Will our Policy Respond? Coronavirus and Business Interruption Insurance Coverage

Hugh Sims QC & Jay Jagasia, Guildhall Chambers, 29 April 2020

1. One could be forgiven, given recent pronouncements (in some cases self-serving) by (amongst others) the Financial Conduct Authority (the "**FCA**") and the Association of British Insurers (the "**ABI**"), for having formed the view that business interruption ("**BI**") insurance cover is unlikely to be able to assist the very many businesses in this country that are currently experiencing the acute (and potentially longer-lasting) financial difficulties which have resulted from COVID-19 and the mandated closure of their business premises despite having incepted (and invariably paid higher premiums) for such cover.

2. In its letter dated 15 April 2020 to the Chief Executive Officers of the insurance companies that operate in the UK market concerning SMEs and BI coverage, the FCA appears to have adopted the rather pessimistic view, based on apparently one-sided "*conversations with the industry to date*", that "*most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic*", and consequently determined on that basis that it could "*see no reasonable grounds to intervene in such circumstances*". The FCA also pointed out that: there are some (but presumably not many) policies "*where it is clear that the firm has an obligation to pay out on a policy*" and that, as far as these apparently clear-cut policies are concerned, the firms ought to assess and settle any claims quickly; firms should pay out by way of interim payment any undisputed parts of claims where there "*are reasonable grounds to pay part of a claim but not to make the payment of such claims in full*"; and by way of a thinly-veiled (but toothless?) threat, the FCA mandated that any firms which disagreed with the ground-breaking principles that firms should pay out quickly in clear-cut cases or where part of the claim could not be properly disputed need to send their grounds for disagreement including how it believes that "*it represents a fair outcome for customers*", and told that the firm's "*decision is likely to help inform our assessment of its culture*".

3. Unsurprisingly, the ABI commented, in response to the FCA's "Dear CEO" letter, that the FCA's "*clarification confirms the scope of pandemic insurance among firms*". More recently, the ABI has further commented that: "*While many business owners are uninsured for pandemics, UK insurers still expect to pay over £1.2 billion in claims, making this a significant insured event…However, we are also painfully aware that the majority of businesses are uninsured for global pandemics, as is the case throughout continental Europe and North America. Although ABI members expect to pay £900 million in business interruption claims, most policyholders are not covered for pandemic losses. We agree strongly that the UK should examine public-private partnerships to find a lasting solution, to enable more affordable, more extensive pandemic insurance cover to be available to those firms who want it*". If one was to listen exclusively to the ABI, who appears to construe its members' own policy wordings by having regard to non-

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admissible matters such as the cost to pay out, BI cover was never intended to cater for a global pandemic, is limited to well-known perils which might directly affect a business property and, like for example, large-scale flood perils, requires the intervention of the state so that affordable insurance can be made available which would extend BI to pandemics.

4. Within this backdrop of pessimism, and the FCA's false dichotomy between so-called clear-cut policy wording and non-existent coverage, it ought to come as some relief to affected businesses that there is not only a middle ground of policy wording, which is not so clear-cut against them, but other potentially relevant areas of coverage outside of BI, which might respond. A recent and, well-reasoned, Canadian decision, has adopted an expansive meaning of 'damage', which lends some persuasive support to the adoption of that expansive meaning in the interpretation of policies in the courts of England and Wales. A considered analysis suggests further consideration and investigation of BI and other cover for recovery of losses caused by COVID-19 is unlikely to be entirely fruitless, whether relief is sought via the courts, or through other redress avenues, such as via the Financial Ombudsman Service ("**FOS**") where compensation up to £350k is available.

Construction/Interpretation – General Principles

5. Although self-evident, it is important to emphasise that like any contract, an insurance policy must be interpreted based on a careful analysis of its own relevant terms. The difficulty in the context of BI cover is that not only are there different terms in the market offered by different insurers, but those terms may differ with different customers and (unsurprisingly) there is no authority which has considered those terms in the context of a pandemic such as coronavirus. To a large extent, therefore, at this stage, the issue needs to be approached from first principles.

