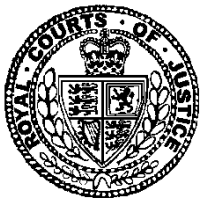

Neutral Citation Number: [2020] EWHC 2710 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No CL-2020-000219
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Thursday 15 October 2020

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

TKC LONDON LIMITED

Claimant

- and -

ALLIANZ INSURANCE PLC

Defendant

- -

Mr Tim Marland
(instructed by *Memery Crystal LLP*)
appeared for the Claimant

Mr Gavin Kealey QC and Mr Keir Howie
(instructed by *DAC Beachcroft Claims Ltd*)
appeared for the Defendant

Hearing date: 22 September 2020

- -

……

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 15 October 2020.

MR SALTER QC:

Introduction

1. The claimant in this action, TKC London Limited ("**TKC**"), operates a café restaurant known as The Kensington Crêperie at 2-6 Exhibition Road, South Kensington, London SW7 2HF. With effect from 2pm on 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020[1] required businesses of that kind to close and to cease selling food or drink for consumption on the premises. The Kensington Crêperie closed and did not re-open until 4 July 2020.

2. At the material time, TKC was insured by the Defendant, Allianz Insurance Plc ("**Allianz"**) under a "Commercial Select" policy ("**the Policy**"). The Policy includes a section entitled "Business Interruption All Risks Estimated Revenue" ("**the Business Interruption Section**"). In this action, begun on 16 April 2020, TKC asserts that the Business Interruption Section responds to the business interruption losses that it claims to have suffered as a result of the closure of The Kensington Crêperie in compliance with the Coronavirus Regulations. Allianz denies liability and, by its Application Notice issued on 29 May 2020, seeks to strike out the Claim Form and Particulars of Claim under CPR 3.4(2) alternatively to have summary judgment under CPR 24.2 entered against TKC on the grounds that, on the correct interpretation of the Policy, TKC's claim is misconceived and bound to fail.

3. In the recent Financial List test case, *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others*[2] ("**the FCA test case**"), the court was asked to "construe a number of wordings which contain non-damage 'extensions' to the 'standard' Business Interruption cover provided by the relevant insurers .. to which the FCA refers as 'disease clauses'"[3]. The Policy relied on by TKC in the present case does not contain any such 'disease clause' extension. Although the sums at stake in the present action are, by the standards of the Commercial Court, comparatively modest, the Policy is largely in Allianz's standard form of policy wording. The decision in the present case may therefore be of consequence for other potential claimants. To that limited extent, this judgment is therefore something of a footnote to the comprehensive and (subject to any appeal) authoritative statement of the law and exegesis of the various policy provisions in the judgment of Flaux LJ and Butcher J in the FCA test case.

The principal terms of the Policy

4. The Policy document consists of several sections. It begins with an "Introduction", which (inter alia) states that:

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1 SI 2020 No. 327 ("**the Initial Regulations**"), revoked and replaced with effect from 1.00 pm on 26 March 2020 by The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 202 No. 350 ("**the Replacement Regulations**"). In this judgment I shall refer to the Initial Regulations and the Replacement Regulations together as "the Coronavirus Regulations".

2 [2020] EWHC 2448 (Comm)

3 See para [80].

> **Your Commercial Select Policy is made up of several parts which must be read together as they form your contract of insurance with [Allianz] .. The parts of the Policy which form your contract of insurance with [Allianz] are:**
>
> - **this Introduction**
> - **the proposal, presentation of the risk, or any other information supplied by you or on your behalf**
> - **the Policy Definitions; the Insuring Clause; the General Exclusions and General Conditions, all of which apply to all Sections of the Policy ..**
> - **the Sections of cover selected by you (as shown on the Schedule) ..**
> - **the Exclusions and Conditions which apply to the Sections selected by you ..**
> - **the Schedule, which includes all clauses applied to the Policy while the Policy is in force.**

5. The Introduction includes a page of "Policy Definitions". This identifies (by reference to the Schedule) TKC as the "Insured", The Kensington Crêperie premises at 2-6 Exhibition Road at the "Premises", the restaurant and café business carried on there as the "Business" and the Period of Insurance as running from 4 September 2019 until 4 September 2020. The Introduction also contains an "Insuring Clause" in the following terms:

> **In consideration of payment of the premium the Insurer will indemnify or otherwise compensate the Insured against loss, destruction, damage, injury or liability (as described in and subject to the terms, conditions, limits and exclusions of this Policy or any Section of this Policy) occurring or arising in connection with the Business during the Period of Insurance or any subsequent period for which the Insurer agrees to accept a renewal premium.**

6. The Introduction is then followed by a series of seven "Sections" each of which deals with a particular kind of risk. The two "Sections" that are relevant to the issues which I have to decide are the "Property Damage All Risks Section" ("**the Property Damage Section**") and the Business Interruption Section.

7. The Property Damage Section provides cover for:

> **.. Damage to Property Insured at the Premises ..**

"Damage" being defined as:

> **Accidental loss or destruction of or damage to Property Insured**

"Property/Property Insured" being defined as:

Buildings, Contents, Stock and other items shown and/or described in the Schedule.

8. There are 16 paragraphs of specific exclusions from the cover provided by the Property Damage Section, among which are:

1. Damage caused by or consisting of

(a) inherent vice, latent defect, gradual deterioration, wear and tear, frost, change in water table level, its own faulty or defective design or materials ..

..

13. Damage occasioned by nationalisation, confiscation, requisition, seizure or destruction by the Government or any public authority.

14. Consequential loss or damage of any kind or description, except loss of rent when such loss is insured by this Section

9. A "Basis of Settlement" clause then states (inter alia) that:

The Insurer will pay the Insured the value of the Property Insured at the time of its loss or destruction, or the amount of the Damage, or at the Insurer's option will reinstate or replace such Property or any part of such Property ..

10. The Property Damage Section includes a long list of Special Conditions, including the following:

45. Undamaged Stock

The Basis of Settlement for Stock includes any loss incurred less the value of any salvage

(a) in the event of undamaged Stock deteriorating and/or being condemned or otherwise becoming unusable

(b) in respect of Stock which the Insured is obliged under contract to accept from any other party but is unable to use

resulting solely from Damage as insured by this Section ..

11. The Business Interruption Section provides cover for:

.. Business Interruption by any Event ..

"Business Interruption" being defined as:

> **Loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of an event to property used by the Insured at the Premises for the purpose of the Business.**

"Event" is in turn defined as:

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

12. In the Business Interruption Section, there are 11 paragraphs of specific exclusions from cover, including:

> **1. Business Interruption caused by or consisting of**
>
> **(a) inherent vice, latent defect, gradual deterioration, wear and tear, frost, changes in water table level, its own faulty or defective design or materials ..**
>
> **..**
>
> **2. Business Interruption**
>
> **..**
>
> **(b) caused by or consisting of change in temperature, colour, flavour, texture or finish**

13. The "Basis of Settlement clause in the Business Interruption Section provides as follows:

> **The Insurer will pay the Insured in respect of each item covered, the amount of their claim for Business Interruption, provided that at the time of any event**
>
> **(A) There is an insurance in force covering the interest of the Insured in the property at the Premises against such Event and that**
>
> **(i) payment has been made or liability has been admitted for payment, or**
>
> **(ii) payment would have been made or liability would have been admitted for payment but for the operation of a proviso in such insurance excluding liability for claims below a specified amount ..**
>
> **..**
>
> **The insurer will pay the Insured as indemnity in consequence of Business Interruption for**
> **(A) Loss of Revenue, and**

(B) the Increase in Cost of Working.

Loss of Revenue means the amount by which the Revenue during the Indemnity Period falls short of the Standard Revenue.

Increase in Cost of Working means the additional expenditure necessarily unreasonably incurred or the sole purpose of avoiding or diminishing the loss of Revenue which but for that expenditure would have taken place during the Indemnity Period,

14. A clause towards the end of the Business Interruptions Section, which is headed "Extensions", provides that:

Any claim resulting from interruption or interference with the Business in consequence of

(A) accidental loss, destruction or damage at any Situation or to any Property shown below, or

(B) any of the under-noted Contingencies

within the United Kingdom, shall be understood to be Business Interruption by an Event covered by this Section ..

15. This clause is followed by lists of the "Situations", "Property" and "Contingencies" referred to in the Extensions clause. The "Property" list includes

Property

(A) at any land-based premises

(B) comprising any land-based connecting cable, pipe or pylon to the terminal connecting point at the premises of any supply undertaking service provider or producer from which the Insured obtains [utility supplies].

