CITATION: Sir Corp. v. Aviva, 2022 ONSC 6929
COURT FILE NO.: CV-20-653557
DATE: 20221220

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SIR CORP., US S.I.R., LLC AND/OR SUBSIDIARIES AND/OR FRANCHISES AND/OR AFFILIATED AND/OR ASSOCIATED FIRMS AND/OR OTHER INTERESTS AS DIRECTED BY SIR CORP.	)	Rory Barnable and Zac Cooper, for the Applicants
	)	Mirilyn Sharp for the Applicants
	)	Ellen Snow, John Nicholl and Emma Nicholl, for the Respondent
Applicants	)	
– and –	)	
AVIVA INSURANCE COMPANY OF CANADA	)	
Respondent	)	
	)	**HEARD:** May 9, 2022

A.P. RAMSAY J.

A. Overview

[1] As January 2020 drew to a close, Canada saw its first reported case of the nC0V acute respirate disease, commonly referred to as COVID-19. The virus, thought to be transmitted through the air or by adhering to surfaces before infecting people, spread unrelentingly around the world and across Canada. The Director General of the World Health Organization (the "WHO") initially declared that the outbreak represented a public health emergency of international concern.

[2] On March 11, 2020, the WHO declared the outbreak of a pandemic. To manage the spread of the virus, on March 17, 2020, the Government of Ontario declared a provincial emergency under s. 7.0.1 (1) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. A series of emergency orders followed, limiting the size of gatherings, restricting access to amenities and places, and suspending non-essential services (the "government orders"). One such order,

Regulation 51/20[i], mandated the closure of non-essential businesses and recreational facilities. All bars and restaurants were affected, except take out facilities.

[3] The applicant SIR Corp (described below) had to close its chain of restaurants to in person dining. SIR Corp contends that the various government orders constituted "civil authority orders" specified in its policy of insurance with the respondent, Aviva Insurance Company of Canada ("Aviva"). SIR Corp also contends that, because of the "civil authority orders", it sustained significant business losses and food and beverage spoilage.

[4] Aviva insured SIR Corp under a commercial "all risks" policy of insurance (the "Policy") which provided coverage against "all risks" of "direct physical loss or damage" to the property of the insured, except where excluded. The Policy also provided coverage for business interruption insurance if the insured's property was destroyed or damaged, and extra expense insurance where there was destruction of the insured's property, except where the cause of the loss or damage was excluded. The Policy included several exclusion endorsements and General Policy Conditions (which includes the extensions relied upon by SIR Corp). Aviva took over SIR Corp's insurance needs in 2017 from Arch Insurance Company of Canada ("Arch").

[5] On March 17, 2020, SIR Corp, through its broker, provided notice to Aviva that it would be making a claim under its policy for losses sustained and anticipated losses to be sustained because of the closure of its restaurants as mandated by the government orders.

[6] On or about June 5, 2020, Aviva denied coverage on the basis that the COVID-19 virus did not constitute "direct physical loss or damage" or "destruction or damage" to property.

[7] SIR Corp argues that coverage is available under the "coverage grant" in the "Special Endorsement" at paragraph 14 of the Policy (Civil Authority) and the "Extension" of coverage at paragraph 16 of the Policy (Ingress/Egress) or under Extension 15 (Interruption by Civil Authority).

B. Nature of the Application

[8] SIR Corp brings this application pursuant to r. 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a declaration of coverage and, if successful, seeks an order directing a reference under r. 54 to determine the quantum of SIR Corp's losses.

[9] Both parties filed extensive materials on the application including multiple affidavits and transcripts. Both parties later provided written submissions concluding in oral submissions on the five Australian appeals in a COVID-19 business interruption test case, dealt with below.

C. The Parties

[10] SIR Corp is a Canadian restaurant chain owner/operator, operating approximately 60 restaurants in Canada, with one location in Buffalo, New York. SIR Corp counts amongst its brands, Jack Astor's Bar and Grill, Scaddabush Italian Kitchen & Bar, and Canyon Creek.

[11] Aviva is a property & casualty insurer which underwrites commercial property risks in the Canadian market.

D. The Issues to be Determined

[12] The issues to be determined are:

i) Whether there is coverage under the policy of insurance issued by the respondent to the applicant, for losses following the issuance of various government orders to manage the COVID-19 virus.

ii) If paragraph (i) is answered in the affirmative, whether the court ought to direct a reference to determine the quantum of the applicant's losses.

E. The Policy

[13] The policy at issue is an Aon manuscript policy, that is, one that was tailored to SIR Corp's insurance needs. The Policy was negotiated by SIR Corp's broker, Aon Reed Stenhouse Inc. ("Aon"). The Policy in place in March 2020 covered SIR Corp and US S.I.R., LLC and/or Subsidiaries and/or Franchises and/or Affiliated and/or Associated Firms and/or Other Interest as directed by SIR Corp. (collectively "SIR Corp.").

[14] For the policy period September 30, 2019 to September 30, 2020, Aviva issued an all-risks manuscript insurance policy to SIR Corp with a policy limit of $50,000,000.00, in consideration of a premium in the amount of $331,554.00. The parties do not dispute that the Policy was valid and in effect for the period that the claims were submitted to Aviva.

[15] The entire Policy consists of a Binder, Insuring Agreement, and six endorsements relating to exclusions under the Policy. The binder refers to "Special Endorsements/Extensions" (the "Extensions"). These Extensions are not attached to the Policy but are contained in the main Policy itself. None of the exclusions apply to the issues before the court.

[16] The Binder sets out the following key information:

Name of Insured	SIR Corp. and US SIR; LLC and/or Subsidiaries and/or Franchises and/or Affiliated and/or Associated Firms and/or Other Interest as directed by SIR Corp.

…

Policy Form – Aon Manuscript

Property Insured

- Property of Every Description

Business Interruption

- Profits, including Contingent Business Interruption
    - Extra Expense including Contingent Extra Expense

Perils Insured

- All Risks of Direct Physical Loss or Damage (except as excluded)

    - Earthquake Included
    - Flood Included
    - Sewer Back-Up Included

Limits of Liability

Any One Occurrence $50,000,000.00

…..

