its intended purpose..."

76. Later, at p. 6, Beetlestone J. continued as follows:-

"The... decision in Port Authority supports a finding that an insured does not suffer a "direct physical loss of" property where... the physical premises remain in satisfactory, operable condition.

This conclusion accords, moreover, with the general purpose of first-party property insurance policies... which are written to protect insureds "against loss caused by injury to the insured's own property."... As other courts have noted, if first-party property coverage were to be extended in the manner suggested by Plaintiffs, insurers would potentially become "liable for the negative effects of operations changes resulting from any regulation or executive decree"... such as... a regulation that lowers a city's maximum occupancy codes, thereby preventing the city's restaurants from seating as many customers as they used to...

For these and other reasons, the vast majority of courts to have considered Plaintiffs' "loss of use" theory have found for the insurers...

Plaintiffs identify a handful of cases to the contrary, none of which offers a persuasive analysis of the policy terms at issue. The Policies are not reasonably susceptible to Plaintiffs' proffered definition of 'direct physical loss'..."

77. Thus, the approach taken by the majority of U.S. decisions is very similar to the approach taken by the deputy judge in the *TKC* case. The courts have not looked at the meaning of the word "loss" in isolation but have looked at the meaning of that word in the context of the policy as a whole. Furthermore, as evidenced by the approach taken by *Beetlestone J.* (quoted in para. 76 above), the courts have considered the purpose of property insurance and have identified that the purpose is to provide cover against damage to property rather than the impact of operational changes in the way in which that property is used. That approach chimes with that adopted by the deputy judge in the *TKC* case quoted in para. 67 above.
78. It is true that, in *Tria*, *Beetlestone J.* placed significant emphasis on the use of the adjective "physical" in close juxtaposition to the noun "loss". It is also true that the definition of **Damage** in the Zurich policy contains no such adjective. However, that is not, in itself, determinative. The overall approach taken by *Beetlestone J.* was to consider the language and structure of the policy as a whole. That is what I have attempted to do in this judgment. When one considers the Zurich policy in that way, there are many factors that point to a conclusion that the reference to "loss ... of ... the Property Insured" was also intended to refer to a physical loss of property rather than a temporary loss of use.

Conclusion

79. Bearing in mind the discussion in paras. 45 to 77 above, I have come to the conclusion that the claim made by HAL does not fall within the ambit of the cover available under the Zurich policy. I have come to that conclusion for a number of reasons. In the first place, it seems to me that, when the policy is read as a whole, there are two relevant forms of cover available which are quite separate and distinct namely material damage and business interruption. The fact that they are – and are intended to be – quite separate species of cover is confirmed by the language used in describing each form of cover. This is reinforced by the separate series of conditions and exclusions applicable to each and the terms of the claims conditions – including claims condition 4A(a) discussed in para. 57

above. No hint is given in that condition that loss of use will arise as part of a material damage claim. Equally, as explained in para. 60 above, the policy expressly envisages that, in the case of a claim where any of the insured property suffers **Damage** (i.e. where the insured makes a material damage claim), the insurer will have the right to reinstate or replace the item of property concerned. As the deputy judge observed in the *TKC* case, a condition of that kind would be rendered inoperable if loss of use could be said to be included in the meaning of **Damage**. It seems to me to be clear that the policy intends that it is the business interruption section of the policy that is intended to respond to claims in respect of loss of use of any item of the property insured.

80. This chimes with the distinction which the policy makes between **Damage**, on the one hand, and **Consequential Loss**, on the other. **Damage** is concerned with the immediate effect on the property insured while **Consequential Loss** is concerned with the impact that effect, in turn, has on the business of the insured. As discussed in para. 56 above, loss of use, very obviously, falls within the definition of **Consequential Loss**. Significantly, save to the extent that any form of **Consequential Loss** is excluded under the material damage section of the policy, there is no reference to **Consequential Loss** in any of the species of **Damage** specifically excluded from the material damage cover. Moreover, each of the species of **Damage** listed in those exclusions envisages some form of physical damage or physical loss. As explained in para. 61 above, while at first sight, it might appear that some of the exclusions extend to a non-physical loss or damage, that view is dispelled when one considers the description of the property insured as set out in the policy schedule. Moreover, none of the exclusions relevant to the property damage section uses language which suggests that a loss of use of real property falls within the ambit of **Damage**.
81. All of this supports the conclusion that the material damage section is concerned with events that cause damage to or the loss or destruction of the insured property listed in the policy schedule while the business interruption section is clearly intended to address the effects which those events, in turn, have on the business carried on at the premises such as an inability to use the property. Thus, if the events covered by the material damage section of the policy have the effect that the insured is unable to carry on its business or suffers some other interruption to its business, the insured will be able to maintain a claim under the business interruption section in respect of the interruption and to maintain a claim under the material damage section in respect of the cost of remedying the impairment of the item of property impacted by the event in question. To my mind, loss of use is clearly intended to be covered by the business interruption section. It would make no commercial sense that loss of use could also be treated as falling within the definition of **Damage** so as to bring it within the material damage section of the policy. That would involve the kind of circularity that the deputy judge in the *TKC* case regarded as wholly unlikely. In substance, it would have the effect that the material damage section of the policy would also operate as providing business interruption cover.
82. In my view, the case made by HAL involves a very strained and unnatural reading of the policy provisions. It is based on an over-concentration on the reference to "loss" in the