16. It also includes a clause headed "Denial of Access", which identifies as Property to which "accidental loss, destruction or damage" would be within the scope of the Extension:

Property in the immediate vicinity of the Premises, which prevents or hinders the use of or access to the Premises whether the Premises or property in the Premises is destroyed or damaged or not, but excluding loss or destruction of or damage to the property of any supply undertaking from which the Insured obtains electricity, gas, water or telecommunications services which prevents or hinders the supply of such services to the Premises

17. The Schedule to the Policy also incorporates into the Business Interruption Section clause Z/177/1 "Loss of Licence", which provides

> **Any claim for loss of Revenue resulting from interruption of or interference with the Business in consequence of the undernoted Contingency shall be understood to be Business Interruption, subject to:**
>
> **A. all of the terms, conditions and provisions of this Section and of the Policy, except in so far as they may be expressly varied by this clause**
>
> **B. the undernoted Definition, Exclusions and Special Conditions ..**
>
> **Contingency**
> **Forfeiture, suspension or withdrawal of The Licence under the provisions of legislation governing such licences, or refusal to renew The Licence after due application to the appropriate licensing authority.**
>
> **Definition - The Licence**
> **The Licence(s) granted to the Insured for the sale of excisable liquors in connection with the Business at the Premises.**
>
> **Exclusions**
> **The Insurer will not pay the Insured for**
> **..**
>
> > **2. any loss arising from alteration of the law governing the grant, renewal, transfer, surrender, forfeiture, suspension or withdrawal of The Licence after the commencement of the Period of Insurance, unless the Insurer confirms in writing that this clause will continue to apply after such alteration ..**

TKC's pleaded case

18. TKC's pleaded case is set out in its Particulars of Claim dated 14 April 2020 and in its Responses to Requests by Allianz for Further Information. After references to the Policy and to the Initial Regulations, TKC pleads as follows in paragraphs 6 and following of the Particulars of Claim:

> **6. .. The Claimant accordingly closed the Premises.**
>
> **7. Further, the Claimant has suffered loss of and/or damage to stock rendered unusable by the forced closure of the Premises.**
>
> **8. The Claimant will say that, as a matter of construction of the relevant provisions and of the Insurance as a whole:**
>
> **8.1 "Accidental' in the definition of Event means unexpected or unintended from the viewpoint of the insured;**

8.2 Loss of use of Premises/property as a result of their forced closure by Government edict constitutes loss to, alternatively loss of, property within the meaning of the Insurance;

8.3 Alternatively, the loss and/or damage to stock in trade constitutes damage to property within the meaning of the Insurance;

8.4 The Claimant's losses flowing from the enforced closure and/or from the loss of or damage to stock constituted loss resulting from interruption of or interference with the business carried on at the premises consequent on such loss to, alternatively loss of, such property;

8.5 Yet further or alternatively, the legal requirement to cease the selling of, inter alia, alcoholic drinks by virtue of s.2(1)(a)(ii) of the Regulations is, on its proper construction, the suspension of the Claimant's licence under the provisions of legislation governing such licences.

9. In the circumstances the Claimant asserts that it is entitled to be indemnified in respect of its losses resulting from the interruption of or interference with its business caused by the closure of its business premises and/or the loss/destruction of its stock. Further or alternatively, the Claimant is entitled to be indemnified in respect of its losses resulting from lost alcohol sales during the relevant period up to the sub-limit of indemnity for loss of licence cover.

10. Since the "relevant period" as defined in the Regulation is ongoing, the Claimant's losses are ongoing and it is not possible to particularise or quantify such losses at this juncture. Further, it is likely that the business interruption losses suffered by the Claimant will continue for some time after the end of the 'relevant period' as defined by the legislation, assuming such is within the Maximum Indemnity Period. Accordingly this claim is confined to a claim for declaratory relief as to the scope of the Insurance.

19. In its Response dated 17 June 2020 to a Request by Allianz for Further Information, TKC stated that:

[*In answer to a request to identify the type of stock rendered unusable*]
The stock rendered unusable consists primarily of dairy, meat, fish and 'batches'. See attached March 2020 stock report. In due course it is likely to include other stock which passes its use by date and/or is no longer of sufficiently high quality for use in the business.

[*In answer to a request to say how the stock had been rendered unusable*]

> **Primarily because it has not been possible to use it within its use by life and/or - eg in the case of frozen goods - because it will not meet quality standards having been unused for so long.**
>
> **[*In answer to a request to confirm the amount of stock rendered unusable*]**
> **Currently:**
> **Dairy £1088.43**
> **Fruit and veg £144.25**
> **Batches £3809.71**
> **Meat and fishes £472.95**
> **Frozen goods £124.94**
>
> **[*In answer to a request to say whether TKC had submitted any claims for its losses to any other insurer*]**
> **No other claims have been submitted**

20. This last answer was supplemented in an email dated 8 September 2020 from TKC's solicitors, which stated that:

> **We confirm that our client has not made, and does not intend to make, a claim under any other material damage policy (including any buildings insurance policy) in respect of its loss**

21. Despite the averments in paragraph 8.5 and in the last sentence of paragraph 9 of the Particulars of Claim, Mr Marland accepted that, in the light of the exclusion relating to alterations in the law, his client was unable to assert a claim under the specific provisions of extension Z/177/1. He nevertheless submitted that the loss of use of the licence amounted to "loss of contents" under the Property Damage Section and/or loss of property within the meaning of the Business Interruption Section.

The arguments on behalf of Allianz

22. On behalf of Allianz, Mr Kealey QC (who appeared with Mr Keir Howie) submitted that it is plain as a matter of interpretation of the Policy that TKC's temporary inability to carry on its restaurant and café business at the Premises as a result of the prohibitions in the Coronavirus Regulations was not something that was covered by the Policy terms.

23. There were two overlapping limbs to Mr Kealey's argument. First, he submitted that what TKC alleged had happened did not amount to "Business Interruption by any Event". The temporary closure of the business as a result of the Coronavirus Regulations was not an "Event" within the meaning of the Policy, either because "accidental loss .. of .. property" refers only to physical loss and/or because "loss" for these purposes requires something more than merely transient deprivation.

24. Secondly, he submitted that - even if his first point were wrong - the proviso to the Basis of Settlement clause in the Business Interruption Section required there to be

"an insurance in force covering the interest of the Insured in the property at the Premises against such Event" under which payment had been made or liability had been admitted. As TKC had admitted that it had no insurance complying with this proviso, it followed, Mr Kealey submitted, that there could in any event be no liability upon Allianz to make payment.

25. In developing the first limb of his argument, Mr Kealey submitted that the meaning of the word "loss" must always take its colour from the context in which the word is used. As Sir Martin Nourse observed in *Tektrol Ltd v International Ins Co of Hanover Ltd*[4]:

> **''Loss'' is a word whose meaning varies widely with the context in which it is used. If a man said to you: ''I have lost my wife'', you would understand him to mean one thing outside the maze at Hampton Court and another outside an undertakers in the high street.**

26. In the definition of "Event" in the Business Interruption Section of the Policy, the word "loss" appears within the phrase "accidental loss or destruction of or damage to property". An "Event" for the purposes of the Business Interruption Section can therefore involve any one or more of three situations: (1) loss of property; (2) destruction of property; and (3) damage to property. Both "destruction" and "damage" are words whose usual meaning is a physical one. That, in Mr Kealey's submission, provides a powerful indication that the entirety of the definition of an "Event" is referring to physical matters, and that the word "loss" in this context is therefore referring to physical loss – that is, some commercially harmful change in the physical state of the property concerned.

27. In support of these submissions, Mr Kealey relied upon the observations of Hobhouse LJ in *Promet Engineering (Singapore) Pte Ltd v Sturge (The "Nukila")*[5]. The issue in that case was whether the cost of repairing fatigue cracks in the legs of the plaintiff's accommodation platform fell within the cover provided by the defendant underwriters. That cover was in the terms of the Institute Time Clauses, including the Inchmaree clause (which provided cover against "damage to the subject matter insured caused by .. any latent defect in the machinery or hull") and the Institute Additional Perils Clause.

28. The Court of Appeal (reversing Tuckey J[6]) held in favour of the plaintiff. In the course of his judgment (with which Ward LJ, who gave a short concurring judgment, and Sir Stephen Brown P agreed), Hobhouse LJ made the following observations about what amounts to a "loss" in the context of a hull and machinery policy.

> **A policy of insurance does not cover matters which already exist at the date when the policy attaches. The assured, if he is to recover an**

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4 [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep 701 at [27]
5 [1997] 2 Lloyd's Rep 146
6 [1996] 1 Lloyd's Rep 85

> **indemnity, has to show that some loss or damage has occurred during the period covered by the policy. If a latent defect has existed at the commencement of the period, and all that has happened is that the assured has discovered the existence of that latent defect, then there has been no loss under the policy. The vessel is in the same condition as it was at the commencement of the period. Therefore, in any claim under the Inchmaree clause or any similar clause, the assured has to prove some change in the physical state of the vessel. If he cannot do so, he cannot show any loss under a policy on hull. We are not concerned in this case with any insurance of different interests: the present policy is a hull and machinery policy. If, however, damage has occurred, that does involve a physical change in the condition of the vessel and can be the subject of a claim under the policy.**

29. These observations were applied by Potter LJ in *Pilkington UK Ltd v CGU Insurance plc*[7] (upon which Mr Kealey also relied). That was a liability insurance case, arising from the installation by Pilkington of glass panels in the roof and vertical panelling of the Eurostar terminal at Waterloo. A small number of these panels proved defective in that they fractured in situ. No personal injury was caused to anyone, nor was there any damage to the fabric of the terminal other than the fractures in the panels themselves. Eurostar closed the terminal for a time, but ultimately did not elect to remove and replace the panels, instead installing safety features designed to prevent any fractured glass falling into areas of the terminal frequented by the public or staff. One of the issues in the case was whether Pilkington's claim for an indemnity against Eurostar's claim for its losses was a claim in respect of "loss of or physical damage to physical property not belonging to Pilkington".