6. As is well-known, the leading modern statement on the correct approach to contractual interpretation is set out in the decision of the Supreme Court in **Arnold v Britton**[1]. In that case, Lord Neuberger summarised the correct approach to construction in the following frequently cited passage: "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd…And it does so by focusing on the meaning of the relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed,*

[1] [2015] UKSC 36. See also **Wood v Capita Insurance Services Ltd** [2017] UKSC 24, particularly [10]-[13].

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and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions"[2].

7. It is important, generally, but especially in the current context, to briefly summarise five of the seven factors which Lord Neuberger sought fit to emphasise (the other two being immaterial in the present analysis), which might not assist insurers resorting to the doomsday-type arguments recently ventilated by the ABI:

   (a) Reliance placed on commercial common sense and surrounding circumstances <u>should not be</u> invoked to undervalue the importance of the language of the provision which is to be construed; see "*The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision*"[3];

   (b) The less clear the words used which need to be construed, the more ready a court will be to depart from their natural meaning; see "*that is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning*"[4]. So, it is not the role of the court to depart from the natural meaning of words, find ambiguity which does not exist or resort to commercial common sense and surrounding circumstances, where the words used have a clear and obvious meaning;

   (c) Commercial common sense should not be invoked retrospectively; see "*the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made*"[5]. So, arguments by the ABI about the cost of coverage if its members are required to pay out (except in clear-cut cases) under BI cover, based on its current understanding of that cost, are strictly speaking irrelevant to the exercise of construction;

[2] At [15].
[3] At [17].
[4] At [18].
[5] At [19].

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(d) In a similar vein, although non-retrospective "*commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice*"[6]; and

(e) A court should only take into account facts known to both parties; see "*…it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties*"[7].

8. Those principles are applicable to all contracts including, of course, insurance contracts. In the context of insurance, the following important general principles must also be considered[8]:

(a) The parties should be taken to understand the nature and limits of the business to be insured[9];

(b) If there is ambiguity in the clause(s) in issue, such ambiguity should be resolved against the insurer[10]. Note also: "*It has been said that a party who proffers an instrument cannot be permitted to use ambiguous words in the hope that the other party will understand them in a particular sense and that the court which has to construe them will give them a different meaning…*"[11]; and

(c) In the case of terms of onerous or draconian effect, it is incumbent on the insurer to clearly spell out any such terms or the insured will not be bound by them[12], and "*it is a well-established and salutary principle that a party who relies on a clause exempting him from liability can only do so if the words of the clause are clear on a fair construction of the clause…*"[13].

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[6] At [20].
[7] At [21].
[8] See **Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd** [2018] EWHC 834 (TCC) at [65] for a recent consideration of those principles by Jonathan Acton Davis QC (sitting as a Deputy High Court Judge) in a case which was principally concerned with conditions precedent.
[9] See **Margate Theatre Royal Trust v White** [2005] EWHC 2171 (TCC).
[10] See **MacGillivray (14th Ed.)** at [11-33]-[11-35].
[11] *Ibid* at [11-33].
[12] **Pratt v Aigaion Insurance Co Sa** [2008] EWCA Civ 1314 at [13] (per Sir Anthony Clark).
[13] **Royal & Sun Alliance Insurance plc v Dornoch Ltd** [2005] EWCA Civ 238 at [19] (per Longmore LJ).

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9. So far, so uncontentious. The same cannot be said as to the approach and meaning to be afforded to the term 'damage' and the different manifestations of that term, which are frequently used in insurance policies to delineate the contours of coverage, and BI policy terms are no different. It is our view, based on what we have seen in the policies which we have reviewed to date, that the meaning to be attributed to the term 'damage' will be a critical part of any assessment of whether or not BI cover ought to respond to loss sustained by the mandated closure of business premises as a consequence of the pandemic.

<u>'Damage': The Narrow vs Broad Views in UK Law</u>

10. 'Damage' is ordinarily understood to mean harm or injury that is caused to something or someone that makes it less attractive, useful, or valuable, though different dictionaries contain slightly different definitions, and whether 'physical damage' or, to put it another way 'tangible' change in the 'something' is required depends on the context in which the word is used.