Special Endorsements/Extensions

- Interruption by Civil Authority – No. of Weeks -8
- Ingress/Egress – No. of Weeks – 8
- Permission for Vacancy with respect to two locations -Port Carling & Minett, Ontario

[17] The Binder sets out the annual aggregate limits for flood, earthquake, "pollution cleanup – land and water", as well as the sub-limits for newly acquired property and property in transit, among other things, and the applicable deductibles for some of the perils in various provinces.

[18] The main insuring agreement indicates that the Policy is an all-risk policy, which covers "property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded".

[19] Section 1 of the Policy contains the policy conditions. It is under this section that the Extensions, or rather, clauses 14, 15 and 16, appear. The relevant clauses are as follows:

SECTION 1
POLICY GENERAL CONDITIONS

1. RISK/INTEREST INSURED:

> This Policy, subject to the terms, conditions and limitations hereinafter set forth, insures:
> Direct Damage as provided under Section II
> Business Interruption (Profits) as provided under Section III
> Business Interruption Extra Expense as provided under Section IV
>
> ……
>
> 14. **CIVIL OR MILITARY AUTHORITY**:
> This Policy insures loss, as covered herein, which is sustained by the Insured as a result of damage caused by order of civil or military authority to retard or prevent a conflagration or other catastrophe.
>
> 15. **INTERRUPTION BY CIVIL OR MILITARY AUTHORITY**:
> This Policy is extended to include the loss sustained by the Insured during the period of time while business is affected as a result of order of civil or military authority, but only when such order is given as a direct result of loss or damage of the type insured by this policy, or threat thereof. Maximum 8 weeks.
>
> 16. **INGRESS/EGRESS**:
> This policy is extended to include the loss sustained by the Insured during the period of time when as a result of a peril insured or threat thereof, ingress to or egress from any part of premises of the Insured or of others is prevented or impaired, including prevention or impairment of such access by any civil or military authority. Maximum 8 weeks.
>
> …..
>
> 38. Any ambiguity or conflict in meaning in this Policy shall be resolved in favour of the Insured. The language of this policy shall be deemed to be that of the Insurer(s) and the Insurer(s) shall accept it as their own.

[20] Section II of the Policy insures SIR Corp's property against "all risks" of direct loss or damage except as excluded. The section states:

> SECTION II
>
> DIRECT DAMAGE SECTION
>
> 1. INSURING AGREEMENT:
>
> This Policy, subject to the conditions and limitations as herein set forth, insures the property described herein against All Risks of direct physical loss or damage occurring during the term of this Policy, except as hereinafter excluded.

[21] Section III of the Policy provides coverage for business interruption insurance, including contingent business interruption (profits) if SIR Corp's property is destroyed or damaged by the perils insured under the Policy. Section III reads:

> Section III states:
>
> SECTION III
>
> BUSINESS INTERRUPTION INSURANCE INCLUDING CONTINGENT BUSINESS INTERRUPTION (PROFITS)
>
> 1. INSURING AGREEMENT
>
> Subject to the conditions, provisions and limitations hereinafter stated, the Insurer(s) hereby agree(s) with the Insured that if any property of the Insured or of others including but not limited to property
>
> (a) at premises described in the Contingent Business Interruption definition, or
>
> (b) property in transit, other than worldwide transit while waterborne,
>
> is destroyed or damaged by the perils insured under this Policy at any time during the period of insurance and the normal business carried on by the Insured be in consequence thereof interrupted or interfered with, the Insurer(s) will pay the Insured the amount of loss resulting from such interruption or interference in accordance with the provisions herein contained.

[22] Section IV of the Policy provides coverage for extra expense incurred by SIR Corp. following damage or destruction to the insured property. The section states:

> SECTION IV
>
> EXTRA EXPENSE INSURANCE INCLUDING CONTINGENT EXTRA EXPENSE
>
> 1. INSURING AGREEMENT:
>
> This Policy, subject to the conditions and limitations as herein set forth, shall cover the Necessary Extra Expense incurred by the Insured in order to continue as nearly as practicable the normal conduct of the Insured's business following damage to or destruction of property of the Insured or of others including but not limited to property
>
> (a) In course of construction or property incidental to such construction;
> (b) The insured has contracted to acquire;
> (c) at premises described in the Contingent Business Interruption definition;

(d) in transit other than worldwide transit while waterborne, caused by the perils insured under this Policy, occurring during the term of this Policy.

[23] The Policy has six separate endorsements attached which set out the exclusions to coverage. The "Fungi or Spores Exclusion", Endorsement No. 2 was raised by counsel for the applicant, but the parties agree that none of the exclusions would apply to SIR's current claims.

F. Background Facts

[24] Prior to September 30, 2017, SIR Corp's commercial property insurance policy was underwritten by Arch Insurance Canada Ltd. In 2017, Arch announced that it was exiting the Canadian property market. SIR Corp's policy with Arch was set to expire on September 30, 2017. Its broker, Aon, invited Aviva to provide a quote on a commercial property policy for SIR Corp.

[25] Aon acted as agent for SIR Corp in arranging the Policy with Aviva. Aviva assumed SIR Corp's Arch policy. The Arch policy contained an Absolute Microorganism Exclusion clause, which excluded coverage for mold, mildew, fungus, spores or other microorganisms. Three of the Endorsements regarding exclusions in the Arch Policy were replaced with Aviva wordings in the 2017-2018 Policy which included replacing the Absolute Microorganism Exclusion with a Fungi/Spores Exclusion. Aviva added its standard terrorism exclusion to the Policy. The expiring 2016-2017 Arch Policy did not contain any coverage or extension for loss resulting from communicable disease.

[26] On September 15, 2017, Aviva provided two quotes, the first being a premium based on no changes to the sub-limits in the 2016-2017 Arch Policy, and the second being a lower premium based on adding new sub-limits to the policy extensions. On September 19, 2017, Aon communicated to Aviva that it had instructions from SIR Corp to proceed to bind the Policy based on the first quote with no changes to the existing sub-limits under the 2016-2017 Arch Policy. Aon prepared a binder for Aviva's signature.