30. Potter LJ (with whom Jonathan Parker LJ and Charles J agreed) held that it was not such a claim, and that Pilkington's claim for an indemnity accordingly failed. In Potter LJ's view:

> **[49] .. [W]here a product is supplied for incorporation into a building and it is so incorporated without damage of any kind and in a condition such that it and the other components of the building function effectively, subject only to the possibility of some future failure or malfunction, that is not in any ordinary sense an occurrence or event which gives rise to physical damage in those other components or to the building as a whole. At best, it creates the possibility of some fracture or malfunction occurring in the future ..**
>
> **[50] In English law, 'damage' usually refers to a changed physical state: see *Promet Engineering (Singapore) Pte Ltd v Sturge, The Nukila* [1997] 2 Lloyd's Rep 146 at 151 per Hobhouse LJ. The precise borderlines of the definition depend upon the context of the word or words used. Thus, while**

[7] [2004] EWCA Civ 23, [2005] 1 All ER (Comm) 283

> **for the purposes of indemnity it will normally be necessary to demonstrate that physical change has occurred to the property damaged, a clause insuring 'loss or damage … in connexion with [the] goods' under the Hague Rules (the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806) includes economic loss even in the absence of such physical damage (see *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1957] 3 All ER 100 at 115, [1958] 1 QB 74 at 105 per Pearson J). However, that is not this case. The relevant words expressly require physical damage and further that it must be to the physical property of another ..**
>
> **[51] As already observed, generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied .. However, it will not extend to a position where the commodity supplied is installed in or juxtaposed with the property of the third party in circumstances where it does no physical harm and the harmful effect of any later defect or deterioration is contained within it.**

31. In Mr Kealey's submission, the most that TKC can establish on the facts of the present case is not a physical loss but merely a temporary loss of the use of its property. That, he argued, cannot in any event amount to "loss of property" as that expression is used in the definition of "Event". It is common ground that the actual loss of use was in fact a temporary one, since it lasted only from 21 March to 4 July. In Mr Kealey's submission it was also a loss of use that was from the first expected only to be temporary or transitory. In that connection, Mr Kealey drew attention to paragraphs (6) and (7) of regulation 2 in the Initial Regulations and paragraphs (2) and (3) of regulation 3 in the Replacement Regulations. These expressly required the Secretary of State regularly to review the need for the restrictions, and to terminate the restrictions as soon as he considered that they were "no longer necessary to prevent, protect against, control or provide a public health response to the incidence of spread of infection in England with the coronavirus". According to Mr Kealey, such a temporary or transitory prohibition from use cannot sensibly be described as a "loss of property"

32. Mr Kealey again supported his submissions by reference to authority. The first case upon which he relied was *Moore v Evans*[8]. In that case, a London firm of jewellers had consigned pearls on sale or return terms to trade customers in Germany and Belgium. The outbreak of the First World War between Great Britain and Germany and the occupation of Brussels by the Germans made it 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. There was no evidence that the pearls sent to

[8] [1917] 1 KB 458 (CA); [1918] AC 185 (HL)

Germany had not remained in the possession of the trade customers to whom they had been sent. The evidence showed that those sent to Belgium had (with the agreement of the jewellers) been placed in a bank there for safekeeping. The pearls were insured against "loss of and/or damage or misfortune to" them, and the jewellers claimed under the policy. Rowlatt J gave judgment in favour of the jewellers[9]; but his decision was reversed by the Court of Appeal, who held that the jewellers had failed to prove a loss within the meaning of the policy.

33. Swinfen Eady LJ and Lawrence J emphasised that the policy was a "policy on goods and not on an adventure" and rested their judgment on the fact that there was presently no evidence that anything that amounted to a "loss" of the insured goods had in fact occurred:

> **.. There must either be loss of the property or part of it, or damage or misfortune to it. There is no evidence that anything has happened to the goods themselves beyond what I have already mentioned. The goods have not been returned to the plaintiffs. That is all ..**
>
> **.. In our opinion the plaintiffs' evidence is not sufficient to establish a loss under the policy. The burden of proving a loss is upon the persons alleging it.**
>
> **We recognize, however, that it is quite possible that the plaintiffs may have a present right of action, although they have not been able to adduce evidence which proves it ..**[10]

34. Bankes LJ gave a concurring judgment. He too laid stress upon the fact that this was a policy on goods, observing that:

> **.. The fact that the policy is a business policy does not .. justify a construction the effect of which would be to convert it from a policy on the goods themselves into a policy upon a series of adventures by the plaintiffs with the goods ..**[11]

Having considered the issue of the date at which the facts have to be ascertained and commented upon a number of marine insurance cases, Bankes LJ then went on to consider the meaning of the word "loss" in this policy, as a matter of interpretation of the words used in the policy having regard to the nature of the goods insured.

> **The word "loss" in such a policy as this 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.**

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9 [1916] 1 KB 479

10 [1917] 1 KB 458 (CA) at 465-466.

11 Ibid at 467.

> **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.**[12]

35. The House of Lords dismissed the jewellers' appeal, Lord Atkinson (who gave the leading speech) stating that the decision of the Court of Appeal was "absolutely right"[13]. Lord Parker of Waddington, concurring, specifically endorsed the reasoning of Bankes LJ, observing that:

> **.. It appears to me impossible to say that the goods in question were during the currency of the policy "lost" within the ordinary meaning of that word ..**[14]

36. The second case relied on by Mr Kealey in relation to this point was *Holmes v Payne*[15]. That was also a case about a pearl necklace, though the facts were rather different. The insured plaintiff had misplaced the necklace and had been unable to find it after repeated searches and enquiries. She had made a claim under a Lloyd's policy which insured her against "all loss wheresoever which the insured may sustain by the loss of or damage to" certain specified items including the necklace, and had agreed with the insurers that she should be compensated by being provided with other items of jewellery up to the insured value of the necklace. When she had received some of these other items, to a value of about a third of the insured value of the necklace, the necklace was found at her house, where it fell out of an evening cloak in which it had become concealed. The insurers brought an action claiming a declaration that the necklace had not been lost, rescission of the compensation agreement, and the return of the replacement items.

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12 Ibid at 472-3
13 [1918] AC 185 (HL) at 197
14 Ibid at 198.
15 [1930] 2 KB 301.

37. Roche J held that it was sufficient to dispose of the action brought by the insurers that there were no sufficient grounds to rescind the compensation agreement, and that it was therefore unnecessary to decide whether there had been a "loss" of the necklace. He went on to observe that:

> **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 ..**
>
> **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 of 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.**

38. Thirdly, on this point, Mr Kealey relied upon the decision of Parker J in *Webster v General Accident Fire & Life Corp*[16], which was a case which came before the court on a case stated by an arbitrator. The insured had been induced to part with his car as a result of a fraudulent representation, the fraudster subsequently selling the car at auction in his own name and misappropriating the proceeds. The insured, having been advised by the police that any attempt to recover the car would be unavailing, took no further steps in the matter, although he knew in whose hands the car was. The arbitrator held that there been a loss of the car within the meaning of the policy. Parker J upheld that finding, observing that;

> **.. The test, as it seems to me, is whether, after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain ..**

Mr Kealey relied upon a passage in the judgment which records that:

> **.. it seems to me that 'loss' can be fairly defined as 'an effective deprivation in circumstances making recovery uncertain' ..**

However, Parker J was there quoting from the case stated by the arbitrator, rather than expressing his own view, and later in his judgment observed that:

> **It is almost impossible to lay down any accurate test which will fit all circumstances.**

39. Mr Kealey also relied the similar findings by Tomlinson J in *Outokumpu Stainless Ltd v Axa Global Risks (UK) Ltd*[17], and upon a comment by the Court of Appeal of New

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16 [1953] 1 QB 520.

17 [2007] EWHC 255 (Comm) [2008] 1 Lloyd's Rep IR 147 at [22]-[26], per Tomlinson J.

Zealand in *Kraal v The Earthquake Commission*[18]. The facts of the letter case involved a claim under the Earthquake Commission Act 1993 by the owners of a house which, whilst not itself damaged by the Christchurch earthquake, was considered at risk from further rockfall and was therefore made subject to a notice prohibiting occupation. The case turned on the meaning to be given to the phrase "natural disaster damage" in that statute, which was further defined as meaning (in particular) "physical loss or damage". In agreement with the judge at first instance, the Court of Appeal of New Zealand held that the circumstances did not amount to "physical loss or damage", and so were not "natural disaster damage" against which the statute provided insurance.

40. Having surveyed a number of authorities, both from this jurisdiction and from New Zealand, on the meaning to be given in insurance cases to the words "loss or damage", Justice Asher, who gave the judgment of the court, observed that:

> **These cases support an interpretation of "loss or damage" in the context of this area of insurance law that requires physical damage.**

41. Finally, in this context, Mr Kealey drew attention to section 16-2B in the *Law of Insurance Contracts*[19] in which the editor states:

> **The meaning of deprivation loss depends on the context, not only the immediate context of the policy but also that of the purposes of the kind of insurance and the practices of that branch of the industry. For example, marine insurance on cargo is concerned with loss of an adventure, it has been said, while non-marine insurance is concerned with loss of goods; the courts will be slow to apply the special rules about loss in marine insurance to non-marine insurance. Subject to this, the general definition of deprivation loss is located in a band between two extreme positions. On one side, temporary deprivation of the subject-matter is not loss, unless the effect is that the subject-matter perishes. If there is no reason to suppose that the insured will not get the subject-matter back (in substantially the same condition), although the time is uncertain, the insured has failed to prove loss. On the other side, it is not necessary for the insured to prove a certainty that he or she will not get the subject-matter back. Between these points defining loss is difficult, perhaps undesirable.**

42. Mr Kealey submitted that these authorities are in practice determinative of the fact that the word "loss" as used in the Property Damage Section of the Policy must be construed to mean the physical loss of property involving (at least) TKC suffering the effective deprivation of that property in circumstances making its recovery uncertain. On that basis, he submitted that it was almost inevitable that the word "loss" should bear the same meaning in the Business Interruption Section of the Policy. It was

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[18] [2015] NZCA 13, [2015] Lloyd's Rep IR 378 at [71]

[19] Hemsworth (ed), *Law of Insurance Contracts* (looseleaf, Informa UK Plc)

inherently improbable that the same phrase would have been intended to carry a radically different meaning in each section. In any event, the reasoning in these cases - that the concept of the "loss" of property naturally connotes physical deprivation in circumstances which make its recovery at least uncertain - applies with equal force to business interruption insurance as it does to property insurance.