11. It may be argued that the approach of the UK courts as to the construction, or interpretation, of the term 'damage' has traditionally fallen within the narrow camp although, as explained below, this is not necessarily correct, and context plays an extremely important role here.

12. One of the leading cases on the subject is **<u>Pilkington United Kingdom Ltd v CGU Insurance plc</u>**[14] and it is a case which insurers may seek to place significant reliance upon in coverage disputes arising out of coronavirus, though as appears from our consideration of it, a more nuanced line of reasoning is suggested. This case concerned the limits of cover where a product (glass panels) had been introduced by the claimant so as to arguably cause damage to third-party property (a railway terminal) into which the product had been introduced. There had been no damage to the fabric of the property other than fractures to some of the product supplied itself. After having contributed to the settlement of a claim instigated by the owner of the property, the claimant supplier looked to its insurer, the defendant, under a global liability policy, and the critical issue which arose for consideration was whether the claim was one in respect of "*loss of or physical damage to physical property not belonging to*" the claimant so as to fall within the relevant part of the specification contained in the policy. The claimant lost at first instance and in the Court of Appeal (on this issue and generally).

13. The following general principles on the meaning of 'damage' can be derived from the decision of the Court of Appeal (emphasis added)[15]:

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[14] [2004] EWCA Civ 23.
[15] At [50] and [51] (per Potter LJ).

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*In English law, 'damage' usually refers to a changed physical state: see Promet Engineering (Singapore) Pte Ltd v Sturge, The Nukila…**The precise borderlines of the definition depend upon the context of the word or words used**. Thus, while for the purposes of indemnity it will normally be necessary to demonstrate that physical change has occurred to the property damaged, a clause ensuring 'loss or damage … in connexion with [the] goods' under the Hague Rules…includes economic loss even in the absence of such physical damage (see Goulandris Bros Ltd v B Goldman & Sons Ltd)…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. At the same time, the policy makes clear by particular cl 16 that damage sustained, in so far as it relates to a defect in or the harmful nature of the product itself, is excluded, ie the policy only answers in respect of the physical damage shown to have been suffered by property in relation to which it has been introduced or juxtaposed. 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.*

14. It might be argued based on this decision that normally physical damage by some tangible 'alteration' in the state of the item or property in question will need to be shown. However, it is important and necessary to set **<u>Pilkington</u>** within its all-important context:

(a) This was a case where the relevant policy wording stipulated the double-whammy of 'physical damage' to 'physical property' of a third party and, with this in mind, it is perhaps a rather ordinary and correct decision in that the insurance policy was not intended to provide the claimant supplier with protection arising from and contained exclusively within the very goods it had supplied; see: "*In my view it gives effect to the ordinary meaning of the words and reflects the apparent intention of the parties. In the context of insurance law it makes commercial sense of an agreement which is designed to protect the insured against liability for physical damage to physical property and not to afford an indemnity by way of guarantee for the quality and fitness of the commodity supplied*"[16];

(b) The Court of Appeal was heavily influenced in determining that there had to be some form of "*poisoning or contaminating effect upon the property*" by the fact that the policy under consideration included an exception clause which expressly provided that

[16] At [53].

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physical damage or deterioration confined to the product itself is not intended to fall within the policy[17].

15. Therefore, although at first glance **Pilkington** might be said to look helpful to any insurer asserting that the meaning of 'damage' used in BI cover requires a "*changed physical state*", such as that caused by perils such as fire and flooding, set within its context, the decision is relatively unremarkable, and is no answer on its own to whether a policy, which includes BI cover, will respond to losses caused by coronavirus.

16. The earlier decision of the Court of Appeal in **Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)**[18] is referred to in **Pilkington** as support for the proposition that 'damage' usually refers to a "*changed physical state*". The question arises, therefore, whether insurers might successfully place significant reliance on **The Nukila** in coverage disputes arising out of the pandemic, even if the relevant policy wording is not bounded by physical damage. However, again, context is everything, as a careful analysis of the case demonstrates that, on its facts, it was also a most unremarkable decision.

