IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6499/2020

In the matter between:

MA-AFRIKA HOTELS (PTY) LTD	**First Applicant**
THE STELLENBOSCH KITCHEN (PTY) LTD	**Second Applicant**

and

SANTAM LIMITED, a division of which is HOSPITALITY AND LEISURE INSURANCE	**Respondent**

Coram: Goliath DJP *et* Cloete J *et* Mantame J

Heard: 1 September 2020

Judgment delivered on: 17 November 2020

Delivered electronically.

JUDGMENT

GOLIATH DJP *et* MANTAME J (CLOETE J concurring separately):

INTRODUCTION

[1] On 11 March 2020, the World Health Organization declared Covid-19 a global pandemic. The first death was reported in South Africa on 27 March 2020. The President of South Africa, Cyril Ramaphosa (*"the President"*), declared a national

state of disaster on 15 March 2020 and announced a national lockdown which commenced on 27 March 2020. The economic impact of the pandemic is unprecedented in its scale and effect. It had devastating consequences on businesses across the globe. Government engineered various mechanisms to contain and limit the spread of Covid-19, some of which included mandatory quarantines, social distancing measures and lockdowns to fight the rapid and dramatic spread of the virus, causing business disruptions and closures on a massive and unprecedented scale.

[2] In the wake of the Covid-19 pandemic and crisis, there has been a surge in business interruption insurance claims and lawsuits. The insurance industry globally denied cover for business interruption losses that resulted from Covid-19 and the lockdown, and refused to indemnify business for losses sustained. The novel Covid-19 pandemic poses new legal challenges that required innovative approaches. Lawsuits are seeking to determine whether any cover had been triggered by the pandemic, and if so, what is the ambit and scope of such cover provided for by the wording in particular and policies in general. This is one such litmus lawsuit.

THE PARTIES

[3] The first applicant, Ma-Afrika Hotels (Pty) Ltd operates different entities t/a Best

Western Cape Suites Hotel; the Village Café; Best Western International Inc; and B

W International Licensing Inc. situated in Zonnebloem, Cape Town; (ii) Ma-Afrika

Hotels (Pty) Ltd t/a Coopmanshuijs Boutique Hotel & Spa situated in Stellenbosch; (iii)

Ma-Afrika Hotels (Pty) Ltd t/a Rivierbos Guest House situated in Stellenbosch; (iv) Ma

Afrika Hotels (Pty) Ltd t/a Stellenbosch Hotel in Stellenbosch, Western Cape. The second applicant, Stellenbosch Kitchen is a restaurant that operates on the premises of The Stellenbosch Hotel. They shall be referred to in this judgment as the applicants.

[4] The respondent is Santam Limited *("Santam"),* a company duly incorporated and registered in terms of the Companies Act 71 of 2008 of the Republic of South Africa, situated in Bellville, Western Cape.

FACTUAL BACKGROUND

[5] The applicants' establishments mentioned above are each covered by an insurance policy with Santam which provides for business interruption insurance cover, including a cover as an extension in the infectious diseases clause. The combined total of business interruption cover for loss of revenue under the first applicants' four policies is R105 482 456.00. The second applicant has the same cover with Santam and the insured's business interruption cover for loss of revenue under this policy is R16 947 368.00. All five policies contain the same wording as regards the terms of the business interruption cover.

[6] The applicants seek two declaratory orders, to the effect that Santam is liable to indemnify them in terms of the business interruption section of the relevant

insurance policies, for losses *'…occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises'.* The applicant further seeks an order that the indemnity period for the loss incurred by each establishment is 18 months.

[7] This is the second South African case after **Cafè Chameleon CC v Guardrisk Insurance Company Ltd**[1] that was filed by a business entity after the insurers rejected their claim as a result of the loss and damages that was suffered as a result of business interruption due to Covid-19. In that matter the Court dealt with an identically worded policy, and ruled in favour of the policyholder. The applicants contended that this matter is on all fours with **Cafè Chameleon**. In opposing this application, Santam advanced similar arguments that were advanced by **Guardrisk**, and contend that the matter was wrongly decided, more particularly with regard to the identification of the insured peril.

[8] On 11 March 2020, the first case of Covid-19 was reported in Cape Town and on 16 March 2020, another in the Tygerberg area. On 15 March 2020, a first case of Covid-19 was identified in one of the applicant's establishments in Stellenbosch. As a result thereof, both the Stellenbosch Hotel and the Stellenbosch Kitchen staff had to be quarantined for two weeks. Santam accepted liability under the policy in respect of The Stellenbosch Hotel, but specified that cover would run from 15 March 2020, until 27 March 2020. On 23 March 2020, the President announced a nation-wide 21 day lockdown, from 26 March 2020, which was further extended until the

[1] Café Chameleon CC v Guardrisk Insurance Company Ltd (5736/2020) [2020] ZAWCHC 65 (26 June 2020).

end of April 2020. The lockdown regulations were published on 25 March 2020, and in compliance with same, all hotels and restaurants were required to close.

[9] Santam accepts that Covid-19 is a notifiable disease in terms of the infectious disease extension clause in each policy, and admits that there were confirmed cases of Covid-19 within 40 kilometres of the applicants' establishments. Furthermore, Santam concedes that the establishments had to close under the national lockdown imposed by government in response to Covid-19, and that the applicants had suffered a loss of revenue as a result. Santam also accepts that the national lockdown was a proactive step to minimise transmissions and as a result thereof, it was sensible, rational and legitimate.

APPLICANT'S CASE

[10] The applicant contends that the insured peril, or insurable event that is the proximate cause of the applicants' loss of revenue occurred on 11 March 2020, when a Notifiable Disease in the form of Covid-19 occurred within a radius of 40 kilometres of each of the establishments insured under the policies. On 11 March 2020, it was widely reported in the media that a patient living in Cape Town, who had returned from Europe two days before, had been diagnosed with Covid-19. The Best Western Cape Suites Hotels is located within 40 kilometres radius of the reported incident. On 16 March 2020, it was confirmed that the first positive case of Covid-19 was diagnosed at Tygerberg Hospital. The said hospital is within 40 kilometre radius of the business premises in Stellenbosch.

[11] After the announcement of the first confirmed case of Covid-19 in Cape Town, the applicants experienced an increase in cancellations of reservations in their establishments. For instance, from 11 to 23 March 2020, 241 rooms were cancelled at the applicants' hotel in Cape Town. That represented an eight-fold increase in cancellations compared to the ten days prior to this incident. In the same period, there was a spike in cancellations at the Stellenbosch Hotels which amounted to 585 rooms, which translated into a five-fold increase in cancellations compared to the ten days prior to this incident. During the period from 11 to 26 March 2020, the applicants suffered a total loss of revenue in the amount of R5 160 408 from guests cancelling their reservations as a result of the Covid-19 outbreak. A further positive case of Covid-19 was identified at The Stellenbosch Hotel on 15 March 2020. As a result, the hotel had to be closed and all the staff members were placed under quarantine for a two-week period from 15 - 27 March 2020.

[12] As stated above, on 27 March 2020, the President of South Africa placed the entire country under a hard lockdown as a result of this outbreak. Since the hard lockdown was announced on 15 March 2020, this meant that after 23 March and until end June 2020 the applicants could not take any bookings for its hotels and its restaurants as the business activity was completely shut down. The loss in accommodation revenue amounted to R4 525 456.00 and the loss in breakfast revenue to R634 951.00.

[13] On 1 April 2020, the applicants submitted their claims for loss of revenue as a result of business interruption through their broker, Intasure, to Santam. On 13 May 2020, the applicants, through their attorneys, addressed a letter of demand to

Santam urging it to accept the claims. This correspondence was triggered by a communication from the respondent on 12 May 2020, which strongly suggested that Santam was about to repudiate applicants' claims. This letter pointed out that the indemnity period for this type of cover is 18 months and not 3 months as Santam suggested. After being placed on terms to respond to the letter of demand, the applicants were informed

on 26 May 2020, by the respondent that four of the five business interruption claims had been rejected. The respondent advised the applicants that the claim under the first applicant's policy in respect of The Stellenbosch Hotel had not been rejected but that cover would run from 15 March 2020 to 27 March 2020 only, as the latter was when the national lockdown had commenced. The respondent rejected the four claims on the basis that none of them were caused by a Notifiable Disease occurring within the 40 kilometre radius of the business premises. The respondent therefore submitted that the loss the applicants had suffered is because of the lockdown and/or the general concern or fear of the public.

[14] The applicants contended that the respondent's interpretation of the relevant provisions of the policy, read with the schedule, is disingenuous, contrived and without merit. In fact, it was asserted that a proper interpretation of the policy results in cover being in place.

[15] Pursuant to the Santam's repudiation of the claims, it introduced a specific coronavirus exclusion into its policies with effect from 1 June 2020. It was the

applicants' contention that if the claims were not covered under the original wording of the policy why was it necessary for Santam to introduce this exclusion. The applicants asserted that it has legitimate claims against Santam. It suffered losses when guests cancelled their future reservations due to the outbreak of Covid-19. The reservations were cancelled before lockdown.

RESPONDENT'S POSITION

[16] Santam opposed the relief sought and argued that although Covid-19 pandemic resulted in the interruption of the applicants' business, it does not trigger liability for cover under the policies. The policies cover insured loss, subject to their terms, not economic hardship as a consequence of the Covid-19 pandemic. In this matter, the issue is whether the terms of the policy wording and applying established legal principles, any business interruption loss the applicants may have suffered is covered by the insurances. Critical to this inquiry is the proper identification of the insured peril with reference to the policy wording.

[17] According to Santam, the extension to the business interruption section provides cover in respect of various events, including infectious diseases. This cover is limited to causative events that are local to the insured premises. The extension specifically does not provide cover for the consequences of a global pandemic or a nationwide disease such as Covid-19 and the consequences thereof, including government responses to such global pandemic or national outbreak by way of lockdown. They contend that the wording of the policy determines the nature

and scope of the insurance cover. The relevant wording of the policies in this matter demonstrates that the extension covers a number of insured perils, including infectious diseases that are specifically local to the insured's premises.

[18] Santam avers that the correct approach is to identify the insured peril with reference to the policy wording and to thereafter establish whether that insured peril is the proximate cause of the interruption to the applicants' business and any loss

suffered. Santam emphasised that the proximate cause is the dominant effective or operative cause of the loss.

[19] Santam submitted that although Covid-19 may have been widespread, the extension requires that the local occurrence of Notifiable Disease must cause the interruption of the applicants' business and loss. Stated differently, the extension requires the local occurrence of Covid-19 to be the proximate cause of any loss suffered. According to Santam the events that were the proximate cause of the applicants' loss was the global pandemic and all that it brought, including the government lockdown. These are not insured perils under the extension. Santam argued that there is no need to exclude that which is not covered by the policy. In insurance terms, an extension of cover supplements the insured perils covered, while an exclusion expressly reduces the cover.

[20] Santam contended that the applicants' case is entirely reliant on, and flows from the misidentification of the insured peril. Santam therefore avers that the

applicants' had failed to establish that the local occurrence, i.e. the two local infections in Cape Town and at Tygerberg Hospital were the proximate cause of the interruption of their business and loss of revenue, and accordingly, the applicants have not established that they have suffered any loss of revenue as contemplated by the policy, in consequence of an insured peril. The applicants are therefore not entitled to the declaratory orders and the application should be dismissed.