[27] On September 21, 2017, Aon forwarded the binder to Aviva for its signature. On October 4, 2017, Aviva's representative provided a signed copy of the Binder to Aon. The Binder described the perils insured under the Policy as "All Risks of Direct Physical Loss or Damage (except as excluded)" and indicated that the following perils were included: earthquake, flood and sewer back-up.

[28] Prior to the first renewal of the Policy with Aviva in 2018, for the policy period 2018 to 2019, Aviva sought to make certain changes to the exclusions and to add new sub-limits. Certain changes proposed by Aviva were incorporated by Aon in the Policy for the policy year 2018-2019, with the policy period changing to October 30, 2018 to September 30, 2019. The Policy remained the same, for the most part.

[29] Prior to binding coverage, Aon provided SIR Corp with a summary showing the differences between the expiring and renewal policy; the document provided to SIR Corp was identified by the non-party at an examination.

G. *Position of the Parties*

a. Position of SIR Corp

[30] All three policies issued by Aviva to SIR Corp were negotiated between SIR Corp's broker, Aon, and Aviva's underwriters.

[31] SIR Corp argues that, because of the issuance of various "civil authority orders" restricting and/or closing businesses, including SIR Corp's restaurants, "to retard or prevent" the spread of the coronavirus, it suffered damage to its stock and food, and suffered beverage spoilage, costs of disposal, as well as business losses and other expenses of approximately $27,000,000.00. SIR Corp indicates that it was limited to operating only delivery or takeout services.

[32] SIR Corp argues that coverage for its losses is available under several clauses of the Policy. It notes that Section I of the Policy contains Special Endorsement 14, which provides an additional grant of coverage beyond that contained in Sections I and II, and it argues Extensions 15 and 16 also extend coverage to the losses described in those Extensions.

[33] SIR Corp argues that the only place with reference to perils insured under the Policy are all risks of direct physical loss or damage is Section II of the Policy. It submits that the other Sections of the Policy provide that the perils insured include, but are not limited to, the risk of business interruption losses resulting from damage or destruction to the property of others (Section III), the risk of extra expenses resulting from damage or destruction of the property of others (Section IV), and the risk of loss caused by an order of civil authority (Section I).

[34] SIR Corp argues that there is coverage under Special Endorsement 14 of the Policy (Civil Authority), which contains a $5,000,000.00 sub-limit. SIR Corp submits that the Policy's grant of coverage was broadened to insure "loss, as covered herein, which is sustained by the Insured as a result of damage caused by order of civil or military authority to retard or prevent a conflagration or other catastrophe". SIR Corp argues this coverage applies: the civil authority orders were implemented to retard or prevent a catastrophe (i.e., the spread of coronavirus). SIR Corp argues that the term "other catastrophe" in Special Endorsement 14 is not defined in the Policy and should be interpreted to include the COVID-19 virus. It argues that COVID-19 has been described as both a "catastrophe" and a "cataclysm". It maintains that the civil authority orders were implemented to retard or prevent a catastrophe (i.e., the spread of COVID-19). SIR Corp argues that the only "limiting" portion of Special Endorsement 14 is the requirement that there be "loss, as covered herein".

[35] SIR Corp also argues that there is no requirement in Extension 16 that "loss sustained" be "physical". It argues that there is an "extension of coverage" during the period that ingress to or egress from any part of the premises is prevented or impaired by any civil or military authority.

[36] SIR Corp argues that “Special Endorsement 14” and “Extension 16” provide coverage for SIR’s losses, including food inventory losses, business losses and other related losses. It noted, coverage under Extension 15 may also be available.

[37] SIR Corp submits that all three policies issued by Aviva to SIR Corp contained virtually identical wording to the September 30, 2016 - September 30, 2017, policy issued by Arch Insurance, except the Arch policy contained the “Microorganism Exclusion (Absolute)”, which stated:

> “This Policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:
>
> Mold, mildew, fungus, spores or other microorganism or any type, nature or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.
>
> This exclusion applies regardless whether there is
>
> (i) any physical loss or damage to insured property;
> (ii) any insured peril or cause, whether or not contribution concurrently or in any sequence;
> (iii) any loss of use, occupancy, or functionality; or
> (iv) any action required,

[38] SIR Corp submits that, when Aviva took over coverage from Arch Insurance in 2017, it removed the exclusion of the Microorganism Exclusion (Absolute) and did not replace it with any exclusion for “viruses” “contagious diseases”, “infectious diseases”, “pandemics”, or other such risks when it renewed the policies in 2018 and 2019. SIR Corp argues that, as there is no exclusion under the Policy, the COVID-19 virus is a peril insured.

[39] SIR Corp points out that in 2017, Aviva’s underwriter sent Aon proposed policy wording for SIR’s US restaurant, which contained an “Exclusion of Loss Due to Virus or Bacteria”, specifying that “we will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease”. No such exclusion was requested for SIR Corp’s Canadian restaurants.

[40] SIR Corp relies on post-conduct actions taken by Aviva in support of its position, including the introduction of a contagious diseases exclusion in SIR Corp’s renewal policy in September for the 2020-2021 Renewal Policy, and the introduction of more restrictive language in Extensions 15 and 16.

[41] SIR Corp further submits that the claim would also qualify for coverage under Extension 15 as Aviva had paid a similar claim a few months earlier under Extension 15 involving a snowstorm in St. John's, Newfoundland and Labrador. SIR Corp argues that Aviva should be estopped from denying coverage now, and further submits that the same policy should be construed consistently.

[42] SIR Corp challenges the evidence of Sarah Hume, who deposed that at the time Aviva issued its first policy to SIR Corp in 2017 and its second policy to SIR Corp in 2018, Aviva did not offer communicable disease coverage under any of its policies. SIR Corp urges the court to consider an affidavit sworn by Aviva's Chief Technical Underwriter in a class action lawsuit involving Aviva for COVID-related business interruption claims.