17. In **The Nukila**, the focus was on hull damage and in particular the debate centred on latent damage. In the passage of this case noted in **Pilkington**, Hobhouse LJ had the following to say: "*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*"[19].

18. So, rather unremarkably, the meaning of 'damage' used in the hull and machinery policy was interpreted as not extending to a latent defect which existed prior to the policy having been incepted and required some change in the physical state of the vessel after the policy was incepted. Like with **Pilkington**, set within its relevant context, **The Nukila**, and its focus on a changed physical state, is readily understood, and is far removed from the issue of whether all or any BI cover also requires a change to the physical state of the insured business premises.

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17 See [55].
18 [1997] CLC 966.
19 At p.971

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19. A different and much more expansive approach to the meaning of 'damage' was adopted by Pearson J in **Goulandris Bros Ltd v B Goldman & Sons Ltd**[20] but, like with the cases referred to above which fall into the narrow camp, context is everything, as the approach in this case was heavily influenced by the application of the Hague Rules (and how they had already been interpreted). So, although on its face it appears to support a broader approach to the construction of 'damage', that approach could be said to be limited to the facts of that case. The clause under consideration in that case, which related to coverage in relation to cargo on a ship, provided cover for "*loss or damage in connexion with the goods*" and was held to extend to intangible loss.

20. In so holding, Pearson J had the following to say as to why loss was not restricted to actual loss of or physical damage to the goods: "*But how close is the relation required between the loss or damage and the cargo owner's goods? Can the loss or damage be confined to actual loss of or physical damage to the cargo owner's goods? That can be plausibly suggested when regard is had to the provisions of article III, rule 6, taken as a whole, but it is difficult to maintain in the face of the decision of the House of Lords in G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama…that the "loss or damage to or in connexion with the goods" referred to in article III, rule 6, is not confined to actual loss and physical damage, and the decision of Devlin J. in Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd….that the "loss or damage" referred to in article IV, rules 1 and 2, is not confined to actual loss and physical damage*"[21].

21. So, **Goulandris** is potential support for a wider and more expansive approach to the meaning of 'damage', but that support may only take an insured so far, as the case may be best explained by the application of the relevant Hague Rules.

22. There are also other examples of different approaches being taken to the concept of 'damage' in chattel cases in England Wales. These are also influenced in some of the cases by whether or not cover is provided for 'loss and damage' or whether 'damage' may be said to include the notion of 'accidental loss'[22].

23. Extremely recently, however, in **MDS Inc. v Factory Mutual Insurance Company (FM Global)**[23], the Ontario Superior Court of Justice, in a case which did not relate to the COVID-19 epidemic, but did directly consider the meaning to be attributed to 'damage' in a property insurance policy (and so, it could be argued, is considerably more apt than many of the UK decisions considered above), adopted an interpretation of 'physical damage' (so not just

[20] [1958] 1 QB 74.
[21] At p.105.
[22] See **MacGillivray** at [29-011].
[23] (2020) ONSC 1924. Released on 30 March 2020.

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'damage') which, if applied in this jurisdiction, would suggest that there may well be coverage for BI losses caused by the pandemic.

'Physical Damage': The Broader View from Across the Pond

24. In **MDS**, the claimant (or, in Canadian jurisprudential parlance, the plaintiff) brought a claim against the defendant insurer, for lost profits on account of the shutdown (for safety reasons linked to a radioactive leak) of the Nuclear Research Universal Reactor ("**NRU**"). The claimant purchased radioactive isotopes from the NRU, processed them and sold them worldwide. The defendant insurer had conceded that the NRU constituted property of the type insured under a worldwide all-risk policy issued to the claimant. It resisted the claim on a number of grounds including, importantly, on the basis that the shutting down of premises due to the presence of a threat did not give rise to 'physical damage' to those premises, but merely constitutes uninsured 'loss of use'; it argued that what was required was actual, tangible corporal damage to property where the leak was occurring. The claimant argued the contrary, that the leak of heavy water causing a shutdown itself constituted 'physical damage' as the leak impaired the use or function of the premises as a whole[24].