PRELIMINARY POINTS

Application to Strike Out

[21] Santam sought leave to file a fourth set of papers, which was not opposed by the applicants. In its papers Santam objected to alleged new issues raised in the applicants' replying papers. Santam submitted that it is not open to the applicants to supplement their case in the replying affidavit, and if allowed, it would be prejudiced in the conduct of its case.

[22] First, Santam submitted that the applicants relied on the press releases issued by the Financial Sector Conduct Authority (*"FSCA")* to the effect that it endorsed the Cafè Chameleon judgment and that the lockdown cannot be used by any insurer as grounds to reject a claim. According to Santam, the views of FSCA are irrelevant and inadmissible. As such, they should be disregarded. Second, Santam objected to the fact that the applicants allegedly advanced different arguments relating to the identification of the insured peril in reply.

[23] Second, Santam contended that the applicants did not confine the insured peril to the local outbreak. Instead, it was explicitly stated that the insured peril includes Covid-19 and the government's response to it by way of lockdown. They initially did not make it clear that they in fact contend that the lockdown is a direct consequence of the insured event.

[24] Third, Santam protested that the applicants sought to advance a case in their replying affidavit based on considerations of fairness, reasonableness and justice. According to Santam this was impermissibly raised in reply in support of its contention that the common law should be developed to the extent that it is necessary. It was Santam's assertion that the applicants have not made a proper case for developing the common law, and these contentions should not be entertained by the Court.

[25] Third, Santam protested that the applicants sought to advance a case in their replying affidavit based on considerations of fairness, reasonableness and justice. According to Santam this was impermissibly raised in reply in support of its contention that the common law should be developed to the extent that it is necessary. It was Santam's assertion that the applicants have not made a proper case for developing the common law, and these contentions should not be entertained by the Court

[26] Fifth, the applicants sought to introduce new evidence as regards to the cancellation of bookings. These allegations were not made in the founding affidavit, constitutes a new matter, is impermissible, and should be disregarded.

[27] The applicants raised procedural and substantive objections. Firstly, there was no formal application to strike out, in violation of the provisions of Rule 6(11) of the Uniform Rules of Court. In the absence of such a notice, it is irregular to seek such a strike out. The Courts will typically disregard strike outs that are not brought on notice. Consequently, on this ground alone the application is flawed.

[28] With regard to substance, it was submitted that if this Court is prepared to accept the statements and/or allegations raised in Santam's fourth affidavit as a procedurally regular application to strike out, then a decision as to whether or not, to strike out is discretionary and has to be exercised judicially. However, the key consideration is prejudice. The applicants aver that Santam simply filed the fourth affidavit without notification to them, which was one of the considerations that had to be taken into account with regard to prejudice.

[29] Santam had the opportunity to deal with the alleged new matter in their fourth affidavit, more particularly the issue relating to the cancellations of bookings, but elected not to do so. In any event, details of cancellations from 1 to 25 March 2020 is already contained in schedules which form part of the record. It appears that this information is not an entirely new matter, but rather a better description and better analyses of allegations made in the founding affidavit.

[30] Santam's application was not brought on notice. *"Notice"* in Rule 6(11) does not mean "*Notice of Motion*".[2] However, in interlocutory applications, a notice serves an important role in litigation as it forewarns another party that procedural steps are about to be taken, in order to allow preparations to be made by another party. Absent such preparations this means that another party was not afforded an opportunity to prepare themselves for the procedural points taken. It was uncontroverted that no proper notice was given to the applicants. In our view this amounts to ambush litigation and is prejudicial to the applicants. In any event we are satisfied that Santam suffered no prejudice by the introduction of issues raised in the reply, and its objections fall to be dismissed.

[31] 'Notice' in this subrule does not mean notice of motion. However, in these interlocutory applications, a 'notice' serves an important role in litigation as it forewarns the other party what steps are intended by such other party and/or that a certain procedural step is about to be taken in order to allow preparations to be made by such party. Absent such preparations this means that the other party was not afforded an opportunity to prepare themselves for the procedural points taken. It was uncontroverted that no proper notice was given to the applicants. In our view this amounts to ambush litigation and is prejudicial to the applicants. In the circumstances this approach is unwarranted, and Santam's application should fail. It would therefore not be necessary to deal with substantial objections relating to the circumstances.

THE POLICY WORDING AND INTERPRETATION OF THE POLICY

[2] Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO**.** 1981 (4) SA 329 (O) at 332 G

[32] The central issue in this matter is the interpretation of the policy with reference to the nature and scope of the insured peril in question, and whether the insured peril caused the business interruption and losses sustained that the applicants claim. This requires a consideration of the proximate cause of the loss, involving the application of the tests for factual and legal causation to the relevant facts of the case.

[33] At the heart of the matter is the interpretation of the infectious disease extension, which has similar features as the disease clauses in the FCA matter. The infectious disease clause extends business interruption coverage losses *"due to"* amongst other things, a "*Notifiable Disease occurring within a radius of 40 kilometres of the premises"* and the relevant part reads as follows (our underlining):

> ***'Infectious Diseases/Pollution/Shark and Animal Attack Extension***
>
> ***Loss as insured by this Section <u>resulting in</u> [from] <u>interruption or interference</u> with the Business <u>due to</u> …***
> ***(a) …***
> ***(b) <u>Notifiable Disease occurring at the Premises</u> or attributable to food or drink supplied from the Premises***
> ***(c) …***
> ***(d) <u>Notifiable Disease occurring within a radius of 40 kilometres of the Premises</u>***
> ***(e) …***
>
> ***Special Provisions***
>
> ***(a) "<u>Notifiable Disease</u>" shall mean illness sustained by any person resulting from***
>
> ***(i) …***
>
> ***(ii) Any human infections or human contagious disease an <u>outbreak</u> of which <u>the competent local authority has stipulated shall be notified to them</u>***

Excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'

[34] The general approach to the interpretation of contracts is succinctly dealt with and restated in cases such as **Natal Joint Municipal Pension Fund v Endumeni Municipality**[3] and **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.**[4] The approach was summarised in **City of Tshwane Metropolitan v Blair Atholl Homeowners Association**[5] as follows:

> "*It is fair to say that this Court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This Court, in Natal Joint Municipal Pension Fund v Endumeni … stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically akin to the unitary approach."*

[35] In **Centriq Insurance Company Ltd v Oosthuizen and Another**[6] the Court summarised the approach as follows:

> "*The consequence of adopting a business-like or commercially sensible construction of an insurance policy is that the literal meaning of words read in their context may have to yield to a fair and sensible application where they are likely 'to produce an unrealistic and generally unanticipated result', which is at odds with the purpose of the policy."*

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[3] 2012 (4) SA 593 (SCA) at para 18
[4] 2014 (2) SA 494 (SCA) paras 10-12
[5] [2019] 1 All SA 291 (SCA) at para 61
[6] 2019 (3) SA 387 (SCA) at [21]

[36] Insofar as there may be any ambiguity in the contract, this should on the application of the *contra proferentum* principle be interpreted in favour of the policyholder.[7] Courts have long accepted that because insurance contracts are *"contract[s] of indemnity"*, they should be construed *"reasonably and fairly to that end"* and so "*provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract*".[8]

[37] The interpretation of contracts has evolved towards a practical, common sense approach, giving the words used their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. The words are considered by having regard to their context in relation to the contract as a whole, taking into account the nature and purpose of the contract. The purposive approach to interpretation was most recently affirmed in the matter of **Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd**[9]. Consequently, a purposive approach to the interpretation of the policy wording is required, in a manner that provides an interpretive outcome that is fair, sensible and business-like.

[38] The government response to Covid-19 which resulted in the promulgation and enforcement of the Regulations (Lockdown Regulations) made by the Minister of Co-operative and Traditional Affairs under the Disaster Management Act 57 of 2002 is summarised in **Cafè Chameleon (supra).**[10] The Regulations published under the

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[7] Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 (A) at 38B-E
[8] Norwich Union Fire Insurance Society Ltd v S A Toilet Requisite Co Ltd 1924 AD 212 at 222
[9] 2020 (4) SA 428 (SCA) at para [8]
[10] Para 5–13 and Para 44–61.

National Health Act implicitly recognised that Notifiable Diseases pose a public health risk to the country as a whole, and require active "*surveillance and control*". The regulations stipulated that such diseases "*may require immediate, appropriate and specific action to be taken by the national department, one or more provincial departments or one or more municipalities*."[11]

[39] In the same regulations a "*public health risk*" is defined as "*a likelihood of an event that may adversely affect the health of human populations, with the emphasis on one which may spread internationally or may present a serious and direct danger*." It is common cause that Covid-19 falls within the definition of a notifiable condition in terms of the regulations under the National Health Act. It is evident that the concept of a Notifiable Disease owes its existence to the real need for a co-ordinated, government-led response to diseases that pose peculiar and immediate health risks. Santam concedes that Covid-19 constitutes a Notifiable Disease in terms of the infectious disease part of the extension.

[40] The purpose of the policy is to provide the applicant protection in the event of its business being interrupted due to the outbreak of an infectious disease that has a local occurrence and which triggers a response from the authorities that results in a disruption of the business to trade. The infectious diseases clause covers notifiable diseases which are, by their nature, diseases that entail a government response, or at least the risk of a government response. It is evident that a notifiable disease and government response is inextricably linked due to the public health risk imperatives.

[11] Regulations 12(2) of the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions published in GN1434 or 2017.

It therefore, appears to be a logical conclusion that the only textual-and purposeful - interpretation of the clause is that the insured peril covers Covid-19 and the government's response to Covid-19.

CAUSATION AND THE INSURED PERIL

[41] A policy will only cover loss covered by the insured peril. The insurer is liable if such cause is within the risks covered by the policy. Santam contends that the applicant failed to prove factual causation, satisfying the "*but for*" test, and legal causation establishing the insured peril was the proximate cause of the loss. The purpose of the "*but for*" test determines whether the insured peril was the factual cause of the loss. The Court asks what would have happened by considering a counterfactual where the insured peril did not operate. Santams' case is that the local occurrence of Covid-19 was the proximate cause of the interruption of the business and resulting loss. Santam considers the insured peril and the correct counterfactual to be the local occurrence of Covid-19. Santam argues that if one imagines away the local occurrences of Covid-19 within 40 kilometres of applicants' business, the national lockdown would nevertheless have been declared and businesses affected. The loss would have been caused by the worldwide spread of Covid-19, preventative measures taken by governments and the restrictions imposed by the South African government, including the national lockdown.

[42] According to Santam the extension explicitly requires that there be a causal connection between the insured peril (the local occurrence) and the business interruption. The extension thus does not cover loss caused by a worldwide

pandemic, the consequences thereof or government's response thereto. Consequently, the applicant failed to establish that the particular insured peril, being the occurrence of Covid-19 within 40 kilometres of the premises, has actually caused the business interruption and resulting loss. Santam's argument relies on a distinction between Covid-19 and the government response. However, Santam accepted the first applicant's claim due to the closure of its Stellenbosch Hotel pre-lockdown upon diagnosis of Covid-19 occurring ten (10) days after the first in Kwazulu Natal and four (4) days after the first in Cape Town.