definition of Damage. It is striking that the definition does not, by its terms, refer to loss of use. It speaks solely of "loss ... of ... the property insured". Moreover, as I have sought to explain in paras. 46 to 48 above, the reference to "loss" must be read in context. While I have rejected the suggestion that "loss" can be construed as a synonym of either "damage" or "destruction", it is relevant that the word "loss" is used in close juxtaposition to the words "destruction" and "damage", both of which have a purely physical connotation. In addition, the word refers specifically to a loss of the property insured (i.e. the property specified in the policy schedule). Several of the items of property specified in that schedule (such as wines, spirits, cigarettes and other items of stock) are capable of being physically lost even where they are not (or cannot be proved to be) damaged or destroyed. In those circumstances, it is unsurprising that **Damage** would be defined as extending to loss of the property insured. In that light, the reference in the definition to "loss" makes commercial sense. It is not surplusage and it does not give rise to ambiguity when read in that way. It is also consistent with the meaning attributed to the word "loss" in the English cases discussed in paras. 62 to 72 above and with the decision of the New Zealand Court of Appeal in *Kraal*, when that decision is read with the underlying facts in mind (in particular the fact that there was no certainty in that case that the plaintiff's home would ever be habitable in the future). With the exception of the decision of Hunter J. in *North State Deli*, the word "loss" in a policy of this kind has not been construed as extending to the temporary loss of use of property. As explained above, his view was reached without a consideration of the terms of the policy as a whole. His approach is not consistent with the approach to contractual interpretation (as summarised in para. 38 above) which the Supreme Court has mandated in this jurisdiction. When the terms of the Zurich policy are considered as a whole, they do not support the interpretation canvassed on behalf of HAL.

83. There is nothing in the relevant factual or legal backdrop that supports the interpretation advanced by HAL. In so far as the legal backdrop is concerned, there was, at the time the policy was put in place, a consistent line of case law to the effect that, absent some indication to the contrary, loss did not extend to a temporary deprivation of property. While the cases suggest that loss does not necessarily involve a permanent deprivation of property, it must be shown, at minimum, that it is uncertain that the property in question can ever be recovered.
84. In so far as the factual background is concerned, counsel for HAL has highlighted that the hotel business is a high footfall business involving congregation of people in various ways. As I understand it, counsel was seeking to suggest that a hotel business of the kind carried on by HAL was inherently likely to be adversely affected in the event of the emergence of a pandemic which spreads rapidly in such crowded settings. In my view, that does not assist HAL. The fact is that there were several forms of policy available on the market (including extensions to the Zurich policy in issue) which expressly addressed this kind of risk. Regrettably, HAL did not seek such cover.
85. For all of the reasons outlined above, I have come to the conclusion that HAL has failed to establish that it is covered under the Zurich policy for the interruption to its business

arising from the closure of the hotel in 2020 in the context of the COVID-19 pandemic. In short, HAL has failed to show that its inability to use the hotel during the period of closure falls within the ambit of "*loss ... of ... the Insured Property*" in the definition of Damage in the policy. As a consequence, it is unable to prove that **Damage** has occurred at the premises to property used by it for the purposes of its business and it is also unable to prove that material damage cover is in place to cover that **Damage**, both of which are preconditions to any claim under the business interruption section of the policy.

86. Accordingly, the only order which I can make is to dismiss HAL's claim. I will list the matter remotely before me for mention on Wednesday 13th October, 2021 at 10.30 a.m. to address any further issues that may arise including any issues that arise in relation to costs.

High Court practice direction 101

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