25. The battle lines had therefore been drawn, with the central issue being whether 'physical damage' should be defined narrowly (the defendant insurer's position) or broadly (the claimant insured's position) so as to extend to mere loss of use, under an all risks property insurance policy. Unlike the UK cases referred to above, the context here in which 'physical damage' came to be interpreted is much more comparable to the situation at hand occasioned by the forced closure and interruption of business premises due to COVID-19. The relevance of **MDS** to the current debate, even if only of persuasive relevance, is relatively obvious because, where the policy terms of BI cover require the occurrence of 'damage' or 'physical damage' at or near the insured premises (which most policies that we have seen do), it supports the conclusion that a narrow approach to the meaning of those terms will not assist the insured.

26. Wilson J noted that there were few Canadian cases that specifically discuss the interpretation of 'physical loss' or 'physical damage' in the context of an all-risk policy and that "*from these cases, and a review of caselaw in other jurisdictions, two approaches of physical damage emerge: one the narrow view that limits physical damage to corporeal, tangible damage; and the other a broader interpretation that encompasses not only tangible damage but also impairment of use or function*"[25]. It should be noted that **Pilkington** was cited (and therefore considered) as one of the cases which endorsed a narrow view.

[24] See [464] for a summary of the parties' opposing positions.
[25] At [466].

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27. As we have sought to emphasise, context is everything, and only limited utility can be derived from previous cases which have considered the meaning of ‘damage’ or ‘physical damage’ (or similar permutations) in different contexts. This is what Wilson J concluded; see: “*a review of the cases confirms that there is no bright line or a single case that is dispositive of the meaning of resulting physical damage for this case. There is a range of factual circumstances and a variety of policy language present in the various cases…that limit the utility of a specific case in considering the unique facts of this case*”[26].

28. The Court rejected the insurer’s argument and considered that a broad definition of ‘resulting physical damage’ is appropriate in the factual context of the case to interpret the words in the policy to include impairment of function or use of tangible property[27]. In her judgment, Wilson J noted that: “*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*”[28].

29. Although **MDS** is, of course, only of persuasive authority in this jurisdiction, it is a well-reasoned judgment which considered a number of cases (including cases in this jurisdiction and in others) which have interpreted the term ‘damage’ in an insurance context, it had to deal with the narrow versus broad camp arguments head-on and within a context which is contextually more apposite to coronavirus BI claims than the cases in this jurisdiction which have hitherto considered and given meaning to the term ‘damage’ and, fundamentally, it supports a broad interpretation which recognises and gives effect to the purpose of an all-risks policy.

30. It is our view, especially in circumstances where there is little in this jurisdiction to tie the hands of our Courts on coronavirus BI claims, that the reasoning employed in **MDS** should provide a powerful basis to argue that the broader approach to the meaning of ‘damage’ or ‘physical damage’ ought to be adopted, so as to give purposive effect, especially under an all-risks policy, to the risks that the policy was intended to cover. It certainly ought to provide some much-needed optimism to relevant businesses and their advisers that their prospects of obtaining BI cover are not as poor as the ABI and the FCA (and no doubt also their individual insurers) will have them believe, and there may also be the potential for recovery of losses under buildings or property cover, depending on the terms of the clauses in question. It should be emphasised that **MDS** considered the meaning of ‘physical damage’ and still adopted a broad approach to the construction of that undefined term, and that the arguments in support of a policy which is bounded by just ‘damage’, ought to be even stronger. It should also be noted that **MDS** is a good

[26] At [469].
[27] At [518].
[28] At [519].

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example of the fact that there is a large grey area between the extremes of clear-cut in either direction. Where there is a grey area, of course, there is risk on both sides, and that risk represents an opportunity for an insured who is prepared to take on that risk and, if necessary, instigate proceedings.

Notifiable Disease and the View from Hong Kong

31. A case which has been referred to as potentially offering further relevant guidance as to how the courts in England and Wales will deal with COVID-19 BI claims is the decision of the Hong Kong Final Court of Appeal in **New World Harbourview Hotel Co. Ltd & Ors v ACE Insurance Ltd & Ors**[29]. This is referred to because it involved the consideration of the impact of the Severe Acute Respiratory Syndrome ("**SARS**") outbreak on a hotel in Hong Kong and the question of what and when something may be said to have become a 'notifiable disease'.