[43] Santam places reliance on the UK High Court decision in **Orient-Express Hotels Limited v Assicurazioni General Spa (UK) (t/a Generali Global Risk)**[12] in support of its contention that the business interruption would have occurred regardless of the physical damage to the hotel building as a result of destruction wrought by the hurricane. **Orient Express** is the paradigm example of this approach to business interruption loss in English law, where loss caused by damage to the insured property was distinguished from hurricane damage to the wider area, which was uninsured, notwithstanding that the damage to the hotel and the wider area had a common cause. The tribunal, applying the *'but for'* test, concluded that the hotel would have suffered business interruption loss even if it had not itself been damaged because the damage to the surrounding area would have deterred its customers anyway. However, the applicants emphasised that a crucial distinction between **Orient-Express** and the present case is that the relevant policy cover was for physical damage to the hotel, whereas in this case it is the *"hurricane"* of the notifiable disease occurring within the prescribed radial limit.

[12] [2010] EWHC 1186 (Comm)

[44] The applicant argued that causation has been established on the traditional "*but for*" test; and contends that, but for the insured peril, (Covid-19 and the government's response), the applicant's businesses would not have been interrupted and they would not have suffered their losses.

DEVELOPMENTS IN COVID-19 LITIGATION

USA

[45] The Pennsylvania Law School's Covid-19 Coverage Litigation Tracker shows that more than 1200 Covid-19 lawsuits have been filed to date. Decisions emerging from these lawsuits largely revolves around a crucial legal dispute namely whether the Covid-19 pandemic and the related government shutdown orders represent a *"direct*

physical loss or physical damage" that triggers coverage under the policies. The issue has proven to be a significant hurdle for policy holders. The courts interpreted this threshold requirement to manifest itself as *"tangible damage"* or a *"distinct, demonstrable physical alteration of property."* Insurers succeeded with favourable rulings in the majority of cases heard thus far.[13]

[13] Gavrilides Mgmt.Co.LLC v Michigan Ins. Co.No.20-258 CB (Mich Cir Ct July 21 2020; Social Life v Sentinel Ins Co.No.1;20-cv-03311-VEC (SDYN April 28,2020; Rose's 1 LLC v Erie Ins Exch (DC Super CT Aug 6 2020); Diesel Barbershop LLC v State Farm Lloyds (WD Tex Aug 13 2020); 10E LLC, Mama Jo's Inc dba Berries v Sparta Ins Co. No.18-12887,Slip Op at (11th Cir. March 18,2020); Malaube LLC v Greenwich Ins Co.(SD Fla No.20-22615-CIV) Aug 26 2020; Maurico Martinez DMD,PA v Allied Ins Co. of America No.20-00401; Turek Enterprises Inc dba Alcona Chiropractic v State Farm Mutual Automobile Ins Co.No.20-11655(E D Mich, Sept 3 2020; Pappy's Barber Shops v

[46] In ***Studio 417 v The Cincinnati Insurance Company***,[14] *the* court examined the plain and ordinary meaning of the phrase *"physical loss"* and ruled against the insurer. The court concluded that *"loss"* must be distinct from *"damage"* and thus denotes something other than structural damages. The Court focused on the plain and ordinary meaning of the phrase "*physical loss*" undefined in the policies, and held that it was broad enough to encompass depravation of use of property caused by a natural phenomenon like a virus. The court found that Covid-19 related losses may qualify as physical loss or damage. The **Studio 417** definition of loss was adopted in subsequent rulings in favour of the policyholders.[15]

[47] In ***Urogynecology Specialist of Florida LLC v Sentinel Ins. Co***,[16] *the* court rejected the insurer's broad reading of virus exclusions language, and refused to dismiss a claim for coverage notwithstanding that the policy contained a virus exclusion clause. In a matter currently pending,[17] the policyholder dissected policy language and seeks to argue that the definition of *"damage"* is separate from that of *"loss"* and that both were insured under the policy.

Farmers Group Case No.20-CV-907-CAB-SD.Ca BLM; Mudpie v Travelers Case No.20-cv-03213-JST; Sandy Point Dental v The Cincinnati Ins Co. Case No.20-CV-2160

[14] Studio 417, Inc v The Cincinnati Ins Co. Case No.20-cv-03127-SRB

[15] Blue Springs Dental Care LLC et al v Owners Ins. Co, Case No.20-CV-00383-WD.Mo. Sep.21, 2020; K.C. Hopps, Ltd. v The Cincinnati Ins. Co. Case No. 20-cv-00437-SRB (WD Mo, Aug.12, 2020) Optical Services USA/JCI v Franklin Mutual Ins. Co, No.BER-L-3681-20; Ridley Park Fitness, LLC v Philadelphia Indemnity Ins. Co.,No. 200501093 (Pa.Ct.Com.Pl.Aug.13, 2020)

[16] Urogynecology Specialist of Florida v Sentinel Ins. Co., Case No. 6:20-M.D. Fl. Cv-1174-Or-l22EJK

[17] Mashallah, Inc. et al. v West Bend Mutual Insurance Company (N.D.IL September 15, 2020)

[48] The current approach adopted by the majority of US Courts was summarised in **Pappy's Barber Shops Inc, et al. v Farmers Group Inc. et al.**[18] as follows:

> *"Plaintiffs are not the first policyholders to argue in court that government orders forcing their businesses to stop operating as a result of the Covid-19 pandemic trigger insurance under provisions similar or identical to the ones in the policy here. Most courts have rejected these claims, finding that the government orders did not constitute direct physical loss or damage to the property."*

[49] Due to a proliferation of Covid-19 lawsuits, a large number of policyholders requested the US Judicial Panel on Multidistrict Litigation (JPML) to centralise all federal Covid-19 insurance cases in co-ordinated proceedings in a single court.[19] The JPML declined to centralise and consolidate all federal business interruption lawsuits into a single MDL. The Panel ruled that there were too few common questions of fact

and that centralisation would not result in efficiencies.[20] Consequently policyholders will have to initiate their own coverage litigation in an appropriate forum based on the applicable state law, the specific policy language, and other relevant factors. Litigants can continue to expect diverging results across different US jurisdictions.

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[18] Pappy's Barber Shops v Farmers Group Case No.20-CV-907-CAB-SD.Ca BLM

[19] The US Judicial Panel on Multidistrict Litigation is a special body within the US Federal Court system which manages Multidistrict litigation and determines whether civil action pending in different federal districts should be transferred to one federal district for co-ordinated or consolidated pre-trial proceedings.

[20] In re Covid-19 Bus. Interruption Ins. Coverage Litig. No. 2942 (J.P.M.L. Aug. 12, 2020). The JPML ruling does not impact on class actions. Plaintiffs need to meet the standards for class certification under Federal Rule 23 or its State law equivalent in order to maintain their claims as class actions.

[50] Currently the US Congress introduced four bills[21] and several state legislatures[22] have proposed legislation that would retroactively expand coverage under existing polices to cover losses due to the Covid-19 pandemic. The rationale behind these proposals is to provide mechanisms for certain businesses that suffer losses due to Covid-19 to recover their losses from the insurer; and bar insurers from denying claims on the basis that Covid-19 losses are excluded, and there being no physical damage to the insured properties. These interventions are also aimed at managing future pandemics by the introduction of legislation that would create a pandemic reinsurance program.

UK

[51] The Financial Conduct Authority as the conduct regulator of insurers in the UK, launched its test case in the matter of **The Financial Conduct Authority v Arch Insurance (UK) Limited and Others (Hospitality Insurance Group Action and Another Intervening)**[23] ("FCA"), which was heard on 15 September 2020. The objective was to obtain clarity and certainty for policyholders and insurers as to whether Covid-19 related business interruption losses are covered. Eight insurer defendants agreed to participate in the test case. The FCA selected 21 sample

[21] In the U.S. Congress, four bills have been introduced and referred to the House Committee on Financial Services: HR 7011 (the "Pandemic Risk Insurance Act" or PRIA), hr 6494 (THE "Business Interruption Insurance Coverage Act of 2020"), HR 6497 (the "Never Again Small Business Protection Act of 2020"), and HR 7412 (the "Business Interruption Relief Act of 2020"). Each would create a voluntary scheme whereby insurers would pay certain Covid-19 business losses experienced by small businesses in exchange for a reinsurance-like "backstop," funded by the U.S. Treasury (which under some bills would be funded by policyholder premium payments). All four bills have been referred to the House Committee on Financial Services.

[22] New Jersey, Louisiana, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island and South Carolina.

[23] [2020] EWHC 2448 (Comm)

policy wordings that appear in business interrupt policies it believes reflected some of the main issues in dispute. The test case was essentially a policy interpretation exercise.

[52] The test case grouped policy wordings in three broad categories[24] and examined each group. First, *"infectious disease"* clauses where a notifiable disease has occurred in the vicinity, or within a given radius of the premises. This category of disease clauses comprises of wording similar to the one under scrutiny in this matter. Second, *"hybrid"* clauses which refer both to restrictions imposed on the relevant premises and to the occurrence or manifestation of a notifiable disease – Third, *"denial of access clauses"* where there has been a prevention or hindrance to, or use of the premises as a consequence of restrictions imposed by a public authority.

[53] The court found that most of the *"disease"* and *"hybrid"* clauses generally provide cover for Covid-19 business interruption claims. Furthermore, that certain of the prevention of access / public authority clauses did so as well, depending on whether there was a mandatory ordered closure, or a complete shutdown of the business: The court did not make blanket rulings in these categories noting that the outcome will depend on the policy language and facts of the case.

[24] The court grouped the sample clauses into three main categories, all of which had some sort of non-damage extensions to the "standard" business interruption clauses.

[54] Although the court rendered different conclusions with regard to each of the sample policy wording, the court concluded that after careful analysis of the precise policy language and extensions, as well as the facts and circumstances and surrounding losses of a particular business, coverage can indeed be available for business interruption claims. The court's ruling essentially favoured the FCA representing the policyholders, on key issues of coverage, causation and trends clauses. A more detailed discussion of the test case will follow below.

[55] On 15 October 2020 the English High Court, in ***Tkc London Ltd v Allianz Insurance Plc,***[25] ruled that the temporary loss of a premises as a result of Covid-19 lockdown measures does not trigger cover under a standard business interruption policy. The policy covered business interruption which was caused by *"accidental loss or destruction or damage to property."* The court found that the meaning of the word *"loss"* in property damage usually has a physical element attached to it. This is the first UK case to be dismissed due to lack of evidence of *"physical loss",* a requirement which is considered to be the ultimate threshold for Covid-19 liability in the US.

[56] The test case did not deal with the cover issues impacting on litigation in the US, more particularly whether Covid-19 and/or resulting governmental orders have caused any particular policy holder to sustain *"physical loss or damage"*

Other Countries

[25] TKC London Ltd v Allianz Insurance Plc [2020] EWHC 2710 (Comm)

[57] The High Court's decision in the FCA case may impact on business interruption claims and lawsuits in other countries, more particularly common-law jurisdictions. On 22 May 2020 the commercial court of First Instance of Paris ("*Tribunal de Commerce de Paris")* issued the first worldwide ruling relating to Covid-19 business interruption revenue losses in **Maison Rostang vs AXA France (ARD)**. The court ordered that the restaurant owner be indemnified for business interruption without damage suffered in one of its four establishments over a period of two months. (The restrictions had the effect of a de facto closure – an administrative closure).

[58] In Germany, the Regional Court of Manheinn, in its ruling on 29 April 2020 (Case No. 11066/20), involved a hotel operator who had taken the initiative to close down his establishment. This, without an official order to do so due, to the fact that the continuation of his business was no longer economically viable following restrictions on tourist accommodation. The court determined that in spite of the absence of an official order, the resultant damage could be covered under coverage for *"notifiable diseases"* i.e. diseases that are subject to mandatory reporting to public health authorities.