[43] SIR Corp submits that the COVID-19 virus meets the definition of a "catastrophe". SIR Corp argues that Aviva's interpretation of the Policy would lead to an absurd commercial result and render coverage illusory as a civil or public authority cannot issue orders to prevent or retard the spread of physical catastrophe events such as cyclones, hurricanes, or volcanic eruptions.

[44] SIR Corp points to other documents to assist the court in interpreting the intentions of the parties including a July 6, 2006 – ISO Circular filed to address exclusion of loss due to virus or bacterial for commercial lines, and a Bulletin entitled "COVID-19 Update" clarifying the "commercial insurance wordings", issued by Aviva.

[45] SIR Corp rejects the application of the Australian test cases to this case, as the policies were different, and the Australia court construed the *ejusdem generis* principle differently than have Canadian Courts.

b. Position of Aviva

[46] Aviva submits that SIR Corp fails to apply the plain language of the Policy as written, or to consider the Extensions in their proper context within the Policy as a whole.

[47] Aviva agrees that the language of the Policy is unambiguous.

[48] Aviva submits that, to trigger coverage, physical loss or damage to property is required. The necessary trigger for coverage, as both a matter of construction and common sense, is the occasion (real or threatened) of physical loss or damage to property. Aviva submits that there is no coverage under the Policy because the COVID-19 virus could not cause "direct physical loss or damage" or "destruction or damage" to property under any of the sections of the Policy.

[49] Aviva argues that to engage coverage for the present claim under this Extension, SIR Corp must satisfy the Court that: (i) the March 2020 Orders are civil authority orders to retard or prevent

a conflagration or other catastrophe; and (ii) the March 2020 Orders have caused damage to SIR Corp. If these conditions are met, SIR Corp is entitled to coverage for loss of the kind covered by the Policy.

[50] Aviva submits that SIR Corp cannot establish the existence of an "insured peril" as the root cause or triggering event for the government orders limiting access to SIR Corp's premises. It submits that the simple reality is that government orders were put in place to slow or stop the spread of COVID-19. These Orders have unfortunately also impacted and interfered with the operation of SIR Corp's business interests, but neither the Orders nor COVID-19 itself have occasioned any physical harm to SIR Corp's property.

[51] Aviva submits that SIR Corp's proposed interpretation of the Extensions is not supportable on any reasonable construction of the Policy. Aviva submits that SIR Corp's interpretation, that direct physical loss or damage is either not required or has been satisfied with respect to three extensions to cover found in Section I of the Policy, requires that SIR Corp read each of these provisions in isolation and divorced from the rest of the Policy terms and conditions, contrary to the canons of contractual interpretation. Aviva argues that SIR Corp inverts the causal requirements contained within the extensions and imbues meanings to the words used which are inconsistent with the normal and accepted definitions of those words.

[52] Aviva submits that the proper interpretation of the Policy is straightforward and consistent with both the wording of the Policy and the circumstances in which it was made. The Policy is a commercial property insurance policy structured around the concept of an "insured peril", in other words, the risk of direct physical loss or damage to property. Aviva argues that the Policy is divided into sections, namely: Section II, which insures against the risk of direct physical loss or damage to SIR Corp's property; Section III, which insures SIR Corp against business interruption loss sustained when the Insured's property or the property of others is destroyed or damaged by the perils insured under the Policy; and Section IV which insures SIR Corp against extra expense incurred because of damage to SIR Corp's property or the property of others. Aviva argues that Section I of the Policy sets out the general Policy terms and conditions as well as a limited number of provisions which somewhat extend – but do not standalone from – the coverages offered in Sections II-IV.

[53] Aviva submits that, to engage coverage under the Extensions, there must be a nexus with direct physical loss or damage to property, or the threat thereof.

[54] Aviva submits that Extension 14 must first be interpreted in light of the specific words used in that clause as well as against the terms of the Policy as a whole. The Policy is a commercial property policy which is organized around the twin pillars of: (i) indemnifying an insured for direct physical loss or damage to property; and (ii) indemnifying the insured for lost business income and extra expense which it suffers as the result of direct physical loss or damage to property. Extension 14 operates to extend this coverage for damage caused by civil orders issued to "retard or prevent a conflagration or other catastrophe". The terms used together in the context of the overall Policy indicate that coverage is engaged where a public authority issues an order to prevent

or slow the spread of some physical event and that order, in turn, causes physical damage to an insured's property. The classic example of this occurs where an insured's property is ordered to be destroyed to create a firebreak to stop or slow the spread of fire. Such losses are deliberate and not fortuitous and would otherwise be excluded from coverage under Section II of the Policy but for this Extension.

[55] As for Extension 15, Aviva submits that it will be engaged where closures are ordered due to impending hurricanes, floods or snowstorms or events of that nature which clearly can cause significant damage to property. Aviva concedes that SIR Corp is correct that no actual damage to property is required but submits that in the absence of real or threatened property damage, coverage is not engaged. The losses for closures of business will be covered when the shutdown is ordered due to the threat of physical loss or damage to property. However, in the absence of real or threatened property damage, the wording of the Extension is not engaged.

[56] Aviva argues that Extension 16 is engaged where, as a result of a peril insured, or the threat of a peril insured, the Insured loses access to its premises. Aviva submits that the peril insured is set out in Section II of the Policy and all of the contemporaneous documents leading up to the execution of the Policy as being "all risks of direct physical loss or damage to property." Aviva argues that Extension 16 is only engaged where access to the business is impaired due to actual or threatened direct physical loss or damage to property.

[57] Aviva relies on the Australian court's interpretation in the test cases of *LCA Marrickville Pty Limited v. Swiss Re International SE*, [2022] FCAFC 17 and *Star Entertainment Group v. Chubb*, [2022] FCAFC 16, with respect to that court's interpretation of the phrase "conflagration or other catastrophe".

H. *Disposition*

[58] The application is dismissed, for the reasons below. In the result, no order will be made to direct a reference.

I. *Analysis*

[59] There is no dispute that the Policy is a manuscript policy prepared by SIR Corp's broker, Aon, and not a standard form policy. By signing the Policy, however, the insurer adopts the wording as their own: *Zurich Insurance Company Ltd. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 1870, at para. 49, per Strathy J., as he then was, aff'd 2011 ONCA 663.