32. As noted at [6] of the leading judgment (of Sir Anthony Mason NPJ), the question in the appeal concerned the interpretation of two "Composite Mercantile Policies" issued by the respondent insurers. The appellants (members of the New World Group), who owned or operated convention centres, hotels, car parks and other businesses, sued on the policies to recover losses sustained from interruption of their businesses caused by SARS in 2003. Each appellant, other than the 5th appellant, was insured under one of the policies. The 5th appellant was insured under both policies. The appellants had not been successful in the lower courts on the issues of interpretation which arose for consideration on appeal and were similarly unsuccessful on appeal.

33. The key focus of argument was on clause 14.5, which provided:

> *"This Policy is extended to insure actual loss sustained by the Insured, resulting from a Reduction in Revenue and increase in Cost of Working as a result of murder, suicide, infectious or contagious disease, food or drink poisoning or Contamination, and closure by a competent authority due to vermin or pests all occurring on the Premises of the Insured or of notifiable human infectious or contagious disease occurring within 25 miles of the Premises."*

34. At [23] of the judgment it was noted that, under this clause, loss is covered arising from two causes. The appellants claimed under the second of these causes, namely that their loss resulted from infectious or contagious disease, being "*notifiable human infectious or contagious disease occurring within 25 miles of the premises*". The parties proceeded on the basis that the 25-mile condition was satisfied once SARS occurred anywhere within Hong Kong.

35. It is also worth noting that the definition of 'damage' in this policy, namely (also under clause 14.5) as "*physical loss, loss of use, damage or destruction*" was in broad terms. But the key issue did not turn on this definition.

[29] (2012) 15 HKCFAR 120.

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36. At [29] it was noted that the first instance and Court of Appeal courts concluded that 'notifiable' in cl 14.5 imports a legal or mandatory requirement to notify. This view was upheld by the Final Court (at [42]) which concluded that there was no ambiguity on this point. As a result, it is suggested that where the trigger for coverage is based on whether or not the disease is notifiable this is likely to be construed as the date when it became compulsory to notify as a matter of law. This conclusion has the attraction of certainty and poses no particular problem for COVID-19 claims as such since it was made a notifiable disease in England on 5 March 2020 (pursuant to The Health Protection (Notification) Regulations).

37. Indeed the position in this country has travelled much beyond this with the implementation of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350), which came into force on 26th March 2020, and which gave legislative effect to a public announcement made by the Prime Minister on Friday 20th March, and which has brought us into the state of "lock-down" which has persisted since then (and at the time of writing). As is well known, and can be taken from the preamble to those Regulations, they require: "*the closure of businesses selling food or drink for consumption on the premises, and businesses listed in Part 2 of Schedule 2, to protect against the risks to public health arising from coronavirus, except for limited permitted uses. Restrictions are imposed on businesses listed in Part 3 of Schedule 2, which are permitted to remain open. The Regulations also prohibit anyone leaving the place where they live without reasonable excuse, and ban public gatherings of more than two people. The closures and restrictions last until they are terminated by a direction given by the Secretary of State*".

Other reported instances of potential litigation & cover potentially being available

38. Perhaps in part due to the successful media message which has been sent out by the insurance industry there are numerous reported instances of policies which are said not to respond, and few which are said to. We have already set out above why the pessimism may not be warranted.

39. Some examples of where cover might be effective relate to policies where there is an extension for diseases at the premises, or contamination at the premises. The former suffers from the difficulty that in many policies COVID-19 does not fall within the list of diseases. The latter may be said to offer up the prospect of claims because it may be said that the presence of COVID-19 may be said to constitute "contamination"[30]. The difficulties with these lines of argument however is that the interruption caused to businesses is likely to be much longer lasting than simply the relatively short time which it is believed the virus survives on surfaces in a building (typically believed to be only a matter of a few days, at worst). And that is assuming that it can be shown that there was COVID-19 in the building in the first place, which is not straight-forward to prove.