[59] In the Netherlands there is consensus in the insurance market that damage caused by Covid-19 is not covered by regular business interruption coverage. Generally, business damage is only covered if there is material property damage caused by a risk specified in policy conditions such as a fire or a storm.

[60] In Switzerland, Helvetia Insurance reported that it had paid out insurance claim settlements to most of its hospitality industry policyholders. The settlements reportedly included policyholders from Switzerland, Austria and Germany. Generally, the Covid-19 business interruption response from European insurers appears to be more favourable to policyholders than the United States.

[61] In New Zealand, Covid-19 became publicly notifiable under the Health Act on 30 January 2020, triggering standard business interruption exclusions. The general view is that due to this exclusion, a legal challenge is unlikely. Ultimately, it depends on the policy wording, but a test case may be needed in order to define the extent of business interruption as a result of Covid-19.

[62] On 2 October 2020, the Full Bench of the New South Wales Court of Appeal heard an Australian business interruption test case in a joint effort between the Insurance Council of Australia (ICA) and the Australian Financial Complaints Authority (AFCA). The case, **HDI Global Specialty SE v Wonkana No 3 Pty Limited trading as Austin Tourist Park** is chiefly and primarily intended to seek clarity from the Court in relation to certain exclusion clauses which reference to the Quarantine Act 1908 (Cth) as amended, whether those references encompass the Biosecurity Act 2015 (Cth) and, if so, the timing of the application of the exclusion.

[63] The court heard legal arguments that aim to seek clarity over the application of certain infectious disease exclusions in business interruption insurance policies. The scope and extent of the Australian test case differs from the FCA case. Due to

the limited scope of the test case it seems a second test case is highly probable to clarify the interpretation of various classes of policies, and whether it provides cover for business interruption. In addition to this, trends clauses are common in Australian property insurance clauses, and the FCA case may assist in this regard. Consequently, the application of trends clauses considered in the FCA case may well give rise to the disputes relating to the proper counterfactual to be used, and what the *"insured peril"* is to be excluded, in making an adjustment to a business interruption loss on account of a trends clause in Australia.

[64] In Canada, during October 2020, a national class action lawsuit was filed with the Ontario Superior Court of Justice after insurance companies insisted that there is no coverage from provincial wide shutdown orders as a result of the pandemic.[26] Policy wording in traditional business interruption insurance cover requires the physical damage trigger. The class action seeks clarification regarding the definition of physical damage, and whether Covid-19 losses constitute physical damage. To the extent that most Canadian Courts are guided by British common law, and insurers in the UK test cases are participating in the Canadian market, it is envisaged that the UK case will impact on future Covid-19 litigation in Canada.

United Kingdom – FCA case

[26] The action names Aviva Canada Inc., Co-Operators General Insurance Company, Desjardins Financial Security Life Assurance Company. Economic Insurance, Intact Financial Corporation, Lloyd's Canada Inc., Lloyd's Underwriters, Northbridge General Insurance Corporation, Royal & Sun Alliance, TD General Insurance Company, Wawanesa Mutual Insurance Company, and Wynward Holdings Ltd. and Wynward Insurance Group (collectively, the "Defendants").

[65] It is of great significance in the determination of this case, that the relevant infectious disease extension clauses in the FCA matter contain similar wording as reflected in the policies under consideration in this matter, save that the extension clause in FCA refers to *"following"* rather than *"due to"* an occurrence of a notifiable disease. The relevant clause in FCA is contained in paragraph 85 of the judgment. The clause reads as follows (our underlining):

> **"We shall indemnify in respect of interruption or interference with the Business during the Indemnity Period <u>following</u>:**
>
> **a) any**
>
> **i. occurrence of a Notifiable Disease (as defined below) at the Premises …**
>
> **iii. occurrence of a Notifiable Disease within a radius of 25miles of the Premises; …**
>
> **Additional Definition in respect of Notifiable Diseases**
>
> **1. Notifiable Disease shall mean illness sustained by any person resulting from: …**
>
> **ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them."**

[66] The FCA claimed that the government's lockdown restrictions triggered coverage under the sample policy wordings because the restrictions prevented businesses from operating as usual. The FCA argued that the Covid-19 pandemic and the government and public response were a single cause of the covered loss,

which is central to the payment of claims. The test case considered the application of indemnity for disease, government authority; trends clauses and causation.

[67] A crucial issue in the FCA test case was a determination as to whether the cause of the business losses were as a result of an occurrence of Covid-19 within a certain radius or, as a result of the closure of the business following government restrictions due to Covid-19, in order for cover to be triggered. The insurers submitted that there were multiple causes of loss such as the virus itself, its impact on the economy, and measures imposed by government, which included business closure orders. The insurers argued that it cannot be shown that a business would not have suffered losses but for the occurrence of Covid-19 near the premises or, alternatively, but for the government restrictions. The insurers relied on **Orient Express** to support this construction. Insurers relied on this case as authority for the proposition that in the context of Covid-19 the policyholders would have suffered loss anyway, even if they had not been forced by government to close or, change their business operations because the pandemic itself would have resulted in a general business downturn.

[68] The insurers argued for a narrow definition of the insured peril, (the local occurrence of the disease only), which would have the effect of finding that the widespread nature of the disease and the government response and restrictions were competing causes of a specified loss such that it would be extremely difficult to prove that the narrow insured peril caused the losses sustained. The FCA contended that these multiple causes are inextricably linked and should be treated as a single cause. Consequently, the single proximate cause of the loss should be

seen to be the global pandemic, its impact on the public and the economy, as well as the resulting restrictions.

[69] The Court dismissed the insurers' arguments and held that there were broad composite perils (i.e. an insured peril made up of more than one element like the requirement of government action or interruption of the business) in respect of all policy wordings. The Court criticised the **Orient Express** decision as creating an untenable situation whereby an insured would have less coverage, the more widespread the damage by the insured peril. The Court distinguished the test case from **Orient Express** on matters of construction, on the basis that, in the test case, the Court was looking at *'composite or compound perils'* which contrasted with the *'all-risks'* nature of the cover in **Orient Express.** The Court noted that in **Orient Express** there was a misidentification of the insured peril. The Court held that there was a fallacy in the argument that the insured peril was the damage and not the cause of the damage. The decision resulted in the "*insured peril*" being only the damage to the hotel. Rather, the insured peril, in the context of **Orient Express**, was the damage caused by the hurricanes. The Court concluded that it did not need to follow the decision in **Orient Express**, because it could be distinguished on its facts.

[70] The Court reasoned that a key issue was to consider what the proximate or effective cause was for the loss suffered by the business.[27] The Court explained that the logical approach was to consider the outcome if the entirety of this cause was removed. The Court stated as follows at paragraph 532: (our emphasis)

[27] paragraph 523 – 524 and 529 of judgment

> *"Similarly, in relation to the disease clauses where we have concluded that there is cover in principle, we have done so because we consider that on the correct construction of those wordings, they insure the effects of COVID-19 both within the particular radius and outside it, the whole of the disease both inside and outside the relevant area has to be stripped out in the counterfactual. One of the fundamental fallacies in the insurers' approach is to treat the occurrence of COVID-19 within the relevant radius … of the insured premises as completely separate from its occurrence elsewhere in the country as a whole. As we have said in our analysis of several of the disease clauses, the proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts, in other words the disease in the UK is one indivisible cause."*

[71] The Court thus held that if the disease was present both inside and outside the local area because it was part of a nationwide occurrence, then cover would still be triggered. The policy wording properly construed, did not require the occurrence to be only in the local area. This reflects the nature of a notifiable disease which are susceptible to spread widely. In view of the fact that the insured perils were "*composite*" in nature, embracing everything that the clause requires to happen for cover to be triggered, the correct approach to the counterfactual is to strip out everything. In respect of the "*disease*" clauses, this meant assuming not merely that the government response to Covid-19 had not occurred, but that the pandemic disease itself had not occurred. The counterfactual has to be the stripping away of the disease altogether, in all its component parts. The Court concluded that to do otherwise would not give effect to the intentions of the parties, and would involve an unrealistic and artificial exercise that does not recognise that the occurrence of the disease is an essential element of what the insurance covers.

[72] The reason for this approach was made clear in the judgment namely, that when the principles of construction are properly applied to identify the relevant insured peril, the causation issue falls away. In other words, if the insured peril is identified correctly, it makes scant difference whether a *'but for'* test or a proximate cause test is applied. This should be true whether or not the nature of the peril is apt to affect a wide area, or just the immediate vicinity. The Court reasoned as follows in paragraph 100 to 102:

> *"100. While much of the argument was understandably put in terms of the nature of the causal requirements, we consider that what underlies the dispute in relation to causative requirements is a difference as to the nature of the peril insured, and that this depends on a proper construction of the relevant terms of Extension vii. Once that question of construction is answered, it seems to us that the issues of causation will also largely have been answered, and in particular it will have been established which matters can be said to be separate, non-insured causes which could be seen as distinct from the insured peril."*

[73] The Court therefore considered that its decisions on the interpretation of the various clauses largely decided the questions of causation. The Court concluded that most of the causation issues raised fell away upon concluding that the nationwide outbreak of Covid-19 and the resulting government and public response formed a "*composite peril*". The approach adopted by the Court with regard to policy construction, resulted in the Court effectively avoiding issues of causation which may have arisen, by concluding that the peril insured was a "*composite peril*" indivisibly comprising the nationwide outbreak of Covid-19 and the resultant government and public response. The reasoning of the Court in the FCA case is persuasive in this regard.

[74] We are in agreement with the conclusion in FCA that construing the policy in a composite was undoubtedly the proper starting point. Insurance is intended to serve as a social safety net to cover financially devastating losses and compensate injured parties. This is precisely the safety net required as a result of the unprecedented Covid-19 pandemic. The policy does not state that the infectious disease must be limited to a local outbreak only, or that the local authority response must be exclusively due to such local outbreak only, and no other, or that the policy does not respond where the disease and the response is broad and national. It therefore appears that notwithstanding the fact that the nature of the policy and the specific provisions in the extensions are essentially local in nature, it cannot be said that the nationwide or global events were not contemplated or insured. We are in agreement with the conclusion reached in FCA at para 104 that:

> *"They must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak and would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises."*

[75] We therefore conclude that the Covid-19 and government response to Covid-19 are an inseparably part of the same insured peril. The breakout of a notifiable disease, whether reported to a local or national authority always comes with the risk of a government response, and make the government response part of the insured peril of notifiable diseases. We are satisfied that both factual and legal causation are established in respect of the trigger event referred to in the policy. We accordingly conclude that the national response to the Covid-19 disease that has a local

occurrence is sufficient to satisfy the policy. Had it not been for Covid-19 and the government's response, the applicants' business would not have been interrupted and they would not have suffered their loss. In our view the applicants' losses are exactly what they had insured themselves against.

TRENDS CLAUSES

[76] Trends clauses in a business interruption policy are used to quantify the loss that the insured has suffered due to business interruption. This type of clause is fairly standard in business interruption policies. A trends clause is a mechanism which allows for an adjustment to be made to the policyholders' losses to account for *"circumstances / trends affecting the business.* This generally requires identification of a hypothetical counterfactual scenario that quantifies the results of the business *"but for"* the insured peril.

[77] Santam contends that even on assumption that the local occurrence was the proximate cause of the loss, an application of the trends clause would deny the applicants cover. The reason is because the applicants would still have suffered a loss of revenue during the lockdown and Covid-19 related government response thereto. Santam argued that the adjustment had to take into account the government response, the national lockdown and the restrictions imposed by regulation.