[60] The onus is on the insured to prove that the claim falls within coverage: *Indemnity Insurance. Co of North America. v. Excel Cleaning Service*, [1954] S.C.R. 169; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] S.C.R. 245, at para. 29; *G & P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Company*, 2017 ONCA 298, 67 C.C.L.I. (5th) 27, at para. 14.

[61] Once the insured establishes that the loss falls within coverage, the onus shifts to the insurer to show that an exclusion applies: *Progressive Homes*, at para. 51; *G & P Procleaners*, at para. 14.

[62] The parties agree that no exclusion applies. However, SIR Corp relies on the extensions contained in clauses 14, 15, and 16, and therefore has the onus of establishing that the losses that SIR Corp sustained as a result of the government orders (civil authority orders) to manage the spread of the COVID-19 virus, fall within coverage. Aviva does not challenge that the orders issued by the government are civil authority orders, merely whether they were issued to retard or prevent a "catastrophe."

[63] I now turn to the general principles in interpreting insurance contracts.

[64] In *Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995, at p. 1003, the Supreme Court of Canada indicated that:

> In matters of insurance, as in other areas of the civil law, the principle of freedom of contract applies, and in general therefore it is for the parties to an insurance contract to define the limits of the risk covered and the conditions under which the indemnity is payable.

[65] In interpreting insurance contracts, the court must give effect to the intention of the parties. The court must determine the objective intentions of the parties and their "reasonable expectations with respect to the meaning of a contractual provision": *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 55; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 65.

[66] The parties' reasonable expectations regarding the meaning of a contractual provision can often be gleaned from the circumstances surrounding the contract's formation: *Sattva*, at paras. 46-47; *Ledcor* at para. 65.

[67] Where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: *Ledcor* at para. 49; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.

[68] The contract should be interpreted to give effect to the intention of the parties and produce a fair and commercially sensible result: *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888; *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129 at para. 56. Estey J., speaking on behalf of the majority, summarized the requirement, in *Consolidated-Bathurst* at p. 901*:*

> [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which

> the insurance was contracted. Where words may bear two con-structions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[69] If there is no ambiguity in the language, the court should give effect to the language of the policy read in the context of the policy as a whole: *Ledcor*, at para. 49; *Sabean v. Portage La Prairie Mutual Insurance Co*., 2017 SCC 7, [2017] 1 S.C.R. 121, at paras. 12-13; and *Progressive Homes* at para. 22.

[70] Where there is ambiguity, the doctrine of *contra proferentem* requires the ambiguity to be construed against the party who drafted the contract.

[71] Courts should not impute ambiguity where none exists, as noted in *Consolidated-Bathurst*, at p. 901, citing *Cornish v. Accident Insurance Co*. (1889), 23 Q.B. 453 (C.A.) at p. 456. The parties agree that there is no ambiguity in the language. I agree. There is therefore no need for the court to resort to the doctrine of *contra proferentem*, or clause 38 of the Policy.

[72] Both sides have filed extensive extrinsic evidence. In my view, a consideration of that evidence is unnecessary. The jurisprudence establishes that a resort to extrinsic evidence to interpret the terms may first require a finding of ambiguity: *Eli Lilly & Co.,* at para. 55; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 32; *Dunn v. Chubb Insurance Company of Canada*, 2009 ONCA 538, 97 O.R. (3d) 701, at para. 33; *Simex Inc. v. IMAX Corp.* (2005), 206 O.A.C. 3 (C.A.), at para. 23.

[73] In *Eli Lilly & Co.*, the Supreme Court of Canada revisited *Consolidated-Bathurst* and whether extrinsic evidence is admissible in contractual interpretation to ascertain the true intent of the parties at the time the contract was entered into. Speaking for the court, at para. 54, Iacobucci J. wrote: "The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination."

[74] It is not necessary for the court to consider extrinsic evidence when the document is clear and unambiguous on its face: *Eli Lilly*, at para. 55; and

[75] Iacobucci J. commented in *Eli Lilly*, at para. 56, that if it is presumed that the parties intended the legal consequences of their words, the true contractual intent of the parties is not difficult, which he noted was consistent with the court's dictum in *Joy Oil Co. v. The King*, [1951] S.C.R. 624, at p. 641, where the court indicated: "in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer."

[76] Therefore, like all contracts, the Policy must be examined in light of the surrounding circumstances, or the factual matrix in which it was formed: *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27; *Dunn*, at para. 33. As Rothstein J. noted in *Sattva*, this will vary from case to case and has its limits. At paragraph 58 he stated that: "It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting."

[77] Citing *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98, at p. 114, Rothstein J. indicated that the surrounding circumstances would include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva*, at para. 58. The factual matrix considered by the court is largely distilled above.

[78] The courts have also indicated that the reasonable commercial expectations of the parties must necessarily be objective and not subjective, which "requires an examination of the 'general commercial atmosphere' rather than the 'subjective belief' of either party or of the 'concerns' that an insurer alone might hold": *Surespan Structures Ltd. v. Lloyds Underwriters*, 2021 BCCA 65, at para. 94; *Nodel v. Stewart Title Guaranty Company*, 2018 ONCA 341, 140 O.R. (3d) 401, at para. 18; *Sattva*, at paras. 59–61; *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, 212 D.L.R. (4th) 193, at para. 36.

[79] The words of the contract are given their ordinary meaning, not the meaning they might be given by persons versed in insurance law: *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[80] I start with the debate between the parties about the nature of an all-risk policy. The commercial reality is that an all-risk insurance policy is a form of property insurance. It insures the insured's property against all risks, except where the policy otherwise provides an exclusion. The commercial reality is, if the parties decide to add other perils to be insured, e.g., burglary, business etc., the all-risk policy becomes a multi-peril policy.