[30] An analogy has been drawn with contamination by radiation, which was considered (albeit not in the context of a BI claim) in **Outokumpu Stainless Ltd v Axa** [2007] EWHC 2555 (Comm), [2008] Lloyd's Rep IR 147.

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These types of arguments may be a distraction from the more fundamental point we have already discussed above.

40. A publicly reported example of potential litigation where it is said that cover should respond is the talk of group action against Hiscox. The policy wording in issue in that case is said to include the following text[31]:

"We will insure for your financial loss resulting from an interruption to your activities caused by: 11) Public Authority "Your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following: b) an occurrence of any human infectious or human contagion disease, an outbreak of which must be notified to the local authority".

41. It is difficult to see what justification there would be for declinature of cover with wording of that nature, but it may be that what Hiscox has in mind is seeking to run causation arguments alongside their cover arguments. This is strictly speaking outside the scope of this article, though we mention it briefly below.

Other issues – causation & losses

42. It must be remembered that the question of whether cover responds is the first part of the enquiry in relation to any claim. There remain questions of causation and loss to be argued. An anticipated further likely argument to be raised by insurers, depending on the wording of the policy, is that even if some relevant BI has been suffered, this is not in fact the substantial cause of the loss, and instead that is due to (for example) interruption consequent on damage to property or the wider area. This type of argument was run successfully (at first instance) in relation to a BI claim litigated in the UK following a hurricane in the USA; see **Orient-Express Hotels Ltd v Assicurazioni General S.p.a. (UK Branch) t/a Generali Global Risk**[32]. In that case it was conceded by OEH that it had to prove that its business interruption claim was due to physical damage to the property in question. There were two issues as to interpretation or construction which arose, namely: "*1) Whether on its true construction, the Policy provides cover in respect of loss which was concurrently caused by: (i) physical damage to the property; and (ii) damage to or consequent loss of attraction of the surrounding area*"; and "*(2) Whether on the true construction of the Policy, the same event(s) which cause the damage to the insured property which gives rise to the business interruption loss are also capable of being or giving rise to 'special circumstances' for the purposes of allowing an adjustment of the same business interruption loss within the scope of the "Trends Clause*."". The judge answered the first question in the affirmative as a matter of law, but because the tribunal below had applied the "but for" causation test and it could not be shown it was wrong to do so, it did not help the insured. This

[31] See online blog, **Coronavirus business interruption insurance – devil is in the detail for Hiscox and others**, Jen Frost @jeninsurance 21 Apr 2020.
[32] [2010] EWHC 1186 (Comm), [2011] Bus LR D7.

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resulted in the odd outcome that the hypothesis to be applied was of an undamaged hotel but with the surrounding area being devastated. The judge, Hamblen J (as he then was), noted that there was an important difference between a case involving two concurrent interdependent causes of and one involving two concurrent independent causes. He stated at [32]: "*In the former case the "but for" test will be satisfied; in the latter it will not*". It may be thought that, depending on the approach taken to the question of the meaning of the word 'damage', that COVID-19 caused damage to a property and the vicinity are all interdependent and interconnected. It should also be noted that the judge offered some sympathy for the insured's argument that such a "but for" test ought not to apply in all cases, and a more flexible "fair and reasonable" test might apply, and the case might have been decided differently if argued or decided differently before the Tribunal (at [33]).

43. The question of whether this case, and line of reasoning, poses a risk to the insured's claim will have to be considered by reference to the wording used in each policy, but it should be noted that permission to appeal was apparently granted in that case in any event (before the case was settled on appeal), suggesting that the argument is open on the point[33], even if the point is taken.

Conclusions

44. Although each policy will need to be considered on its own wording, far from being hopeless, or characterised by absolutes, the arguments as to whether BI cover will respond to losses sustained during the pandemic are more nuanced than the market might have you believe. A number of matters will need to be considered, none of which are by any means easy to navigate, but from the policy terms that what we have seen thus far, and our learning on this important subject, a considered analysis of those terms is unlikely to be an entirely fruitless exercise, and could well bear fruit.

[33] See for example online commentary by Amy Lacey, partner, Fenchurch Law.

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