[78] The applicants accept that their revenue is subject to an adjustment under the trends clause. According to the applicants the government's response to Covid-19

cannot legitimately be interpreted as a trending circumstance which would have the absurd effect that renders the applicants without business interruption cover. Applicants further contended that Santam cannot double count the loss-causing event as both the insured peril and a trend affecting an insured business. Applicant added that the government response to Covid-19 is part of, and intricately linked to the insured peril. Furthermore, had Covid-19 not occurred there would have been no government response, and no Covid-19 related business trend. Consequently, losses from the government response to Covid-19 cannot be distinguished from the insured peril of Covid-19 itself.

[79] In opposing the applicants interpretation of the trends clause, Santam relied on **Orient Express** where the arbitration tribunal decided that the *"but for"* test is an appropriate test. In the FCA matter, the insurers sought to advance a similar argument. The defendant insurers argued that the trends clauses should be interpreted to include components of the insured peril itself, which could have the effect of significantly limiting the cover available to the insured. The Court emphasised that the trends clause provide for a quantification mechanism for a claim and do not

delineate the cover. The object of the trends clause is to put the policyholder in the same position as it would have been had the insured peril not occurred.

[80] In determining how the trends clause should operate, the Court applied its general approach on causation as summarised above. The Court held that where a party has *prima facie* established a loss caused by an insured peril, unless the wording requires otherwise, the loss should not be limited by including any part of

the insured peril in the assessment of what the position would have been, had it not occurred. The Court therefore accepted the FCA's position that it would be contrary to generally held principles for an established loss to be limited by the inclusion of part of the insured peril in the assessment of the policyholder's loss had the insured peril not occurred. (i.e. the *"counterfactual"*)

[81] The Court held that the insured peril was to be excluded for the purposes of determining the correct hypothetical counterfactual which was one where the broader impact of the pandemic were also excluded. Thus is it necessary to strip out of the counterfactual everything covered in the insuring clause. Put differently, the business interruption referable to Covid-19 as well as the authorities and/or the public response thereto.

[82] In relation to disease clauses, the Court defined the insured peril as the interruption, or interference with the business following the occurrence of a notifiable disease within the relevant geographical limit. Therefore, the Court considered that the correct application of the trends clause would be to consider the position of the insured had the business interruption due to Covid-19 including the government responses not occurred. The Court further held that even where the trends clause refers to damage as the main operative clause of the policy, there is no good reason why the trends clause should not apply to non-damages claims extensions in the

policy. The Court therefore found that trends clauses would apply to losses from non-damages extensions but gave guidance in the judgment as to how it should be applied in respect of each category of wording.

[83] Significantly, the Court found that it was not bound by **Orient Express** in terms of the effect of trends clauses and, in *obiter* comment stated that the case was wrongly decided. On the basis that the hurricanes were an integral part of the insured peril, the counterfactual to apply in the trends cause was the situation where both the damage to the hotel and the hurricanes, and their effect generally had not happened.

[84] We are in agreement with the approach adopted in FCA. It is clear from the judgment that the nature and extent of the insured peril is key for both causation and the trends clause. The Court had defined the insured perils under disease clauses broadly to include the impact of the nation-wide pandemic, such that when analysing causation and trends clauses in relation to that cover, the counterfactual essentially exclude a world without Covid-19. We are in agreement that the insured peril under disease clauses was of a *"composite nature"* comprising a number of interconnected elements. Under the disease wording, the relevant insured peril is a combination of all the various factors described, namely interruption or interference with the business during the indemnity period following any occurrence of a notifiable disease within a radius of 40 kilometres. Consequently, Sanlam's interpretation of the trends clause cannot be sustained. The applicants, in our view, have to be put in the position that they would have been in had the insured peril not occurred, taking into account the correct counterfactual scenario.

INDEMNITY PERIOD

[85] The applicants seek this Court to declare that the indemnity period under their policies is eighteen (18) months. In the business interruption section of each policy "*indemnity period*" is defined as *"the period beginning with the commencement of the Damage and ending not later the number of months thereafter stated in the schedule during which the results of the business shall be affected in consequence of the Damage."*[28] In the schedule for business interruption cover, the "*Indemnity Period*" is listed as 18 MONTHS in capital letters, presumably to emphasise the term.

[86] Santam submits that the infectious disease clause is an extension to business interruption cover, and so the indemnity period is limited to three months.[29] In support of this contention, Santam elected to overlook the period of 18 months and focused on a "*Memorandum*" tucked away at the end of the schedule, which reflects in fine print: "*Extensions under the Section are limited to an Indemnity period of 3 Months*."[30]

[87] It is evident that the infectious disease clause is not one of the twenty-six items listed under the "*Extensions and Clauses*" heading in the schedule. Some of these items, like "*Loss of Tourist Attraction*" and "*Loss of Aesthetic Attraction*" expressly record an indemnity period of three months. Others do not, like the "*Bush Fire*" extension. It appears that the residual three month period may be applicable to these listed extensions. It could be reasonably concluded that the residual indemnity period does not apply to the infectious disease clause because it is not a listed

[28] Founding Affidavit; annexure "FA1", p 53.
[29] Founding Affidavit; annexure "FA1", p 29.
[30] Answering Affidavit; p 287, para 74.

extension. Instead, it comes as a standard feature of the business interruption section.

[88] Santam contends for a narrow interpretation of the indemnity period. Ultimately, as written, the policy is *"capable of both a broader and narrower meaning it is that which is favourable to the insured … which must be employed."*[31] The broader meaning is, of course, the eighteen-month indemnity period.

[89] In the face of the eighteen month stipulation, Santam's insistence on a three-month limit to the clause essentially amounts to a limitation on a clearly expressed obligation to indemnify. It must, accordingly, be restrictively interpreted. As the Supreme Court of Appeal recently held, "*any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer's duty to spell out clearly the specific risks it wishes to exclude.*"[32]

[90] It is clear that there is an obvious ambiguity between the two indemnity periods. In the circumstances the *contra proferentum* principle should be invoked. Consequently, the ambiguity must be resolved against Santam. If Santam wanted to limit the indemnity period for infectious diseases to three months in this contract that it drafted, it could simply have added the clause to the long list of specific extensions.

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[31] Barnard v Protea Assurance Co Ltd t/a Protea Assurance 1998 (3) SA 1063 (C) at 1068D.

[32] Centriq Insurance Company Ltd v Oosthuizen and Another fn 6 at para 18; See also Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd 2008 (3) SA 425 at para 7 ("[A]n exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify"). This is a pedigreed rule of interpretation: see Norwich Union Fire Insurance Society Ltd. v S A Toilet Requisite Co. Ltd. fn 8 at 222 ("It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract").

We therefore declare that the indemnity period in respect of the infectious disease extension clause is eighteen (18) months.

CONCLUSION

[91] In view of our findings we do not deem it necessary to deal with the applicants' alternative argument in relation to the development of the common law pertaining to insurance contracts. The Court is satisfied that the applicants have established the necessary conditions precedent for the exercise of the Courts discretion in their favour. Consequently, the applicants are entitled to the declaratory relief. The applicants have established that they have an existing contractual right to indemnity under the infectious diseases clause to the policies, and to an indemnity period of eighteen (18) months.[33]

[92] **In the result the following order is made:**

It is declared that:

92.1 The respondent is liable to indemnify the first applicant in terms of the Business Interruption section of a policy of insurance number HLU0000-01259 issued in respect of the first applicant's Best Western Cape Suites Hotel and the Village Café, for such loss that the first applicant is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of

[33] It is important to note that the UK Supreme Court has expedited an appeal hearing in the FCA test case. The matter was set down for hearing on 16 November 2020 over a period of four days.

Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 11 March 2020;

92.2 The respondent is liable to indemnify the first applicant in terms of the Business Interruption section of a policy of insurance number HLU0000-01301 issued in respect of the first applicant's Coopmanshuijs Boutique Hotel and Spa, for such loss that the first applicant is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;

92.3 The respondent is liable to indemnify the first applicant in terms of the Business Interruption section of a policy of insurance number HLU0000-01291 issued in respect of the first applicant's Rivierbos Guest House, for such loss that the first applicant is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;

92.4 The respondent is liable to indemnify the second applicant in terms of the Business Interruption section of a policy of insurance number HLU0000-07179 issued in respect of the second applicant's The Stellenbosch Kitchen, for such loss that the second applicant is able to prove to have suffered as a result of loss of revenue occasioned by the

occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;

92.5 The indemnity period for the loss suffered by the applicants is 18 months;

92.6 The respondent is liable to indemnify the first applicant in terms of the Business Interruption section of a policy of insurance number HLU0000-01303 issued in respect of the first applicant's The Stellenbosch Hotel, for the full duration of the indemnity period of 18 months and not to limit the indemnity period from 15 to 27 March 2020, for such loss that the first applicant is able to prove to have suffered as a result of loss of revenue occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40 kilometres of the insured premises on or about 16 March 2020;

[93] The respondent is ordered to pay costs of this application, including the costs of three counsel, on the scale as between party and party as taxed or agreed and including any reserved costs order.

_____

GOLIATH DJP

I agree.

_____

MANTAME J

CLOETE J (concurring):

Introduction

[1] I have had the benefit of reading the judgment of my colleagues. I agree with the result, but for the reasons that follow.

[2] There are five core "concessions" made by Santam which provide context. First, it accepts for present purposes that Covid-19 is a notifiable disease in terms of the infectious diseases extension clause in each policy,[34] and that it would likely fall within the definition of a category 1 notifiable medical condition in terms of the regulations published pursuant to section 90 of the National Health Act.[35] Second, it admits there were confirmed cases of Covid-19 within 40 kilometres of the applicants' establishments.

[3] Third, Santam accepts the establishments had to close under the national lockdown imposed by government in response to Covid-19. Fourth, it assumes, again for present purposes, that the applicants suffered a loss of revenue as a result. Fifth, Santam does not place in issue that government's lockdown response was rational in the sense that it was legitimate.

[4] A few significant dates also provide context. On 5 March 2020 South Africa's first case of Covid-19 was diagnosed in KwaZulu Natal. On 11 March 2020 it

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[34] Santam does not rely on any exclusion based on the special provisions in the clause dealing with *'an outbreak of which the competent local authority has stipulated shall be notified to them'.*

[35] Act 61 of 2003.

was Cape Town's first. By 14 March 2020 there were 40 known cases in South Africa. On 15 March 2020 the first applicant had to quarantine its Stellenbosch Hotel (which therefore included the second applicant's restaurant) after someone there contracted the disease. On the same date Covid-19 was classified as a national state of disaster and international travel to and from high-risk countries was banned. The case in the Stellenbosch 40 kilometre limit (at Tygerberg Hospital) was diagnosed the following day, i.e. 16 March. On 23 March 2020 (when there were 402 known cases in the country) the President announced a 21-day national lockdown from 26 March to 16 April, which was then extended until the end of April. Regulations published on 25 March 2020 governed this "hard lockdown" period. The regulations were published as a result of, and for the sole purpose of dealing with, the Covid-19 pandemic. During much of the lockdown that has followed, amongst others hotels and restaurants were required to close. According to the applicants their losses for the period 11 to 26 March 2020 alone exceeded R5 million. The subsequent government response to Covid-19 is a matter of public record.