43. Turning to the second limb of his argument, Mr Kealey submitted that the proviso to the Basis of Settlement clause in the Business Interruption Section of the policy is a standard wording, whose purpose is to ensure that insurers will only need to make good consequential business interruption loss if the insured has the benefit of separate cover with which to make good the underlying property loss. In this connection, Mr Kealey relied upon sections 2.9(e) and 2.10 of *Riley*[20], which state as follows:

> **[2.9] In order to provide valid grounds for a claim under the policy, the following five conditions (a)-(e) must be met in accordance with the preamble on the face of the policy:**
>
> **..**
>
> **(e) There must be in existence a material damage policy covering the interest of the insured in the property against loss destruction or damage by the insured perils, and the claim under such policy must be admitted by the insurer concerned. The clause in which this is stated is known as the "material damage proviso".**
>
> **..**
>
> **[2.10] The primary object of this 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.**

44. Mr Kealey also relied upon sections 15.1 and 15.2 of *Riley*, which also deal with this issue:

> **[15.1] One of the fundamental tenets of the standard UK form of business interruption policy is the link with physical damage to property. The policy is only triggered by such damage occurring, and the potential for that damage to occur is the main consideration for the underwriter in determining the rating of not just the material damage but also the business interruption risk. It is vitally important to bear this in mind when considering not only what circumstances will initially trigger a business interruption loss, but also the extent to which subsequent developments relate to the physical damage and thus fall within the intended cover.**

[20] Harry Roberts, *Riley on Business Interruption Insurance* (10th edn, Sweet & Maxwell 2016)

> **[15.2] As explained at para 2.10, the material damage proviso is seen as fulfilling two important functions within the operation of the policy cover. Given the existence of material damage insurance covering the interest of the insured in the property at the premises against such loss destruction or damage, and that liability has been admitted for that damage, it is seen as meaning that:**
> **(i) no separate investigation into causation will be required; and**
> **(ii) there will be funds available to effect reinstatement of the damage.**

45. In Mr Kealey's submission, the fact that the terms of the proviso to the Basis of Settlement clause in the Policy require that a payment must be made (or liability to pay admitted) in respect of the "Event" before there can be a claim for consequential business interruption loss flowing from that "Event" demonstrates that the word "loss" was intended to bear the same meaning in both sections of the Policy. It also, he submitted, means that there can be no valid claim in the present case, since it is admitted by TKC that no claim has been made under this or any other policy in relation to any "Event", except for the present claim under the Business Interruption section itself.

46. Mr Kealey submitted that no other interpretation makes commercial sense of the Policy as a whole. First, if an "Event" could simply be temporary loss of use (as TKC contends), the proviso would require the existence of a separate policy covering temporary loss of use. In those circumstances, it is unclear what commercial function the Business Interruption Section of the Policy could itself have, since loss of use resulting from the relevant "Event" would already be covered by the policy required by the proviso. The parties cannot sensibly have intended that this proviso in the Business Interruption Section of the Policy could be satisfied simply by the claim under that Section itself. That would be circular. Secondly, if an "Event" could simply be temporary loss of use, the "Denial of Access" extension would be redundant. To the point made by Mr Marland that it would be impossible for TKC otherwise to satisfy the proviso to the Basis of Settlement clause in the event of a claim under the "Denial of Access" extension, since TKC has no insurable interest in the property of the utility suppliers, Mr Kealey responded by referring me to section 2.11 of *Riley*, which states in reference to such extensions that:

> **.. This method of bringing assets not in use by the insured within the scope of the cover must also mean that the material damage proviso does not apply ..**

47. TKC's alternative basis of claim (as set out in its Particulars of Claim[21]) is that it has suffered loss of and/or damage to stock rendered unusable by the forced closure of the Premises, that the loss and/or damage to its stock constitutes damage to property, and that its losses flowing from that loss of or damage to stock constitute loss resulting

[21] See paragraph 18 above.

from interruption of or interference with the business carried on at the premises consequent on such loss to, alternatively loss of, such property.

48. Mr Kealey accepted that for the purposes of the present application it must be assumed that TKC has arguably suffered loss of about £5,600 worth of perishable stock "because it has not been possible to use it within its use by life and/or .. because it will not meet quality standards having been unused for so long"[22]. However, he submitted that any claim in respect of that loss, either under the Property Damage Section or under the Business Interruption Section, would be bound to fail.

49. First, Mr Kealey pointed out that the definition of Business Interruption required the interruption or interference with the Business to be "in consequence of an event to property used by the Insured at the Premises". He submitted, in reliance on the authority of *MacGillivray on Insurance Law*[23] and of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[24] that the words "in consequence", as used here are words of or equivalent to proximate causation. It followed, he submitted that the "event to property" had to be the dominant, effective or operative cause of the interruption or interference.

50. In Mr Kealey's submission, the loss of stock did not cause (proximately or otherwise) any interruption of or interference with TKC's business, since it was already closed as a result of the Coronavirus Regulations. Mr Kealey submitted that the suggestion to the contrary in TKC's Particulars of Claim is something that is so obviously implausible and without substance that I can summarily reject it even at this preliminary stage. Mr Kealey supported this argument by pointing out that, if in reality the deterioration of the stock had threatened to interrupt the business, TKC would have bought replacement stock and thereby avoided any loss. That, of course, was the very last thing that TKC would have wanted to do, because its whole problem was that it could not sell its stock (even if it had been in sound condition) because its business was closed by the Coronavirus Regulations.

51. Secondly, Mr Kealey submitted that the definition of "Damage" in the Property Damage Section and of "Event" in the Business Interruption Section both require any damage to be "accidental". For these purposes an "accident" is a fortuitous happening. "Events that happen in the course of nature and all ordinary and foreseeable consequences of such events are not accidents"[25]. In Mr Kealey's submission what is alleged by TKC to have happened to the stock was not "accidental" in this sense. The stock was never the subject of any external fortuity: nothing happened to it at all. It merely decayed, as it was always bound to do, in circumstances where it had not been sold.

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22 See paragraph 19 above.

23 Birds, Lynch and Paul, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2018) at [21-001].

24 [1918] AC 350 (HL) at 363, per Lord Dunedin, and at 369-370, per Lord Shaw.

25 *MacGillivray on Insurance Law* (fn 23 above) para [27-013]. See also *DeSouza v Home & Overseas Insurance Co Ltd* [1995] LRLR 453 at 458, per Mustill LJ; "The word "accident" involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes".

52. Thirdly, Mr Kealey drew attention to the exclusions from cover under both the Property Damage Section and the Business Interruption Section of loss caused by or consisting of "inherent vice", "gradual deterioration" or (in the case of the Business Interruption Section only) "change in temperature, colour, flavour, texture or finish"[26]. In Mr Kealey's submission each of these overlapping exclusions would operate to exclude any claim on the basis put forward by TKC, since it is not alleged that there was any external damage to TKC's stock. It simply decomposed in the natural way:

    52.1 In Mr Kealey's submission "inherent vice" means the risk of deterioration of property as a result of its natural behaviour in the ordinary course of events without the intervention of any fortuitous external accident or casualty. The rotting of food is a paradigm example. It occurs without any external fortuity and is simply the product of the inherent characteristics of the property itself. Perishable food will perish in the ordinary course of events if it is left long enough. In support of these submissions, Mr Kealey relied upon *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The "Cendor Mopu")*[27]; *The Law of Insurance Contracts*[28]; and *Arnould, Law of Marine Insurance and Average*[29].

    52.2 According to Mr Kealey "gradual deterioration" refers to the progressive worsening of the condition of property over time arising from the natural behaviour of that property in the circumstances in which it exists. In support of that submission, Mr Kealey relied upon *Leeds Beckett University v Travellers Insurance Co Ltd*[30]

    52.3 With regards to the exclusion for the "change in colour, flavour, texture or finish", Mr Kealey's submission was that this exclusion confirms that, even if TKC's stock had not totally decomposed or passed its use by date, but nevertheless could not be sold in view of deterioration to its appearance or taste, a claim on this basis would still be excluded.

The arguments on behalf of TKC

53. For TKC, Mr Marland argued that the enforced closure of TKC's premises as a result of the Coronavirus Regulations involved Business Interruption by an Event, within the meaning given to those expressions in the Business Interruption Section of the Policy, and that TKC's losses in consequence of that closure were therefore within the scope of cover.

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26 See paragraphs 8 and 12 above.

27 [2011] UKSC 5, [2011] 1 Lloyd's Rep 560 at [80]-[81], per Lord Mance, and at [110]-[111] per Lord Clarke.

28 Fn 19 above, at [17-3A1]

29 (19th edn, Sweet & Maxwell 2019) at [22-41]

30 [2017] EWHC 558 (TCC), [2017] 1 Lloyd's Rep IR 417 at [227]-[236], per Coulson J.

54. Mr Marland submitted that what had occurred was "Business Interruption" within the Policy definition. Turning to the elements of that definition, he submitted that the enforced closure was plainly an "interruption of or interference with the Business", which (he argued) was "in consequence of" the prohibitions imposed by the Coronavirus Regulations, and that those prohibitions were "an event to property used by the Insured at the Premises for the purpose of the Business".

55. Mr Marland also submitted that that "Business Interruption" was "by any Event" within the Policy definition, arguing that the enforced closure of the premises (and consequent loss of use of them) amounted to "accidental loss .. of .. property used by the Insured at the Premises for the purpose of the Business". In his submission, "accidental" here means nothing more than "unlooked for or unintended", and "loss .. of .. property" includes temporary loss of use.