[81] In *Ledcor*, Wagner J. (as he then was), at para. 69, speaking for the majority, stated: "Although such policies are said to insure against all risks, this description is not entirely accurate. As a general rule, insurance offers protection only for fortuitous contingent risk: *Progressive Homes*, at para. 45." In *MDS Inc.* v. *Factory Mutual Insurance Company*, 2021 ONCA 594, 465 D.L.R. (4th) 294, at para. 73, Thorburn J.A. noted that "All-risk policies are, by their grant, limited

to cover only fortuitous or unanticipated losses." She went on to cite the following passage from *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, citing a decision of the House of Lords as follows:

> The Supreme Court held in *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66, [2008] 3 S.C.R. 453, at para. 79, citing *British and Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A.C. 41 (H.L.), [1921] All E.R. Rep. 447, at pp. 46-47:
>
> > These words ["all-risk"] cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies.… Damage, in other words, if it is to be covered by [all-risk] policies such as these, must be due to some fortuitous circumstance or casualty.

[82] The parties disagree on the approach to be taken in interpreting the terms of the Policy. SIR Corp suggests that each section of the Policy affords different grants of coverage and should be interpreted separately. Aviva urges the court to interpret the contract as a whole. I agree with Aviva.

[83] An insurance policy may consist of a binder, insuring agreement, endorsements or riders, and policy wordings and conditions, all of which constitute the entire policy. Section 124 of the *Insurance Act*, R.S.O. 1990, c. I.8., which applies to all policies, sets out the requirement for all policies as follows:

> **124** (1) All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.

[84] SIR Corp has provided no authority for the proposition that the Policy should not be read as a whole. SIR Corp does rely on authority with respect to endorsements to the Policy. Both parties appear to be of the view that clauses 14, 15 and 16, contained in the section dealing with "General Policy Conditions" are the "Special Endorsements" referenced in the Binder. There are no separate documents attached to the contract as required by s. 124 of the *Insurance Act*. In the result, the court will also assume that these clauses are "endorsements".

[85] A rider or endorsement is a "writing added or attached to a policy or certificate of insurance which expands or restricts its benefits or excludes certain conditions from coverage.": L.R. Russ, *Couch on Insurance* 3d (West Group, 1997), at pp. 18-24.

[86] Endorsements, riders, marginal references, and similar writings, form part of the contract of insurance, and are to be read and construed with the policy proper: L.R. Russ at pp. 21-42.

[87] The jurisprudence in Ontario establishes that an endorsement is not a standalone insurance policy. It is linked to the policy to which it is attached and with which it is purchased: *Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789; *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company*, 2020 ONCA 487, 151 O.R. (3d) 663. The policy and the rider or endorsement together constitute the contract of insurance: *Sutherland*, at para. 21; *Le Treport*, at para. 30.

[88] The policy and the rider or endorsement are to be read together to determine the contract actually intended by the parties: L.R. Russ, at pp. 18-26.

[89] The Ontario Court of Appeal has held that an endorsement "does not have an independent existence" from the policy: *Sutherland*, at para. 21; *Le Treport*, at para. 32. As stated by Lang J.A. in *Sutherland* at para. 21: "An endorsement changes or varies or amends the underlying policy. *While it may be comprehensive on the subject of the particular coverage provided in the endorsement*, it is built on the foundation of the policy and does not have an independent existence. [Italics in original; underlining added.]

[90] Where the language of the contract is unambiguous, the court should give effect to clear language, reading the contract as a whole: *Progressive Homes*, at para. 22; *Scalera*, at para. 71.

[91] Both sides have filed evidence regarding the party's subsequent conduct. However, such evidence is not helpful. For example, the evidence of Bev Wong, Senior Property Claims Examiner with Aviva, responsible for handling SIR Corp's business interruption claim after notice was given of the losses, does not assist the court in interpreting the contract. The inherent danger of relying on such evidence is apparent. SIR Corp provided notice of a claim in March of 2020, very early on in the pandemic. The conduct of Aviva in investigating the claim is, in and of itself, is ambiguous and the evidence of Ms. Wong may be self-serving. On the other side, SIR Corp points to the fact that Aviva introduced a Contagious Disease Exclusion when it renewed SIR Corp's policy for the 2020-2021 Renewal Policy, which excludes coverage for losses arising from contagious diseases and viruses, among other things, and introduces stricter restrictions in the Extensions. In *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, Strathy C.J.O. reviewed the dangers of relying on subsequent conduct to interpret a contract. He stated at para. 42 that "evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language."

[92] Evidence of the parties' subsequent conduct is admissible to assist in contractual interpretation only where the court, after considering the contract's written text and its factual matrix, finds that the contract is ambiguous: *Shewchuk*, at para. 56. In this case, I find no ambiguity in the Binder or the Policy (which includes the policy conditions), and, in the result the evidence of the party's subsequent conduct is not relevant in the construction of the Policy.

[93] In *Sattva*, at para. 47, Rothstein J. stated that determining the intention of the parties is a "fact-specific goal" that requires a trial court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances

known to the parties at the time of formation of the contract": *Ledcor*, at para. 27. In *Brissette Estate v. Westbury Life Insurance Co*., [1992] 3 S.C.R. 87, 58 O.A.C. 10, at p. 92, Sopinka J., in summarizing the rules of construction in interpreting an insurance contract indicated that: "The court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract."

[94] The parties agreed to an all-risk insurance policy. As such, since any endorsement or extension would be "built on the foundation of the policy", the starting point is the perils insured, as set out in the Binder. The Binder clearly states that the perils insured are "All Risks of Direct Physical Loss or Damage (except as excluded)". I therefore disagree with SIR Corp that Extension 16 does not have a physical requirement. When read in its entirety, the Extension incorporates the description of "peril insured" from the Binder. The words are clear – the Policy "is extended to include the loss sustained by the Insured during the period of time when as a result of a peril insured or threat thereof, ingress to or egress from any part of the premises of the Insured….". The words are clear, and on a plain reading of the terms, a condition precedent to coverage being triggered under this clause is that ingress and egress to the insured's premises is impaired "as a result of a peril insured". The "peril insured" is set out in the Binder and relates back to all risks of direct physical loss or damage, except as excluded.