[5] On 1 April 2020 the applicants submitted claims under their policies. Four of the five claims were rejected *in toto* by Santam (through its lawyers) on the basis that the national lockdown was not a direct result of a notifiable disease occurring within the stipulated 40 kilometre radius. The fifth (in respect of the Stellenbosch Hotel) was accepted in part for the period 15 to 27 March (subject to quantification) because the applicants were likely to be able to

show for the period pre-lockdown that the outbreak of the disease at the premises was the proximate cause of the business interruption.

[6] The applicants approached this matter on the basis that they would not have claims in terms of the policies had there been no occurrence(s) within the prescribed radial limit. It is therefore important to emphasise, at the outset, that this case is to be decided on its own facts and on the particular policy wording. Santam asserts, and I agree, that critical to the enquiry is the proper identification of the insured peril with reference to the policy wording.

[7] In essence it is the applicants' case that the "trigger" event, being the occurrence of a notifiable disease within that localised radial limit, was an integral component of the government's national response, and such response must therefore constitute part of the insured peril. On the other hand Santam's case is that, given the localised nature of the insured peril in terms of the policies, it is only the local occurrence that is the insured peril and not any national government response to the notifiable disease itself.

General Principles of Interpretation

[8] The general principles governing the interpretation of insurance contracts (which fall within those for interpretation of documents) were recently summarised by the Supreme Court of Appeal in *Centriq Insurance Company Limited v Oosthuizen and Another.*[36] Although the present matter does not

[36] 2019 (3) SA 387 (SCA) at paras [17] – [21].

involve an exclusion clause, with which *Centriq* was concerned, the principles remain the same. In summary:

8.1 Insurance contracts are contracts like any other and must be construed having regard to their language, context and purpose in a unitary interpretation exercise;

8.2 A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract;

8.3 The analysis is objective and aimed at establishing what the parties must be taken to have intended having regard to the words they used in the light of the document as a whole and the factual matrix in which they concluded the contract;

8.4 Because insurance contracts have a risk-transferring purpose, any provision such as an exclusion placing a limitation upon an obligation to indemnify is usually restrictively interpreted, since it is the insurer's duty to spell out clearly the specific risks it wishes to exclude. In the case of *"real ambiguity"* the *contra proferentem* rule applies, and such a clause is construed against the insurer;

8.5 Although in adopting a business-like or commercially sensible construction it may be that the literal meaning of words read in their context must yield to a fair and sensible application where they are

likely *'to produce an unrealistic and generally unanticipated result'* at odds with the purpose of the policy:

> *'[21] … a word of caution is warranted: courts are not entitled, simply because the policy appears to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permits. For, if that is what the insured contracted for, that is what he is entitled to, and no more. It is not for the courts to construe exclusions in favour of the insured simply because it considers them to be unfair or unreasonable.'*

[9] Insofar as interpretation of documents generally is concerned, it is also convenient to briefly summarise the established legal principles.[37] The words used in a document are the starting point because they are the only relevant medium through which the parties have expressed their contractual intentions.[38] The process of interpretation does not stop at a perceived literal meaning of the words, but considers them in light of all relevant and admissible context, including the circumstances in which the document came into being.[39] The other provisions form part of the context in which any particular provision falls to be interpreted. Evidence by lay witnesses or experts regarding the meaning of a document is irrelevant and therefore inadmissible.[40] The words used remain of primary importance. The admissibility of evidence to establish context does not open the door to

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[37] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[38] *Bothma-Batho Transport (Edms) Beperk v Bothma en Seun Transport (Eiendoms) Beperk* 2014 (2) SA 494 (SCA) at para [12].
[39] *Ibid.*
[40] *KPMG Chartered Accountants SA v Securefin Ltd* 2009 (4) SA 399 (SCA) at para [39]; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at paras [64] – [69].

unlimited extrinsic evidence, which must still be considered as conservatively as possible.[41] Interpretation is a matter of law, not fact.[42]

The Infectious Diseases Extension Clause

[10] This clause[43] reads in relevant part as follows:

> *'**Infectious Diseases…Extension***
> *Loss as insured by this Section resulting in interruption or interference with the Business due to:…*
>
> *(b) Notifiable Disease occurring at the Premises…*
>
> *(d) Notifiable Disease occurring within a radius of 40 kilometres of the Premises…*
>
> ***Special Provisions***
>
> *(a) "Notifiable Disease" shall mean illness sustained by any person resulting from…*
>
> *(ii) Any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them*[44]
>
> *Excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'*

[11] To this it must be added that with effect from 1 June 2020 Santam introduced specific exclusions for each policy (it would seem into all other Santam policies of this type as well). These exclusions pertain to infectious or contagious diseases and in particular Covid-19. They do not affect the

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41 *KPMG* at para [39].
42 *KPMG* at para [39].
43 See for example Record p56.
44 See fn 1 above.

applicants since on their version the insured peril had already attached or eventuated by that date.

[12] On its plain wording the infectious diseases extension, as it read prior to 1 June 2020, provided cover for business interruption *'due to'* a notifiable disease occurring at the establishment concerned or within a 40 kilometre radius thereof. To trigger cover under the infectious diseases clause not any disease will do, since it must be one that is "notifiable". The regulations published under the National Health Act implicitly recognise that these types of disease pose a public health risk, not only to a particular community, district, municipality or province, but the country as a whole. They also recognise that such a disease *'may require immediate, appropriate and specific action to be taken by the national department, one or more provincial departments or one or more municipalities'.*[45] In the same regulations a *'public health risk'* is defined as follows:

> *'…a likelihood of an event that may adversely affect the health of human populations, with the emphasis on one which may spread internationally or may present a serious and direct danger…'*

[13] The applicants submit that the very concept of a notifiable disease owes its existence to the need for a co-ordinated, government-led response, because it poses peculiar and immediate public health risks. This submission is indeed supported by the quoted portions of the regulations themselves. Other diseases may be responsible for more deaths – heart disease and strokes, for

[45] Regulation 12(2) of the Regulations relating to the Surveillance and Control of Notifiable Medical Conditions published in GN 1434 of 2017.

example, probably result in more deaths globally than all the notifiable diseases combined.[46] But the government does not need to know about another heart attack. Notifiable diseases are different; the government does need to know because it needs to react.

[14] The applicants thus contend that a notifiable disease requires, and includes, a government response, with the attendant risk that interruption to an insured's business will follow, both because of the disease and the government's response to it. The example given by the applicants highlights this: as firefighters sometimes have to cut through the roof of a house to get to a fire inside, or flood it, authorities as part of their response to a notifiable disease sometimes have to close factories, put people in quarantine, and even put the whole country in lockdown.

[15] Accordingly, the applicants argue, a notifiable disease cannot be separated from the government's response to it. "Notifiable" in "notifiable disease" makes a government response (or the risk of one) as much a part of the insured peril as the disease itself; and accordingly in the present case the local occurrences of Covid-19 and the government's response to the disease are inseparably part of the same insured peril.

[16] Santam contends that all the exigencies covered by the extension clause (which is not limited to infectious diseases but also covers business

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[46] According to the World Health Organisation, heart disease and strokes have been the leading causes of death globally for the past 15 years: https://www.who.int\news.room\fact-sheets\detail\v-top-10-causes-of-death.

interruption due to pollution, shark and animal attacks) relate to events that are *local in character* and must occur at the premises or within 40 kilometres thereof. The heading *'Infectious Diseases/Pollution/Shark and Animal Attack Extension'* is unfortunate, given that the specified events are not limited to these but also include: (a) murder or suicide occurring at the premises/establishment; (b) closure of the establishment due to defective sanitation, vermin or pests on the order of the competent local authority; and (c) witness call and/or jury service by the insured or any of the insured's directors, partners or employees. However nothing turns on this.

[17] Santam submits that the extension accordingly covers only *local* events, including the local occurrence of a notifiable disease, that cause loss to the insured. The extension thus requires the local event (in the present case the local occurrences of Covid-19) to be the proximate cause of any loss suffered. It does *not* cover loss caused by a worldwide pandemic, the consequences thereof or government's response thereto.

[18] Santam maintains that the proximate cause of the interruption of the applicants' business, and any loss of revenue that may have been suffered, was not the local cases of Covid-19. It was rather the worldwide and nationwide pandemic and responses thereto, including the national lockdown imposed. It was the global spread of Covid-19 and responses of other countries which led to government taking steps from 15 March 2020 to deal with it, including restrictions on movement, declaring a national state of

disaster and thereafter ordering the national lockdown from 23h59 on 26 March 2020.

[19] Santam's stance crystallises the critical issue, and its argument develops as follows. The local occurrence is fundamental to a proper understanding of the scope of the cover. The extension cannot be properly construed if effect is not given to this express proximity requirement and is ignored. The applicants must therefore establish that the particular insured peril, being the occurrence of Covid-19 within 40 kilometres of the premises, has actually caused the business interruption and resulting loss.

[20] Santam also relies, for interpretive purposes only, on the special provision in the clause that the outbreak is one which the competent *local* authority has stipulated be notified to them. This, according to Santam, emphasises the local nature of the insured peril which it must be shown is the proximate cause of the loss. I accept that, on Santam's argument, it serves to reinforce the "local flavour" of the insured peril, but do not think that one can take it any further than that. The reason is that the regulations to which I have referred cover, in some detail, responsibilities (including implementation of the regulations) at national, provincial, health district and even health establishment levels.[47] A common thread is the obligation to report. Common sense dictates it is unlikely that a local occurrence would not have to be reported locally, hence a stipulation by a local authority that it be notified. This

[47] Regulations 3 to 7.

does not necessarily mean that the consequence of that notification is limited to a local outbreak alone.

[21] Santam also argues there are obvious difficulties in reading in the government response as part of the insured peril. The first is this would mean, so it contends, that the first applicant is not entitled to an indemnity in respect of the closure of the Stellenbosch Hotel because at the date of occurrence of the insured peril (when the positive case was identified at the hotel on 15 March 2020) the lockdown was not yet in place and had caused no loss. The second is that this would render unclear what type of government responses fall within the insured peril, i.e. local, provincial and/or national.

[22] To my mind these "difficulties" are more artificial than real. First, the applicants do not rely exclusively on the national lockdown in isolation, but on loss occasioned by the occurrence of Covid-19 within the prescribed radial limit on 11 and 16 March respectively and the consequences thereof to them including the lockdown. Second, on Santam's own version, the *public health risk* lay also in cases of Covid-19 being diagnosed in South Africa from a very early detected infection stage. These early diagnosed cases were surely plainly material to the government decisions taken. Given how government has since responded it seems clear that this must be so, since otherwise the unanswered question is why 402 cases spread across a country with a population of around 57 million resulted in the imposition of a *national* lockdown *inter alia* to curb and contain the spread of the disease.

[23] Santam emphasises the applicants recognise that if no case of Covid-19 had occurred within the radial limit the insured peril would not have been triggered. The point however is that in the applicants' case this did occur. It shows the purpose of the radius requirement and – as Santam itself puts it – how the parties intended the insurance cover to operate. As the applicants argue, the radial limit is a pragmatic requirement which puts a brake on the cover and prevents Santam from being exposed to unlimited geographical liability.

[24] I do not accept Santam's argument that cover only arises where the disease *itself* is limited to a defined geographical area in which the prescribed radial limit is located. This interpretation would render the express reference to *'notifiable disease'* in the extension clause entirely at odds with the accepted (and indeed regulated) meaning of a *'public health risk'.*

[25] Turning now to causation. The extension clause stipulates that the business interruption must be *'due to'* the insured event. *'Due to'* means caused by. On the well-established approach to causation in insurance contracts, this requires that but for the insured peril the loss would not have occurred (factual causation) and that the insured peril is the proximate cause of the business interruption and loss (legal causation).