56. As for the proviso to the Basis of Settlement clause in the Business Interruption Section, Mr Marland submitted that the relevant "Event" was insured under the Property Damage Section of the Policy and/or that the Business Interruption Section of the Policy was itself "an insurance in force covering the interest of the Insured in the Property at the Premises against such an Event". He also submitted that it was not open to Allianz to object that payment has not been made and liability has not been admitted (as also required by the proviso), since that would involve them relying upon their own wrong in refusing to accept liability, contrary to the common-law principle affirmed in cases such as *Alghussein Establishment v Eton College*[31].

57. Mr Marland alternative argument was based upon the deterioration of TKC's stock. In Mr Marland's submission, during the period of closure required by the Coronavirus Regulations, TKC's stock at the Premises deteriorated and became unusable. That was "damage to Property" under the Property Damage Section of the Policy, in respect of which TKC can recover its losses under Special Condition 45 of that section. That "damage to Property" has resulted in Business Interruption caused by the inability to sell or use the stock when the premises reopened and/or has resulted in an Increased Cost of Working.

58. By way of general introduction to his submissions on the proper interpretation of these provisions of the Policy, Mr Marland drew attention to the way in which Allianz presented itself in the Introduction to the Policy:

> **With [Allianz] you can be confident that you're insured by a company which is relentless in its commitment to protecting and serving you. You can trust us to insure your business as we've been providing leading insurance solutions in the UK for over 100 years.**

[31] [1988] 1 WLR 587

> **We work in partnership with your insurance adviser to ensure you receive the highest levels of product and service excellence. Our technical experts understand how best to protect you against the risks your business faces.**

Mr Marland also drew attention to the breadth of the Insuring Clause[32] and to the use of the words "All Risks" in the title of both the Property Damage Section and the Business Interruption Section.

59. Mr Marland submitted that these words in the Introduction, the breadth of the Insuring Clause, and in the titling of the relevant Sections of the Policy are all part of the context against which the remainder of the Policy should be interpreted. In that context, Mr Marland argued, the court should seek to construe the Policy so far as possible to provide cover against all of the risks faced by the insured, and should not give it a narrow or technical construction. The Policy is, after all, one of Allianz's own standard forms. If Allianz wished to exclude certain risks, it was open to them to do so clearly and expressly. If they did not do so, then there should be a practical presumption that "all risks" were indeed covered.

60. Mr Marland accepted that "all risks" policies are invariably subject to a number of exceptions. However, he relied upon the following passage in the *Law of Insurance Contracts*[33] in support of the argument that "all risks" means all risks, subject only to any practical limits and any express or implied exclusions:

> **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; thus limits on the range of risks are usually built into the risk situation or to the insurance industry's understanding of the situation. .. 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. Subject to these limits, all risks means all risks, even though the policy may highlight certain specific risks, unless of course the policy makes it clear that, for example, the reference is made to all risks of a certain and limited kind. An obvious Marine example is (all) perils of the sea.**

61. In support of this approach, Mr Marland also relied upon a similar passage in *Colinvaux's Law of Insurance*[34]:

> **It is common to find property policies which are described as "all risks", especially in the case of insurances of jewellery, goods in transit and**

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32 Set out in paragraph 5 above.
33 Fn 19 above, at [17-3]
34 Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell, 2019) at [20-090]

> **household goods generally. Marine cargo is generally insured on this basis. Although described as "all risks", in fact, such policies are invariably subject to a number of exceptions as may be specified and, as a matter of general principle, will not cover loss caused by wear and tear, inherent vice or the fault of the assured. The real effect of the term "all risks" is simply that the assured is required to prove only that there has been a loss and that the loss was fortuitous. The burden of proof then shifts to the insurer to show that the loss was caused by one of the excepted perils. If he cannot do so, the assured is entitled to recover on the policy.**

62. In Mr Marland's submission, there are in the present case no relevant practical limits, and no express or implied exclusions. The "all risks" nature of the Policy therefore means that there ought in principle to be cover for the kind of losses suffered by TKC. The terms of the Policy should accordingly be given a broad and purposive construction.

63. With regard to the definition of "Business Interruption", Mr Marland submitted that the closure of the premises as a consequence of the Coronavirus Regulations was an "event to property used by the Insured at the Premises". He drew attention to the fact that the word "event" in the definition of "Business Interruption" was not capitalised, and so was not limited by the definition given in the Policy to the capitalised word "Event". He submitted that "event" here had its usual, perfectly general, meaning, and so meant no more than an occurrence or happening. The word "property" in this definition is also not capitalised, and so (in Mr Marland's submission) similarly bears a perfectly general and wide meaning,

64. With regard to the requirement that that Business Interruption should be "by any Event", Marland supported his submission that, in this context, "accidental" means nothing more than "unlooked for or unintended from the viewpoint of the insured" by reference to the decision of the House of Lords in *Fenton v Thorley*[35], in which it was held that the word "accident" was used in the Workman's Compensation Act 1897 in the popular and ordinary sense, and meant a mishap or untoward event not expected or designed. Mr Marland relied on the observations of Lord Lindley, who said:

> **The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal**

[35] [1903] AC 443 (HL)

> **purposes it is often important to distinguish careless from other unintended and unexpected events.**

65. It is convenient, however, also to refer at this point to a passage further on in Lord Lindley's speech, where Lord Lindley observed that a distinction should be drawn between the correct approach to the interpretation of an insurance policy and the correct approach to statutory interpretation:

> **In this Act of Parliament the word ["accident"] is used in a very loose way ..**
>
> **.. I cannot agree that this statute ought to be construed as if it were a policy of insurance against accidents.**
>
> **In an action on a policy the causa proxima is alone considered in ascertaining the course of the loss, but in cases of other contracts and in questions of tort the causa causans is by no means disregarded ..**
>
> **.. The rule that in contracts of insurance the proximate cause of loss can alone be regarded is carried so far that if it were rigidly applied to this Act of Parliament its evident object would in many cases be clearly defeated ..**

66. As to the requirement in the definition of "Event" that there should be a "loss .. of property", Mr Marland pointed out that the qualifying word "physical" does not appear in that definition (or in the definition of Business Interruption). He submitted that, although physicality may be implicit in the concept of "destruction", there is no such implication in the concept of "loss". Particularly in the context of a policy against Business Interruption, the concept of "loss" should (in Mr Marland's submission) be interpreted widely, as embracing to all types of loss including purely economic loss such as loss of use.

67. Mr Marland supported this submission by reference to the following comments by the New Zealand Court of Appeal in *Kraal v The Earthquake Commission*[36], the facts of which I have already outlined[37]:

> **[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 has suffered a loss, namely the ability to use her property, and other associated losses. However the**

[36] See fn 18 above,
[37] See paragraphs 39 and 40 above.

> **definition refers to loss "to the property", and not lost to the insured person.**
>
> **..**
>
> **[41] .. 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. They did not do so. They specified "physical" loss "to" the property.**

68. Mr Marland also referred to the decision of J Wilson J in the Superior Court of Justice of Ontario in the case of *MDS Inc. v. Factory Mutual Insurance Company*[38]. In that case, the plaintiffs bought isotopes for processing and resale from the Nuclear Research Universal Reactor at Chalk River, Ontario. An unanticipated leak of heavy water containing radioactive Tritium coming through the calandria wall in the reactor caused it to be shut down for 15 months. The plaintiffs made a claim under the All Risks policy issued by the defendant, which covered specified property (including the reactor) against losses from all risks of physical loss or damage, except as excluded. The policy terms included a corrosion exclusion subject to a resulting damage exemption.

69. In the course of a lengthy judgment, J Wilson J considered two contrasting approaches appearing in the decided cases to the interpretation of the phrase "physical damage": one, "the narrow view that limits physical damage to corporeal, tangible damage"; the other "a broader interpretation that encompasses not only tangible damage but also impairment of use or function"[39]. His conclusion[40] was that:

> **[518] .. a broad definition of resulting physical damage is appropriate in the factual context of this case to interpret the words in the Policy to include impairment of function or use of tangible property caused by the unexpected leak of heavy water.**
>
> **[519] This interpretation is in accordance with the purpose of all-risks property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risks coverage.**

70. Mr Marland also cited the case of *Studio 417 Inc v The Cincinnati Insurance Company*[41], a decision of the US District Court for the Western District of Missouri, Southern Division on a motion for summary dismissal of claims for losses resulting from enforced closures related to the COVID-19 pandemic under all risk policies

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38 2020 ONSC 1924
39 Ibis at [466].
40 Ibid at [515] to [520]
41 Case No. 20-cv-03127-SRB

issued by the defendant insurer covering (inter-alia) loss of business income. The policies provided that the defendant would pay for "direct 'loss'", unless excluded, and defined a "Covered Cause of Loss" as meaning "accidental [direct] physical loss or accidental [direct] physical damage".

71. The court rejected the defendant insurer's motion to dismiss, based upon the overarching argument that the Policies provided coverage "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease". It held (inter-alia) that:

> **Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." ..**
> **The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." .. "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." .. "Loss" is "the act of losing possession" and "deprivation."**
> **Applying these definitions, Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air." .. COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." .. Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase."**
> **..**
> **.. even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose ..**

72. Mr Marland said that he referred to this case simply as an illustration of his argument that "loss" does not necessarily mean "physical loss", and that he did not need to go as far as to support the ultimate holding. It is, perhaps, worthy of note that the judgment of the US District Court also refers to the fact that "there is case law .. that physical tangible alteration is required to show a 'physical loss'", and that there had been "recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss", including *Social Life Magazine, Inc. v. Sentinel Ins. Co Ltd*[42], where it was stated that "the virus damages lungs, not printing presses".

[42] 1:20-cv-03311-VEC (S.D.N.Y. 2020).