[95] *Black's Law Dictionary*, Abridged Fifth Edition, (St. Paul: West Publishing Co., 1983), at p. 593, defines "peril" as follows:

> The risk, hazard, or contingency insured against by a policy of insurance. In general, the cause of any loss such as may be caused by fire hail, etc.

[96] Again, reading the entire policy, the peril insured is "All Risks of Direct Physical Loss or Damage", except as excluded. I do not accept that the government orders (civil authority orders) issued to manage the spread of COVID-19 are, in and of themselves, a peril insured under the Policy. The triggering event is loss or damage as a result of the peril insured, and a consequence of which, access to the insured's premises, may be prevented or impaired by civil or military authority. An endorsement may change the policy, but only to the extent set out in the endorsement: *Sutherland*, at para. 18.

[97] The same reasoning applies to Extension 15. The clause is clear. Coverage is triggered when the insured sustains loss or damage while the insured's business is affected "as a result of order of civil or military authority, but only when such order is given as a direct result of loss or damage of the type insured by this policy, or threat thereof" (emphasis added). Reading the Policy as a whole, the type of loss or damage insured by the Policy is all risks of direct physical loss or damage to property, except where excluded. The civil authority order is not a peril insured. Coverage is only afforded if, as a consequence of loss or damage insured under the policy, the insured's business is affected by order of civil or military authority. That is, the civil or military order follows in the wake of the loss or damage sustained by the insured for an insured peril.

[98] In addition, I disagree with SIR Corp that the COVID-19 virus is an insured peril because no replacement microorganism exclusion was added by Aviva, which it suggests broadened coverage. First, the previous exclusion appears to be directed to physical loss or damage to insured property, or loss of use, occupancy, or functionality. Second, the exclusion would still be construed in the context of the entire policy.

[99] In my view, read in its entirety, the Extensions do not expand the nature of the perils insured, or put another way, the clauses do not indicate that they are comprehensive and self-contained. They are part of the Policy. They are based on the foundation contained in the Binder as to the perils insured. They do not have a life of their own.

[100] SIR Corp placed a great deal of emphasis on coverage being triggered under Extension 14, which reads: "This Policy insures loss, as covered herein, which is sustained by the Insured as a result of damage caused by order of civil or military authority to retard or prevent a conflagration or other catastrophe".

[101] SIR Corp agrees in its factum that there is limiting language in Extension 14 by requiring s that the "loss, as covered herein", but suggests that "other catastrophe" can be interpreted to mean the virus. SIR Corp argues that no "physical" loss or damage is required to trigger coverage. Despite counsel's very persuasive arguments, the court cannot agree with SIR Corp's interpretation.

[102] The word "herein" in Extension 14, can only refer to "in" the document, that is in the Policy. It is not restricted to that clause or Extension. There is no other reasonable interpretation as the clause appears under the "Policy General Conditions" section. The preamble indicates: "This Policy, subject to the terms, conditions and limitations hereinafter set forth, insures:", and then sets out the risk insured under sections II, III and IV. Reading the Policy as a whole, Extension 14 is a term and condition. But, given the manner in which the parties have proceeded, in interpreting the Policy, the court must consider the whole Policy.

[103] The *Oxford Concise Dictionary* (Oxford: Clarendon Press, 1995), at p. 634, defines "herein" as follows: "Adv. Formal in this matter, book, etc." Extension 14 is clear on its face that the Policy will extend to a loss "as covered herein". There must first be a "loss" covered under the Policy. The second requirement is that the insured's loss is caused by "order of civil or military authority to retard or prevent a conflagration or other catastrophe." SIR Corp has ignored the causation factor. For SIR Corp to be afforded coverage, the loss must be as a direct loss or damage. Courts will apply the usual rules of causation, which require the loss to be as a result of "direct physical loss or damage". The COVID-19 virus, even if it meets the definition of being a catastrophe would not cause direct "physical" loss or damage. The government orders did not result in "direct physical loss or damage" to the insured's property.

[104] As for the Australian cases, the parties to the present dispute addressed the *LCA Marrickville Pty Limited v. Swiss Re International SE,* [2022] FCAFC 17, and *Star Entertainment Group Limited v. Chubb Insurance Australia Ltd,* [2022] FCAFC 16, appeals only in their oral

submissions. The *LCA Marrickville* appeal followed from ten test cases that were tried, of which five were appealed. In their joint reasons, Derrington and Colvin JJ. outlined several general issues that arose across all cases. At paragraph 54, they summarized the terminology used to describe the types of clauses which arose including:

- Infectious disease clauses (or disease clauses): these provide cover for loss that arises from either infectious disease or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises

- Prevention of access clauses: these provide cover for loss from orders/actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises)

- Hybrid clauses: these provide cover for loss from orders/actions of a competent authority in closing or restricting access to premises, but only where those orders/actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises

- Catastrophe clauses: these provide cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe

[105] The court then addressed the principles of construction, indicating that a specific clause may require giving a narrower meaning to a broadly worded one. One principle of construction that this court can agree with is reading the policy document as a whole. Beyond that, some of the principles of construction articulated by the Court differ from the jurisprudence in Canada. For example, the Court notes that reading the document as a whole involves more than acquiring an awareness of the provisions and requires evaluating the coherence and consistency between a party's interpretation and the other terms of the agreement. Depending on the policy, "it may be that, if giving a broadly worded clause its fullest scope would negate the operative efficacy of a specific clause directed to the issue at the centre of a claim for indemnity, some alternative and narrower meaning may have to be given to the broadly worded one": *LCA Marrickville*, at para. 58. The Australian Court also indicated that the policies should be construed from the perspective of a "reasonable businessperson": *LCA Marrickville*, at para. 77, which is not the test in Canada. One issue addressed by the Court, which was only addressed by the parties in passing, is that of causation. The Court noted that insurance policies are intended to cover causes that are "proximate" to the loss, in the absence of any contrary intention in the policy itself.