[26] Santam accepted the first applicant's claim *'due to'* the closure of its Stellenbosch Hotel pre-lockdown upon diagnosis at that hotel of a single positive case of a notifiable disease occurring 10 days after the first in KwaZulu Natal and 4 days after the first in Cape Town. But for the lockdown

the applicants' other establishments would not have been forced to close. As Santam itself submits, the fact that a notifiable disease occurs both within and outside the radial limit prescribed in the policies does not change the nature of the cover provided by the extension. The parties chose insurance cover for the consequences of diseases occurring within a specific area, not outside it. However to my mind this does not change the character of the consequence. It does not alter the true position in this matter that the insured peril comprises both the local occurrences of Covid-19 and the national lockdown that followed. In turn both must be considered as one insured peril to identify the correct counterfactual.

[27] Santam also places reliance on the UK High Court decision in *Orient-Express*,[48] a case concerning a business interruption claim instituted by a hotel business that suffered physical damage to its hotel in 2005 when hurricanes struck the City of New Orleans. The insurer resisted the claim on the basis that the business interruption would have occurred regardless of the physical damage to the hotel building as a result of destruction wrought by the hurricanes which left the city effectively shut down. The dispute wound its way up to the High Court where in essence it was confirmed that since the insured peril was physical damage to the hotel, the claim for business interruption was limited to that resulting from such physical damage and no more.

[28] The applicants however point to a crucial distinction between *Orient-Express* and the present case. There the policy cover was for physical damage to the

[48] *Orient-Express Hotels Limited v Assicurazioni General Spa* [2010] EWHC 1186 (Comm).

hotel, whereas here it is the "hurricane" of the notifiable disease occurring within the prescribed radial limit. In any event the Court in the UK decision of *FCA*, which I deal with hereunder, disagreed with the reasoning in *Orient-Express*:

> *'345. …As we note in the section of the judgment on Causation where we deal with the decision of Hamblen J in* Orient Express*, part of what we see as the fallacy in the reasoning in that case is that both the arbitrators and the judge proceeded on the basis that only the Damage in the abstract should be stripped out in assessing the counterfactual under the trends clause. However, we consider that, on a proper analysis, the insured peril in that all risks policy was not Damage in the abstract, but Damage caused by a fortuity, there the hurricane, so that what should have been stripped out in the counterfactual was not just the Damage but the Damage and the hurricane.'*

[29] If one accepts that the lockdown was part of the insured peril then there is no real difficulty in accepting that both factual and legal causation are established, since there is no concurrent or intervening event and it is fair to reason that the contracting parties must have intended that the insured peril would be the proximate cause of the loss.

[30] I thus conclude that in the present case the local occurrences of Covid-19 within the 40 kilometre radial limit and the government's response to the presence of the disease in South Africa (including those local occurrences, on my reasoning) are inseparably part of the same insured peril; that but for the presence of those local occurrences (which of themselves were part of a broader health risk) the business interruption would not have occurred; and

that the insured peril was the proximate cause of the business interruption and any consequent loss.

The decision in *Café Chameleon*

[31] Santam levels four primary criticisms against the recent decision in this division of *Café Chameleon CC v Guardrisk Insurance Company Limited*.[49] I will deal with each in turn.

[32] The first criticism is that no particular attention was given to the language of the policy (which contained similar provisions), the local nature of the insured events and the requirement that the notifiable disease peril which caused the loss should be one occurring within a prescribed radius. Instead, Santam contends, in interpreting the policy, the Court placed emphasis on the need to construe it in a sensible and business-like manner.

[33] In paragraph 53 of that judgment it is stated that Guardrisk admitted Covid-19 occurred within 50 kilometres of the Café's premises (being the radial limit in that policy). I have not been able to discern from the judgment exactly when this occurred, and accordingly it is possible that it may have been post-lockdown. It also seems that the Café's arguments centred more around the imposition of the lockdown itself in response to Covid-19's arrival in this country, given the second criticism levelled against the judgment.

[49] Reported on SAFLII as (5736/2020) [2020] ZAWCHC 65 (26 June 2020); [2020] 4 All SA 41 (WCC).

[34] The second criticism is the Café's case was that as a direct result of the lockdown regulatory regime it suffered business interruption and loss. The Court dealt with factual causation by finding a clear *nexus* between Covid-19 and the regulatory regime that caused the business interruption. In so doing, so the criticism goes, it identified the wrong counterfactual, i.e. *'but for the Covid-19 pandemic which led to the lockdown regulations (which were not insured perils) would there have been a business interruption loss'*. In the present case however I have approached the enquiry on the basis that the counterfactual was both the occurrence of Covid-19 pre-lockdown within the prescribed radial limit as well as the government response to the presence of the disease in South Africa, including the national lockdown.

[35] The third criticism is that the Court, in finding legal causation was established, failed to consider whether the local occurrence of Covid-19 was the dominant and therefore the proximate cause of the loss. It instead referred to a passage in *Bentley*[50] dealing with legal causation and asked whether it was fair, reasonable and just that Guardrisk should be liable, concluding that it was. Santam argues this reflects an incorrect approach in determining legal causation in insurance contracts as established by cases such as *Concord*[51] which is that prime regard must be had to the provisions of the policy to give effect to the parties' own perceptions of causality.

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50 *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A).
51 *Concord Insurance Co Ltd v Oelofsen NO* 1992 (4) SA 669 (A) at 673I-674B.

[36] My approach has followed the one in *Concord*. I have tried to assess legal causation with reference to the provisions of the policy and the requirement that the insured peril must be the proximate cause of the applicants' loss.

[37] The final primary criticism is that the Court in *Café Chameleon* did not consider the trends clause. Santam submits that this clause is relevant to the construction of the policy and supports an interpretation that the insured peril must have caused the business interruption loss, applying the "but for" test. Given how the arguments were structured I deal with this below.

The decision in *FCA*

[38] Subsequent to the hearing of this matter, on 15 September 2020 judgment was delivered in the United Kingdom in the test case of *The Financial Conduct Authority v Arch Insurance (UK) Limited and Others (Hospitality Insurance Group Action and Another Intervening),* which I will refer to as *'FCA'*.[52] Given that post-1977 UK insurance law decisions retain considerable persuasive authority,[53] the parties agreed in terms of para 61.11 of the LPA Code of Conduct[54] for the judgment to be provided to us, but elected to do so without comment, other than identifying potentially important paragraphs. The applicants referred us to paragraphs 100 to 102, 112 and 345. Santam referred us to paragraphs 119 to 122, 208, 213 and 230 to 240.

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[52] *High Court of Justice, Business and Property Courts, Queen's Bench Division*, case no: FL-2020-000018, Neutral Citation Number: [2020] EWHC 2448 (Comm).

[53] See *inter alia Watson and Another v Renasa Insurance* 2019 (3) SA 593 (WCC) at paras [15] to [17].

[54] In terms of the Legal Practice Act 28 of 2014.

[39] On 8 October 2020 we were informed that on 2 October 2020 the Court in *FCA* granted leave to appeal, and we were referred by Santam's lawyers to a website apparently containing the skeleton arguments, leap frog certification and draft grounds of appeal (I had already prepared this judgment by then).

[40] I did not believe it appropriate to accept this "invitation", particularly since the applicants' legal team strenuously objected. It is of course open to the parties to raise any of the arguments on the website in the appeal which may well follow, given the importance of the issues at hand.

[41] The relevant clause in *FCA* for present purposes is contained in paragraph 85 of the judgment, namely *Extension vii 'Infectious Diseases'.* Its wording is similar to the one under scrutiny in this case and reads in relevant part as follows:

> *'**We** shall indemnify **You** in respect of interruption or interference with the **Business** during the **Indemnity Period** following:*
>
> *a) any*
>
> *i. occurrence of a Notifiable Disease (as defined below) at the **Premises**…*
>
> *iii. occurrence of a Notifiable Disease within a radius of 25 miles of the **Premises**; …*
>
> *Additional Definition in respect of Notifiable Diseases*
>
> *1. Notifiable Disease shall mean illness sustained by any person resulting from: …*
>
> *ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an*

outbreak of which the competent local authority has stipulated shall be notified to them.'

[42] The Court summarised the respective arguments of the FCA and insurer concerned (*'RSA'*) at paragraphs 91 and 92:

'91. The FCA's case is that there was cover under RSA 3, Extension vii (a)(iii) ("interruption of or interference with the **Business** during the **Indemnity Period** following … any occurrence of a Notifiable Disease within a radius of 25 miles of the **Premises**"*), on the following basis. There was a Notifiable Disease in all parts of the UK by 6 March 2020. There was an occurrence of that Notifiable Disease within 25 miles of an insured's premises when a person or persons with COVID-19 was within 25 miles of those premises. There was interruption of or interference with the business from 16 March 2020, or from a later date to be determined by the Court, as a result of the government's instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, or alternatively, in cases where businesses were ordered to close, from 23 March 2020. Any losses as insured were sufficiently causally connected with the interruption or interference and the interruption or interference "followed" the occurrence of COVID-19 if they would not have occurred had there been no COVID-19 outbreak or intervention by the government. In relation to this last aspect, the FCA contended that the word "following" deliberately connotes an event "which is part of the factual background and represents a looser causal connection than 'resulting from' and similar".*

92. For its part, RSA contended that there was no cover under RSA 3 on the basis advanced by the FCA. As elaborated by Mr David Turner QC, RSA made three groups of points, as follows. In the first place, he submitted that the cover was only against business interruption or interference proximately caused by a local outbreak of a Notifiable Disease (i.e. one within 25 miles of the premises). That, he submitted,

> *imported a requirement of "but for" causation. The use of the word "following" did not alter this. Had there been no occurrence of COVID-19 within a 25 mile radius of insured premises, the insureds' businesses would still have suffered from a general reduction of demand after 1 March 2020, and would also have suffered from the impact of the government's social distancing measures from 16 March 2020, and from any closure measures, because those would have been introduced anyway by reason of the occurrence or feared occurrence of the disease in areas other than the 25 mile radius. Secondly, RSA submitted that cover for an epidemic such as COVID-19 was, in any event, excluded by the terms of General Exclusion L* [not relevant in the present matter]. *Thirdly, RSA relied on the so-called "trends clause" in the B1 section of the policy as limiting its liability under the relevant extension to any loss which would have been sustained had the insured peril not occurred, which RSA contended meant had the local occurrence not occurred. This was said to provide an alternative route to the same result as reached by reason of the first two arguments. We will consider each of these points in turn.'*

[43] In the instant matter the extension clause specifically refers to *'due to*' rather than *'following'* an occurrence of a notifiable disease. This was not an issue before us and it is therefore unnecessary to consider the Court's reasoning in relation thereto in the context of *'proximate causation'*. The same applies to another argument advanced by RSA in respect of the connection between the insured premises and the radial limit.

[44] What is important is the Court's reasoning at paragraphs 100 to 102:

> *'100. While much of the argument was understandably put in terms of the nature of the causal requirements, we consider that what underlies the*

dispute in relation to causative requirements is a difference as to the nature of the peril insured, and that this depends on a proper construction of the relevant terms of Extension vii. Once that question of construction is answered, it seems to us that the issues of causation will also largely have been answered, and in particular it will have been established which matters can be said to be separate, non-insured causes which could be seen as distinct from the insured peril.