73. Finally in this connection, Mr Marland drew attention to the following passages from the *Law of Insurance Contracts*[43]:

> **[16-2A] Prima facie, loss means physical loss. In the context of insurance, however, the most common meaning of loss is any loss, damage or deprivation suffered by the insured is a consequence of an event insured against, which leaves the insured financially poorer than before. That is the sense in which the word is used this book, unless the context indicates otherwise. That is the sense, in the case of indemnity insurance, in which the insured must prove loss to found a claim. This includes liability insurance: it was sufficient to establish loss, it has been held, that the claimant company's share price had fallen by one-third. However in the context of insurance covering "all risks of loss or damage to the subject-matter insured", the word applies only to physical loss or damage.**
>
> **[16-2A3] .. In general, the nature of loss in cases of indemnity insurance is firmly financial.**
>
> **The contract may limit cover further to "physical" loss, in which case goods which have suffered no physical impairment but have lost value have not suffered loss. However, loss includes loss of use, not only when there is a deprivation of the property concerned, but also when it is still there: it has been held in New York that there may be "loss" of the human limb without actual amputation; it is enough for "loss" that there has been loss of use.**

74. Mr Marland also laid stress upon the fact that the wording here referred to loss "of" property, rather than loss "to" property, and relied upon the following passage from the section of *Colinvaux's Law of Insurance*[44] dealing with buildings insurance, as supporting his submission that, although "loss to" may require physical loss, "loss of" implies no such restriction:

> **The second distinction to be drawn is between "loss of" and "loss to". The former connotes some actual physical loss of the insured subject-matter, and would seem to have that effect even in the absence of the prefix "physical". By contrast, "loss of" relates not so much to the physical existence of the building but rather to the assured's ability to enjoy it. Accordingly the "loss of" a building would encompass loss of use, whereas "physical loss of", "physical loss to" and "loss to" will require physical damage to the building.**

In Mr Marland's submission, the context shows that the word "former" in the second sentence of this passage should be "latter" so that it is "loss to" which connotes physical loss.

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[43] Fn 19 above, at 16.2A and 16.2A3

[44] Fn 34 above at 11-01

75. As to Mr Kealey's point that, to constitute a "loss" for these purposes, there must be something more than a mere temporary or transitory loss, Mr Marland responded that it was in the nature of the "loss" covered by business interruption insurance that it was almost always temporary or transitory. Mr Marland argued, by reference to *Stringer v The English and Scottish Marine Insurance Co Ltd*[45], *Moore v Evans*[46] and *Scott v The Copenhagen Reinsurance Company (UK) Ltd*[47] that, while loss of use for a temporary period does not amount to "total loss" (particularly in the technical sense in which that expression is used in Marine insurance), it does amount to "loss" for the purposes of this (non-Marine) Policy.

76. Finally, on this aspect, Mr Marland argued that the word "property", not being a capitalised expression and so not being specifically defined in the Policy, should be given a broad meaning and would, in its ordinary and natural meaning, include any chose in action or chose in possession used by the insured for the purpose of the business. This, in Mr Marland's submission, would include (among other things) the right to carry on the business from the premises.

77. Turning to the proviso to the Basis of Settlement clause, Mr Marland submitted that what was required was simply "an insurance", not "another insurance" or "a different policy section". Mr Marland submitted that the requirements of this proviso could be satisfied either (1) by the Property Damage Section (which he submitted covered the deterioration in stock and/or was not limited to physical damage but also covered loss of use), or (2) by the Business Interruption Section itself.

78. In that connection, Mr Marland submitted that no other construction could make sense in the context of the Denial of Access extension. As for Mr Kealey's argument that it is necessarily implicit in the cover provided by the Denial of Access extension that the material damage proviso does not apply, Mr Marland responded that that was not what the Policy actually said. With regard to Mr Kealey's reliance upon the passage in *Riley*, where that implication is recorded, Mr Marland pointed out that that passage in *Riley* was written on the assumption that the wording of the material damage proviso requires there to be "in existence a material damage policy covering the interest of the insured in the property against loss destruction or damage". In the present case, that is not what the wording of the proviso in the Policy actually says. Mr Marland also submitted that *Riley*, although the leading text on business interruption insurance, was written from the point of view of the insurer, not of the insured, its current editor being a former President of the Chartered Institute of Loss Adjusters.

79. As for the claim based on loss of stock, Mr Marland submitted that the stock would have been available for sale or consumption when/if the premises reopened, if it had not deteriorated. Thus, Mr Marland submitted, there were two components to the

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45 (1869) LR 4 QB 676; (1870) LR 5 QB 599
46 Fn 8 above.
47 [2003] EWCA Civ 688

relevant Business Interruption loss: first, the loss of trade during the period when the enforced closure was in place (where the proximate cause was the inability to trade, i.e. the loss of use of the Premises, Contents and Stock); and, second, the business interruption caused by the inability to sell or use the stock when the premises reopened because that stock had been rendered unusable. As to the second, the purchase of replacement stock would at least constitute an Increased Cost of Working. Although no claim has as yet been formulated or advanced in respect of the underlying "property" loss, Mr Marland submitted that such a claim could be advanced by way of amendment to the Particulars of Claim.

80. Mr Marland submitted that this was not a case of gradual deterioration, inherent vice or change of colour etc. Here the cause of the deterioration and loss was the closing of the business in consequence of the Coronavirus Regulations. That was not gradual. It was also a "fortuitous external accident or casualty". In that connection Mr Marland relied upon the statement by Lord Mance in *The "Cendor Mopu"*[48] that:

> **.. anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice ..**

Analysis and conclusions - strike out and summary judgment

81. The first matter that I must consider is whether it is right for me to resolve any of the issues in this case summarily. The two provisions of the CPR which have been invoked by Allianz in this application are CPR 3.4(2) and CPR 24.2. CPR 3.4(2) gives the court power to strike out a claimant's statement of case which discloses no reasonable grounds for bringing the claim. Under CPR 24.2, the court may give summary judgment against a claimant on a claim or on a particular issue if the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the matter should be disposed of at trial.

82. It was common ground that the burden of establishing for these purposes that TKC has no reasonable grounds for bringing its claim and/or that it has no real prospect of succeeding on it (and that there is no other compelling reason why the case should be disposed of at a trial) is on Allianz.

83. There was also no dispute that the relevant principles that the court should apply on applications such as this by a defendant under these provisions of the CPR are those explained by Lewison J in the cases of *JD Wetherspoon Plc v Van de Berg & Co Ltd*[49] and *EasyAir Ltd (trading as Openair) v. Opal Telecom Ltd*[50]. The first six of those principles are stated in materially identical terms in both judgments:

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48 Fn 27 at [80]

49 [2007] EWHC 1044 (Ch), [2007] PNLR 28 at [4],

50 [2009] EWHC 339 (Ch.) at [15]; approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24], per Etherton LJ, and in *Global Asset Capital Inc and another v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27], per Hamblen LJ. See also *TFL Management Services Ltd v. Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26]-[27] per Floyd LJ.

> **The correct approach on applications [under CPR Part 24] by defendants is .. as follows:**
>
> **i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success ..**
>
> **ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ..**
>
> **iii) In reaching its conclusion the court must not conduct a "mini-trial" ..**
>
> **iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ..**
>
> **v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ..**
>
> **vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.**

84. In paragraph (vii) of the summary given in the *JD Wetherspoon* case, Lewison J observed that:

> **vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts.**

In the *Easy Air* case, however, paragraph (vii) was as follows:

> **vii) It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it ..**

85. As I noted in *Hall v Saunders Law Ltd*[51], there is no tension between these different concluding paragraphs. The issue of whether a case can properly be disposed of without a trial is one of proper case management and procedural justice. In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.

86. Mr Kealey submitted that his client's application fell precisely into the category referred to by Lewison J in paragraph (vii) of his summary of the principles in the *EasyAir* case. Although Allianz formally does not admit all of the factual matters (particularly those relating to causation and loss) that have been pleaded by TKC, Mr Kealey accepted that, for the purposes of the present application, the court must assume the correctness of almost all of those pleaded factual matters. The one exception (in Mr Kealey's submission) is TKC's assertion that deterioration of its stock itself caused any loss of business – an assertion which Mr Kealey submitted is plainly without substance.

87. Mr Kealey submitted that, that assertion apart, there can be no real dispute about the relevant overall background and legislative history, the details of which are helpfully set out in paragraphs [10] to [60] of the judgment in the FCA test case. In Mr Kealey's submission, this application involves short points of policy construction, in relation to which the court can be satisfied both that it has before it all the evidence necessary for the proper determination of those issues and that the parties have had an adequate opportunity to address those points in argument.

88. Mr Marland disagreed with these submissions, and argued that this was not a case that was suitable for summary determination. He emphasised that, of the three possible limitation to the scope of "all risks" cover identified in the *Law of Insurance Contracts*[52], the only one that was potentially relevant was the "practical limit to those risks to which the particular subject-matter in its particular location is exposed: thus limits on the range of risks are usually built into the risk situation or to the insurance industry's understanding of the situation". Mr Marland submitted that, at present, the court has no or no proper evidence before it of "the risk situation or .. the insurance industry's understanding of the situation". These are matters, according to Mr Marland, which call for evidence (which would likely be expert evidence), none of which is presently before the court. Mr Marland accepted that this would have to be evidence of the situation at the time of the placing of the insurance, which predates the

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51 [2020] EWHC 404 (Comm) at [17] – [18].

52 See paragraph 60 above.

current COVID-19 pandemic. However, in Mr Marland's submission, this is not the first pandemic, or even the first pandemic this century, to have insurance implications.

89. Mr Kealey's answer to this submission was to repeat that Allianz's application assumes the correctness of all save one aspect of the factual matters that have actually been pleaded by TKC as being relevant to the issues of interpretation of the policy. He drew attention to paragraph C1.3(h) of the Admiralty and Commercial Courts Guide, which specifically provides that:

> **Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in its statement of case each feature of the matrix which is alleged to be of relevance. The "factual matrix" means the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract/document.**

He also pointed out that TKC has not identified in any evidence any particular additional fact or industry custom or understanding that it would wish to plead and rely on. Nor has any such material been identified by Mr Marland in his submissions.