[106] In *LCA Marrickville*, a laser therapy clinic was insured under a policy with Swiss Re. The claims were excluded under a hybrid clause, as described above. In 2020, the New South Wales Government made three orders that impacted LCA's business. LCA filed a claim, which was declined by Swiss Re. At trial, the court was asked to determine whether there was coverage under

the more general catastrophe or prevention of access clauses; whether the COVID-19 pandemic was a "catastrophe" covered by the policy; and whether state-wide orders could be considered to have been made to avoid damage within 5 kilometres of the business for the purposes of the prevention of access clause. The lower court judge found that, as COVID-19 was a "listed human disease" pursuant to the *Biosecurity Act*, a claim under the hybrid clause was excluded. The insured did not appeal this finding, but, just as SIR Corp did in the present case, LCA argued that the clause should be given full independent effect. The court held that, to give the policy coherence and to give effect to its provisions, the more specific clauses must limit the more general clauses. The court also held that the words "conflagration or other catastrophe" and "retarding" in the clause under consideration operated to limit coverage under that clause to catastrophes with particular characteristics. The court notes, "The expression 'catastrophe' requires the sudden onset of a physical event of substantial magnitude which results in widespread destruction or loss of life and necessitates physical action to retard it": at para. 358.

[107] In 2019, Star Entertainment Group Limited and a number of its associated entities (together, "Star") agreed to an insurance policy whereby eleven insurers took a share of the risk (the "Insurers"). Star sought a determination as to whether their policy of insurance provided indemnity for losses as a consequence of the COVID-19 pandemic. Star, which is a gambling and entertainment company, sought a declaration that the Insurers were obliged to indemnify Star for losses from the interruption of its business caused by government orders and advice directed at restricting the spread of COVID-19. The court was asked to determine whether the claim fell under an extension to the policy. The lower court judge declined to grant declaratory relief and Star appealed. The issues included whether Star's losses fell under the general catastrophe clause in that Memorandum 7; whether the catastrophe clause was subject to the more specific disease clause at Memorandum 9; and whether, under the catastrophe clause, losses were limited to physical losses or included the consequential losses that result from government action. The court indicated that the scope of Memorandum 7 should be read down to avoid inconsistency with the language of Memorandum 9, which expressly dealt with contagious diseases by setting clear limits on the extent of the indemnity. Based on the words "retarding" and "conflagration", the court found that the words "or other catastrophe" were confined to "catastrophic events that can be retarded by physical actions directed towards restraining or interrupting the progress of a physical phenomenon". It held that the COVID-19 pandemic was not included in the reference to a catastrophe.

[108] I agree with SIR Corp that the policies in those cases are different than the one under consideration. But, for the reasons indicated below, I agree with Aviva that there are aspects of those cases that are helpful, especially in that there is now some jurisprudence from a common law jurisprudence in considering the COVID-19 in the context of insurance coverage, albeit under different policies and subject to different conditions.

[109] In this case, the court does not accept that Extension 14 (or any of them) is independent from the rest of the Policy. The Policy must be read as a whole to ascertain the intention of the parties. As such, I do not accept SIR Corp's argument that the Policy extends coverage to insure

the COVID-19 virus, even if the court accepts that the pandemic may meet the definition of a catastrophe. There is no doubt that the COVID-19 pandemic can be characterized as a catastrophe.

[110] The court is prepared to accept that in certain circumstances, the COVID-19 virus may meet the definition of catastrophe. Indeed, it has been characterized as "a natural catastrophe in slow motion" by virologist Christian Drosten. In certain of the Australian test cases, it was accepted as such, but not for the purposes of meeting the specific term under consideration. I would tend to agree with Aviva that given the sequence of the words in Extension 14 ("to retard or prevent a conflagration or other catastrophe"), the meaning of "other catastrophe" is informed by the word in which it is in close proximity, that is "conflagration", which is a physical event, an extensive fire. In my view, "or other catastrophe" would require a similar large-scale destruction to property.

[111] Reading the entire Policy as a whole and giving effect to the plain meaning of the words used by the parties, I find that there is no coverage under the all-risk policy for the loss sustained by SIR Corp as a result of the government orders issued to manage the coronavirus.

[112] Finally, I do not accept SIR Corp's argument that Aviva should be estopped from denying coverage as a result of paying a similar claim. On the evidence before me, on January 17, 2020, the City of St. John's, Newfoundland and Labrador, issued a state of emergency (the "Emergency Declarations") due to hurricane-forced winds and extreme snowfalls. Ms. Young dealt with Aviva's decision to afford coverage to SIR Corp's Jack Astor's restaurant in St. John's, which was left without power causing some food spoilage to occur. Aviva's position is that it investigated and paid the claim. It argues that the snowstorm caused a power outage, which led to the food spoilage, and the restaurant had to remain closed for nine days under a civil order due to the hazardous conditions caused by snowstorm. SIR Corp challenges the veracity of Ms. Young's evidence, and points to hearsay evidence from Aviva's adjusters, indicating that the snowstorm did not cause any physical damage to SIR Corp's property. Sir Corp also points to the Emergency government orders which make no mention of any threat of or actual damage to property but only indicate a concern for "public safety". There are competing versions of events. This court cannot determine whether the major snowstorm constituted a peril insured under the Policy or even whether the claim was paid intentionally or in error. There is no basis for the court to determine that Aviva should be estopped from denying coverage in this case.

Conclusion

[113] If the parties are not able to resolve the issue of costs, the respondent may deliver its costs submissions within 30 days, and the applicant may deliver its costs submissions within 15 days thereafter.

A.P. Ramsay J.

Released: December 20, 2022

CITATION: Sir Corp. v. Aviva, 2022 ONSC 6929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SIR CORP., US S.I.R., LLC AND/OR SUBSIDIARIES AND/OR FRANCHISES AND/OR AFFILIATED AND/OR ASSOCIATED FIRMS AND/OR OTHER INTERESTS AS DIRECTED BY SIR CORP.

Applicants

– and –

AVIVA INSURANCE COMPANY OF CANADA

Respondent

REASONS FOR JUDGMENT

A.P. Ramsay J.

Released: December 20, 2022

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[i] O. Reg. 51/20: Order Under Subsection 7.0.2 (4) of the Act-Closure of Establishments