101. RSA's contention is that the insured peril is the effect of a local occurrence of a Notifiable Disease. Its case is that if there is a local outbreak of a disease occurring more widely, then it is only the effects of the disease occurring locally, and only insofar as they can be distinguished, which are covered. RSA submits that this is the purpose and effect of the 25 mile radius provision, and that the FCA's case reduces the requirement that there should have been an occurrence of the disease within 25 miles to a senseless, or at least arbitrary, "tick box" condition for cover.

102. This is undoubtedly a significant argument, but it is one which we are unable to accept because we have concluded that it does not withstand detailed consideration of the nature of a cover in relation to Notifiable Disease in the terms of that provided for in Extension vii. Two matters are fundamental to this conclusion. The first is the language of the particular clause. Extension vii (a) is not expressly confined to cases where the interruption has resulted only from the instance(s) of a Notifiable Disease within the 25 mile radius, as opposed to other instances elsewhere. Nor in our view does the language used in this clause implicitly have that effect. Instead, the clause can and should properly be read as meaning that there is cover for the business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance, within the specified radius, from the time of that occurrence. The wording of the clause, in other words, indicates that the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease.'

[45] In considering the nature of a notifiable disease the Court at paragraph 104 appears to have taken a similar view to mine:

> *'104. …It is in the nature of human infectious and contagious diseases that they may spread in highly complicated, often difficult to predict, and what might be described as "fluid", patterns. Furthermore, the list of diseases includes some which might attract a response from authorities which are not merely local authorities, and which is not a purely local response. The requirement under the Regulations of notifications to PHE, and to other local authorities facilitates such wider responses. Moreover, in terms of Extension vii, the fact that it is envisaged that the occurrence of a notifiable disease up to 25 miles away might be followed by interruption of business at the insured's premises demonstrates, in our view, that the parties must have contemplated that there might be relevant actions of public authorities which affect a wide area. They must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak, and would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.'*

[46] While I have cautiously reasoned that the local occurrences, given the timeline, must have formed an integral part of the government response, the Court in *FCA* went further. At paragraph 107 it found:

> *'…The construction we favour avoids the result that there would be no effective cover if the local occurrence were a part of a wider outbreak, and where, precisely because of the wider outbreak, it would be difficult or impossible to show that the local occurrence(s) made a difference to the response of the authorities and/or public…'*

[47] To this it must be added that at paragraphs 108 and 109 of the judgment the Court accepted as correct FCA's argument that if the disease made no local

appearance there would be no cover. This is the same approach as that adopted by the applicants in this case. The Court rejected the insurers' argument that such an interpretation would render the extension clause insensible since the radial limit "trigger" could produce arbitrary results:

> *'108. The point which RSA, and other insurers, particularly pressed us with was that the FCA's interpretation of the cover provided by Extension vii (and other "disease clauses") gave no sensible meaning or effect to the 25 mile radius stipulation at all. They argued that it became, on the FCA's case, just a condition which had to be fulfilled, so that, if there were just one case of a disease within the 25 miles, then there would be cover for the effects of an epidemic which had no other link to the locality, but if no case came within 25 miles, then there would not be. This was described by RSA, and other insurers, as a matter of "happenstance" and productive of arbitrary results.*
>
> *109. In our view, the FCA is correct to say that the 25 mile radius provision, interpreted as it submits it should be, makes sense. It has the effect that diseases which make no local appearance cannot lead to there being cover. While it is possible to think of anomalous cases, where it is a matter of chance whether an infected person came within the 25 mile radius or not, it appeared to us that any such anomalies were considerably less significant that those inherent in RSA's interpretation, some of which we have indicated already.'*

The Trends Clause

[48] A trends clause in a business interruption policy is aimed at adjusting loss to reflect the projected fate of the business despite the happening of the insured

event, hence the label *'trend'*. In the policies at issue this includes taking into account *'other circumstances affecting the business…'*.[55]

[49] Santam argues that even if this Court finds the local cases of Covid-19 were the proximate cause of the business interruption, on the application of the trends clause this would have the result that there is nonetheless no quantifiable loss. This is because the applicants would still have suffered business interruption losses as a consequence of the Covid-19 pandemic and responses thereto, including the national lockdown.

[50] The applicants accept their expected revenue is subject to adjustment under the trends clause but submit, compellingly in my view, that it cannot have been within the parties' contemplation that a trends clause (which goes to the valuation of the claim) could be interpreted to exclude the basic cover (in the form of the insured peril) for which the applicants already qualified. To produce such a result would require the clearest of language which is absent from these policies, and is a result that does not follow from the purpose of the business interruption cover as contemplated therein. However to the extent that there may be real ambiguity caused by the words *'other circumstances affecting the business'* in the trends clause the *contra proferentem* rule applies and the words fall to be interpreted against Santam.

[55] An example of the trends clause is found at Record p53.

[51] Also relevant is the reference to *Damage* in the trends clause which appears to follow from its particular meaning under *'Defined Events'* in the main section for business interruption cover:

> *'Loss following interruption of the business in consequence of damage occurring during the period of insurance at the premises in respect of which payment has been made or liability admitted under:*
>
> *(i) Defined events 1, 2, 3, 4, 5, 6, 7 and 8 of the fire section of this Policy*
> *(ii) The buildings combined section of this Policy*
> *(iii) The office contents section of this Policy*
> *(iv) The theft section of this Policy*
> *(v) The goods in transit section of this Policy*
> *(vi) any other material damage insurance covering the interest of the Insured but only in respect of perils insured under the fire section thereof (hereinafter termed Damage).'*[56]

[52] *'Damage'* thus pertains to specific categories of defined events for purposes of the trends clause. In contradistinction there is no reference whatsoever to *Damage* (nor indeed *damage*) in the extension clause.[57]

[53] This too militates against the interpretation which Santam seeks to place on the trends clause for purposes of interpreting the extension clause, but this does not necessarily mean that for purposes of quantification of the loss the trends clause falls to be disregarded.

[54] In *FCA* the Court, having considered the particular wording of the policy in question, found that although that policy was not well drafted it should be

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[56] Record p51.
[57] Record p56.

construed as meaning that the trends clause was equally applicable for the purpose of *quantification* under the business interruption extension:

> *'120. …It would, in our view, be commercially surprising if the parties intended that the provisions relating to quantification of business interruption claims arising out of damage should not apply, with appropriate adjustments, to claims in respect of non-damage perils and the parties should be left to debate the correct approach to the quantification of such claims notwithstanding their agreement on the principles relating to claims for business interruption following damage. If this is right, then there is also no good reason why the "trends clause" should not apply to such non-damage claims, though it would necessarily have to be manipulated to make it applicable...'*

[55] However the Court continued as follows:

> *'121. There are two important related preliminary points about the "trends clause" in this wording, which are equally applicable to all the trends clauses and provisions which we are considering. First, it is in the quantification machinery for a claim, so that it is not part of the delineation of cover, but part of the machinery for calculating the business interruption loss on the basis that there is a qualifying insured peril. Where the policyholder has therefore* prima facie *established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred. Second, subject to the particular wording providing for something different, the object of the quantification machinery (including any trends clause or provision) in the policy wording is to*

put the insured in the same position as it would have been in if the insured peril had not occurred.

122. *Therefore, in applying this clause, as manipulated, the insured peril would need to be recognised as the interruption or interference with the business following the occurrence of a Notifiable Disease within 25 miles. Given that the "trends clause" is intended simply to put the insured in the same position as it would have been had the insured peril not occurred, and given the construction which we have found to be correct in relation to the ambit of the insured peril under Extension vii (a)(iii), what this means is that one strips out of the counterfactual that which we have found to be covered under the insuring clause. This means that one takes out of the counterfactual the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto. The relevant Indemnity Period, however, only starts with the first occurrence of a Notifiable Disease within the 25 mile radius, because that is provided for in the special definition of Indemnity Period contained within Extension vii itself. Accordingly, to the extent that there was business interruption or interference related to COVID-19 before that date the insured could not claim for it.'* [my emphasis]

The Indemnity Period

[56] An indemnity period is a time limitation on cover provided in a policy as opposed to the granting of cover for that period. Accordingly if no indemnity period is specified then the insured must receive payment for the loss irrespective of how long it endures.

[57] There is no indemnity period specified in the infectious diseases extension clause itself although it is located in the business interruption section of the policies at issue. In this section *'Indemnity Period'* is defined as *'the period beginning with the commencement of the Damage and ending not later than*

the number of months thereafter stated in the schedule during which the results of the business shall be affected in consequence of the Damage'.[58] Unhelpfully there is no corresponding definition of *'schedule'* in the business interruption section, but the only portion of that section resembling a schedule is a table[59] listing the types of "main" business interruption cover available for selection plus specific extensions thereto which may be selected in addition by an insured.

[58] The main part of the schedule (which includes those selected by the relevant applicant, being loss of revenue and additional increase in cost of working) stipulates that the indemnity period is 18 months. Listed in the sub-table thereunder are 26 separately identified extensions[60] (from which the infectious diseases extension is notably absent, being located elsewhere in the section) all of which specify a maximum indemnity period of 3 months (save for public utilities and the removal of fallen trees for which no indemnity period is specified). Almost immediately below are the words *'NOTE: Extensions under this Section are limited to an Indemnity Period of 3 Months'.*

[59] Later in the business interruption section (at Item 3)[61] reference is made to an indemnity period in the context of limitation of cover for loss of revenue and increase in cost of working in consequence of the *'Damage'* suffered by an insured. The formula to calculate the limitation ends with the words:

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58 See for example Record p53.
59 On the example used Record p29.
60 On the example used the first applicant selected 13 of these.
61 Record p52.

> *'…provided that the amount payable shall be proportionately reduced if the sum insured in respect of revenue is less than the revenue rentals where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual revenue rentals where the maximum indemnity period exceeds 12 months.'*

[60] Item 3 thus implicitly contemplates that the maximum indemnity period may exceed 12 months. It also draws no distinction between "main" cover for loss of revenue and increase in cost of working due to business interruption and the infectious diseases clause extension, whereas the listed extensions in the "schedule" limit the indemnity period, almost without exception, to a maximum of 3 months.

[61] A related feature is that the insured is not given the option to take the extension of infectious diseases cover when regard is had to the plain wording of the "schedule" read in light of the business interruption section of the policy as a whole. This cover instead appears to be embedded in the policy itself or put differently, in the main business interruption cover with its accompanying indemnity period of 18 months.

[62] In addition, accepting the approach taken in *FCA*, which I do, that for purposes of quantification of the loss the trends clause must be "manipulated" to extend to business interruption loss caused by both physical and non-physical damage, it should follow that *'Damage'* in Item 3 should bear a corresponding meaning for purposes of the infectious diseases extension. The indemnity period for the infectious diseases extension would not, on this reasoning, be limited to 3 months.

[63] This interpretation seems to fit in neatly with what is implicitly contemplated by Item 3, i.e. the indemnity period extending beyond 12 months. It also fits in with the indemnity period of 18 months in the “main” cover part of the schedule which is only restricted, it would seem, by the maximum indemnity period of 3 months for the specific extensions listed *thereunder*.

[64] In any event, to the extent that there is any real ambiguity the *contra proferentem* rule applies and the indemnity period falls to be interpreted in favour of the applicants. I therefore conclude that this interpretive question must be answered by declaring that the indemnity period in respect of the infectious diseases extension clause is 18 months.

[65] In light of my findings it is not necessary to deal with the applicants’ alternative argument in relation to development of the common law pertaining to insurance contracts.

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J I CLOETE