90. In my judgment, Mr Kealey has the better of this aspect of the argument. If particular facts are relied on by a party as being relevant to the interpretation of a document, those facts must be pleaded. That is so that they can be specifically responded to, whether by admission or denial, and can (where necessary) be established and/or challenged by evidence. It is also so that the court can know with certainty what each party relies on as the relevant elements of the "background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

91. Nevertheless, at this early stage in an action, the court will often give a party that has failed to comply with its obligation to set these matters out in its statements of case an opportunity to correct that deficiency by a suitable amendment. Furthermore, when considering an application for summary judgment, the court will take into account not only the evidence actually placed before the court on the application, but also any other relevant evidence that could realistically be expected to be available at trial. As Moore-Bick LJ said in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [53] (quoted by Lewison J at the end of his principle (vii) in *EasyAir*):

> **Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success ..**

[53] [2007] EWCA Civ 725 at [14]

However, as Moore-Bick LJ went on to say:

> **.. it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ..**

92. In the present case, Allianz's application was issued more than three months before it came on for hearing. That period has given TKC ample opportunity to identify any particular additional matter that it would wish to rely on in support of its case as to the interpretation of these provisions. It has not done so, but instead simply asserts that expert evidence is required, without giving any indication of what it hopes that that expert evidence would actually say. Yet, in the nature of things, these sorts of facts are not generally things that can be exclusively within the knowledge of insurers and insurance industry experts. To be admissible as relevant to contractual interpretation, a fact has to be part of the background knowledge that was reasonably available at the time of contracting to *both* parties, not just to one of them.

93. It also seems to me that the passage from the *Law of Insurance Contracts* on which Mr Marland relies does not, on the facts of this particular case, support his claim that expert evidence is required in order to construe the Policy. That passage is concerned with "the practical limit to [the] risks to which the particular subject-matter in its particular location is exposed". However, it has not been suggested that there is anything exceptional or unusual - at least from an insurance point of view - about the business carried on by TKC at The Kensington Crêperie. Nor, in the light of the decision in the FCA test case that most (though not all) of the 'disease clause' extensions in the sample of policy did provide cover in the circumstances of the current COVID-19 pandemic, can it realistically be suggested that those circumstances were wholly outside the "insurance industry's understanding" of the risk situation (and Mr Kealey has not sought to do so).

94. In my judgment, this is therefore a case in which, contrary to Mr Marland's submissions on behalf of TKC, I can be confident that I have available to me all the evidence necessary for the proper determination of the issues of interpretation of the Policy which fall for consideration on this application.

95. There is, nevertheless, a second limb to Mr Marland's argument that this case is unsuitable for summary determination, which is that it potentially has wider significance. In Mr Marland's submission, the fact that this is a standard form policy wording in widespread use provides a compelling reason why the issue of whether it provides cover in the circumstances of the present COVID-19 pandemic is unsuitable for determination without a full consideration of the underlying facts and full exploration of the issues at trial.

96. In support of this submission, Mr Marland relied upon the observations of Etherton LJ in *AC Ward & Son v Catlin (Five) Ltd*[54]. That case, like the present, involved an application by an insurer for summary judgment against a claiming policyholder. At first instance, HHJ David Mackie QC had dismissed the defendant insurer's application. The Court of Appeal dismissed the insurers' appeal from that decision, holding that the claimant policyholder "has a real prospect of successfully contending that its interpretation gives the Policy a more reasonable commercial meaning and one more likely to be that intended by the parties"[55]. Etherton LJ (with whom Wilson and Sullivan LJJ agreed) then went on to observe that:

> **I agree with the Defendants that neither the Claimant nor the Judge has articulated clearly any evidence relevant to interpretation which is likely to exist and, although not available on the hearing of the Application, can be expected to be available at trial. Had this been the only ground for dismissing the Application, it would not, in my judgment, have been sufficient .. [H]owever, as I have said .. it is apparent from paragraph [46] of the Judgment that the Judge's decision included the arguability of the Claimant's submissions on interpretation.**
>
> **Furthermore, I bear in mind that the Warranties are standard terms of the Defendants' Multiline Commercial Combined Policy, which may affect many other policyholders, and that provisions in the Warranties .. are said to have even wider currency in the insurance market. In those particular circumstances, combined with the arguability of the Claimant's points on interpretation, I can understand why the Judge considered it would also be appropriate to give the Claimant the opportunity to seek and adduce any relevant and admissible factual material available by the date of the trial.**[56]

97. As Lewison J recorded in his *EasyAir* principle (vi), the court will always be conscious of the practical limitations of the summary judgment procedure. As Mummery LJ observed in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd*[57] (a case cited by Lewison J):

> **.. there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment .. than in trying the case in its entirety .. The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.**

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54 [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301
55 At [34].
56 At [35]
57 [2006] EWCA Civ 661, [2007] FSR 3 at [5]-[6]

> **The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made ..**

98. However, this is not a case of the type which Mummery LJ was there considering. The Skeleton Arguments lodged on both sides for this application were lengthy, well-reasoned, and contained a full citation of authority. The hearing by video-link before me was largely free of technical problems and lasted a full day. I am therefore satisfied that both parties have had an adequate opportunity to address the relevant issues in argument.

99. Moreover, given the economic effects of the COVID-19 pandemic, it seems to me that there is a public interest in having the issue of whether the Business Interruption section of Allianz's standard "Commercial Select" policy provides cover determined (if it can fairly and justly be done) sooner rather than later. That circumstance distinguishes the present case from the situation considered by the Court of Appeal in the *AC Ward & Son* case, where the issues being considered, while of some general significance, were not of immediate and pressing importance to other policyholders, and where the court's decision was handed down less than two months before the date fixed (subject to the outcome of the appeal) for the trial of the action.

100. In my judgment, it would therefore be in accordance with the overriding objective for me now to deal with and to decide, so far as I am able, the issues of interpretation raised by Allianz's application.

Analysis and conclusions - the scope of cover under the Policy

101. The general principles of contractual interpretation applicable to the Policy were not in dispute. They have been considered in a series of decisions of the House of Lords, Privy Council and Supreme Court, culminating (at least at the time being) in *Wood v Capita Insurance Services Ltd*[58], and are helpfully set out at length in the judgment in the FCA test case[59]. In *Trillium (Prime) Property GP Limited v Elmfield Road Limited*[60], Lewison LJ (whose authority on matters of contractual interpretation is unrivalled) said of these authorities that he would:

> **.. not attempt to distil or paraphrase that learning. As Lord Hodge said at [9], the legal profession has sufficient judicial statements of that nature ..**

I propose respectfully to adopt the same approach.

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58 [2017] UKSC 24, [2017] AC 1173
59 Fn 2 above at [62]-[79] and [137].
60 [2018] EWCA Civ 1556 at [9].

102. In interpreting this policy, I must course bear in mind that this Policy is one of Allianz's standard forms. As Lord Millett observed in *AIB Group (UK) Ltd v Martin*[61]

> **A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited. The danger, of course, is that a standard form may be employed in circumstances for which it was not designed. Unless the context in a particular case shows that this has happened, however, the interpretation of the form ought not to be affected by the factual background.**

103. In such cases (to adapt slightly the well-known words of Lord Collins JSC in *In re Sigma Finance Corpn*[62]):

> **.. it is the wording of the instrument which is paramount. The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the [transaction].**

104. I must also bear in mind what is sometimes described as the *Hooley Hill Rubber* principle[63], which is that the parties are "taken to have contracted against a background which includes the previous decisions upon the construction of similar contracts"[64]. As Clarke LJ (with whom Peter Gibson and Scott Baker LJJ agreed) explained in *Sunport Shipping Ltd v Tryg-Baltica International (UK) Ltd* [65], this is:

> **.. essentially a principle of construction. Thus the court is trying to ascertain the intention of the parties in using the expression deployed in the contract. Where a contract has been professionally drawn, as in the case of the Institute Clauses, the draftsman is certain to have in mind decisions of the courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning ..**

105. There is something of an air of unreality about applying this principle to a standard form commercial policy sold by a major insurer to (amongst others) many SMEs such

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61 [2001] UKHL 63, [2002] 1 WLR 94 at [7]

62 [2010] 1 All ER 571 at [37], recently cited and applied in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29, [2016] Bus LR 725, SC(E) at [31].

63 *Re Hooley Hill Rubber and Royal Insurance Co* [1920] 1 KB 257

64 *Toomey v Eagle Star Insurance Company Limited* [1994] 1 Lloyd's Rep 516 at 520, per Hobhouse LJ; quoted in the FCA test case at [76].

65 [2003] EWCA Civ 12; [2003] 1 Lloyd's Rep 138

as TKC. Those small business customers are unlikely to have read (or to have anyone readily available on the staff of their business who has read) *MacGillivray on Insurance Law*, or any of the other textbooks or authorities to which I have been referred. They are therefore likely to look to the words of the Policy itself, in their ordinary business meaning, to discover what their insurance covers, rather than to the body of learning to which I have been referred. Nevertheless, where this principle applies (for example, in relation to the meaning to be given to technical expression such as "inherent vice"), it serves the useful commercial purpose of providing legal certainty, and the authorities and textbooks to which I have been referred in any event provide helpful guidance in elucidating the principles to be applied and in identifying the competing considerations.

106. Even so, the terms of every policy must (as has often been said) be considered individually, as it is impossible to determine questions of policy cover in the abstract. My task, therefore, is to interpret the particular words used in this particular Policy, in their commercial context and in the context of the Policy as a whole. Without intending any disrespect to the elaborate arguments that have cogently been deployed on either side in this case, and which I have attempted to summarise above, I can express my reasoning and conclusions on the central issues of interpretation which arise in this case quite shortly.

107. By way of preliminary, I accept Mr Marland's submission that the wording of the Introduction, the breadth of the Insuring Clause, and the "all risks" titling of the relevant Sections of the Policy are all part of the context against which the remainder of the Policy should be interpreted. In particular, the Introduction is expressly stated to form part of the Policy[66]. I also accept Mr Marland's submission that that context provides an indication that the terms of the Policy should, where possible, be given a generous construction with regard to the extent of coverage. That cannot, however, on its own justify giving a strained or unnatural construction to the words of the Policy.

108. It is convenient, in order to provide clarity, to begin with the alternative way in which TKC puts its claim. That is, that the deterioration in the stock held at the premises during the period of closure caused relevant Business Interruption for which TKC is entitled to claim under the Policy.

109. The Business Interruption Section of the Policy responds to "Business Interruption by any Event". The word "by" in that phrase connotes causation, and the definition of Business Interruption itself requires the interruption or interference to be "in consequence of an event to property used by the Insured at the Premises", a phrase which (as Mr Kealey submitted) commonly denotes proximate causation.

110. In my judgment, the factual assertion that the deterioration in TKC's stock caused (proximately or otherwise) any relevant interruption or interference with TKC's business is one which, without in any way seeking to conduct an impermissible "mini

[66] See paragraph 4 above.

trial", I can summarily reject as wholly unrealistic even at this preliminary stage. The deterioration of TKC's stock during the period of closure did not cause TKC's business to be interrupted or interfered with, because (as is common ground) it occurred at a point at which that business was already closed as a result of the Coronavirus Regulations. It was a consequence of the interruption or interference, not its cause.

111. Mr Marland's submission that the deterioration in the stock has resulted in an interruption or interference with TKC's business because of its inability to sell or use the stock when the premises reopened similarly parts company with reality. As Mr Kealey pointed out, if in fact the deterioration of the stock had threatened to interrupt the business, TKC would have bought replacement stock and thereby avoided any loss. That, of course, was the very last thing that TKC would have wanted to do, because its whole problem was that it could not sell its stock (even if it had been in sound condition) because its business was closed by the Coronavirus Regulations.

112. As for Mr Marland's argument that the deterioration was itself the cause of an interruption or interference because the cost of buying replacement stock was an "Increase in Cost of Working", that (in my judgment) confuses cause and effect. The Increase in Cost of Working on which Mr Marland seeks to rely was a consequence of the interruption or interference with the business (and consequent deterioration of stock) caused by the closure. It did not itself cause the interruption or interference.

113. That conclusion is of itself sufficient to dispose of this ground of claim. However, I also accept Mr Kealey's two further arguments as to why this ground of claim cannot properly be maintained.

114. First, I accept Mr Kealey's argument that what occurred to the stock was not "accidental" in the sense in which that word is used in the definition of "Event". The word "accident" takes its colour from its context. In the phrase "accidental loss or destruction of or damage to property", the word "accidental" is not, in my judgment, apt to include the natural process of the decay or deterioration of unsold stock.

115. Secondly, I accept Mr Kealey's argument that what is alleged to have happened to the stock was something that was caused by or consisted of "inherent vice", "gradual deterioration" and/or "change in temperature, colour, flavour, texture or finish", and so was excluded from cover by the express terms of the Policy. Perishable food and other stock will perish in the ordinary course of events if it is left long enough. What is said to have occurred here was simply the product of the inherent characteristics of the property itself.

116. These conclusions also mean that TKC can also have no valid claim under the Property Damage Section of the Policy in respect of the deterioration of its stock. That section responds to "Damage to Property Insured". "Damage" is defined as "accidental loss or destruction of or damage to Property Insured". For the reasons

which I have just given, what occurred to the stock was not "accidental" in the sense in which that word is used in that definition. The Property Damage Section (like the Business Interruption Section) also excludes liability for damage caused by or consisting of "inherent vice" or "gradual deterioration".

117. I also cannot accept Mr Marland's alternative argument in relation to the Property Damage Section, which was that the Property Damage Section itself responds to the closure of TKC's premises (and is therefore "an insurance in force .. against such Event" within the meaning of the proviso to the Basis of Settlement clause in the Business Interruption Section).

118. I accept Mr Kealey'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 "Basis of Settlement" 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 in the Property Damage Section, and so is not covered under that section. I accept Mr Kealey's argument that, to amount to "loss .. of .. Property Insured" within the cover provided by the Property Damage Section of the Policy, 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. That brings me to TKC's principal ground of claim, which is that the prohibitions imposed by the Coronavirus Regulations were "an event to property used by the Insured at the Premises for the purposes of the Business" within the definition of "Business Interruption" in the Policy, and that the enforced closure of the premises (and consequent loss of use of them) amounted to "accidental loss .. of .. property used by the Insured at the Premises for the purposes of the Business" within the definition of "Event" in the Policy.

121. It seems to me that, in order to ascertain the true meaning and effect of these two definitions, they must be read together. They must also be read in the context of the Policy as a whole and, in particular, in the context of the proviso to the Basis of Settlement clause in the Business Interruption Section.

122. The Policy provides that "the Insurer will pay the Insured for Business Interruption by any Event", subject to the list of exclusions. The first question therefore is whether what has happened amounts to "Business Interruption" within the Policy definition. As to that, I accept Mr Marland's argument that the enforced closure of TKC's premises as a result of the Coronavirus Regulations was an "interruption of or interference with the Business carried on by the Insured at the Premises". I also accept Mr Marland's argument that that interruption or interference was "in consequence of an event to property used by the Insured at the Premises for the purpose of the Business". As Mr Marland pointed out, the word "event" in the definition of Business Interruption is not capitalised, and so is not confined to the meaning given by the definition of the capitalised expression "Event". In its context in the definition of Business Interruption, it seems to me that the word "event" simply means an occurrence or happening. In my judgment, therefore, what occurred was "Business Interruption" as defined in the policy.

123. The Policy, however, only responds to "Business Interruption by any Event". As I have already held, the word "by" here connotes causation. The word "Event" is capitalised, and accordingly bears the meaning given in the definition of that expression. The crucial issue is therefore whether the enforced closure can properly be said (as TKC alleges) to be "accidental loss .. of .. property" within that definition.

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 Mr Kealey'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 to the Basis of Settlement clause 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 Mr Marland'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 to the Basis of Settlement clause 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. I also do not accept that that reasoning is invalidated by the "Denial of Access" and similar extensions. These are extensions which are specifically intended to cover circumstances in which the insured has no insurable interest in the relevant property. In those circumstances, as *Riley* states, it is a necessary implication that the proviso (which assumes that the insured does have an insurable interest in the property) does not apply.

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.

129. It also follows from my conclusions (a) that TKC can have no valid claim under the Property Damage Section either in relation to the deterioration of its stock or the temporary loss of use of its premises, and (b) that the Business Interruption Section cannot itself satisfy the requirements of the proviso to the Basis of Settlement clause, that TKC (which has admitted that it has no other relevant insurance) cannot satisfy the requirements of that proviso.

130. The conclusions in paragraphs 128 and 129 above, both independently and when taken together, mean that TKC's primary ground of claim cannot, on the correct interpretation of the Policy, successfully be maintained. Since I have held that TKC's alternative grounds of claim are also bound to fail, and since TKC has now abandoned its attempt to claim under Extension Z/177/1 on the basis that the Coronavirus Regulations amounted to the loss of its licence, it follows that this action by TKC as a whole is, in my judgment, bound to fail.

131. In the circumstances, Allianz's application summarily to bring this action to an end succeeds.

Coda

132. In his Skeleton Argument for this application, Mr Kealey said that:

> **Allianz is acutely conscious of the fact that the coronavirus pandemic has had a severe impact on many of its policyholders, including those such as TKC which operate in the hospitality sector. It has every sympathy with those affected .. Allianz also understands that policyholders with [Business Indemnity] cover will naturally wish to explore the question of whether or not it responds to the losses that they have suffered. Equally, however, it is vital for the functioning of such insurance and for the benefit of policyholders with valid claims that Allianz should only pay claims in cases where the policy requirements are satisfied, and not otherwise.**

133. In the present unprecedented circumstances, it is impossible not to share that sympathy. Some readers of this judgment may therefore have the instinctive reaction that an "all risks" business interruption policy such as this ought in justice to provide

cover to SMEs such as TKC against the significant damage to their businesses caused by government measures such as the Coronavirus Regulations, which have been implemented for the benefit of everyone but which have had their most damaging effect on particular sectors. Some may also argue that the common law should therefore change its approach to such policies, and should adapt its principles of contractual interpretation and implication to the present unprecedented circumstances, so that they assist in transferring the burden of the present emergency to those, such as insurance companies and other major financial institutions, who may perhaps better be able to bear it.

134. However, as the authors of the BIICL Concept Note *"Breathing Space"*[67] wisely observed:

> **In times of uncertainty, the law must provide a solid, practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery ..**
>
> **Contractual rights are to be evaluated by applying settled principles to the contract in question. Legal certainty remains paramount and gives the surest basis for resolution ..**

135. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential issues. In the event that agreement cannot be reached by 4pm on Friday 23 October 2020, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 28 October 2020. I will then either give a ruling by email or direct a short further hearing by video conference. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.

136. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary. I am grateful to counsel on both sides and to the teams behind them for their assistance and for the clarity and quality of their submissions.

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[67] Blair, Lein, Gullifer, Fu, *"Breathing space", BIICL Concept Note 2 on the effect of the 2020 pandemic on commercial contracts* (May 2020) at [68]-[69].