CITATION: Workman Optometry Professional Corporation v. Certas Home and Auto Insurance Company, 2023 ONSC 3356
COURT FILE NO.: CV-22-00676162-00CL
CV-20-643488-CP
DATE: 20230605

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
WORKMAN OPTOMETRY PROFESSIONAL CORPORATION, 1298928 ONTARIO LTD., THE SUIT SHOP CO. LTD., 2328867 ONTARIO INC. (o/a BOOSTER JUICE 369, BOOSTER JUICE 388, BOOSTER JUICE 375, AND BOOSTER JUICE 452), 2635774 ONTARIO INC. (o/a BOOSTER JUICE 275), 2660364 ONTARIO INC. (o/a BOOSTER JUICE 200), IN HARMONY DANCE & WELLNESS LTD., DR. RANA TAJI OPTOMETRY PROFESSIONAL CORPORATION, and SCOTIAN ISLE BAKED GOODS INC. Plaintiffs	See Counsel List attached, for the Plaintiffs
– and –	
CERTAS HOME AND AUTO INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, ECONOMICAL MUTUAL INSURANCE COMPANY, FEDERATED INSURANCE COMPANY OF CANADA, GORE MUTUAL INSURANCE COMPANY, INTACT INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY NO. LNP2210, CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY NO. GASS1300, NORTHBRIDGE GENERAL INSURANCE CORPORATION, NOVEX INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, SGI CANADA INSURANCE SERVICES LTD., THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, THE WAWANESA MUTUAL	See Counsel List attached, for the Defendants

INSURANCE COMPANY, and WYNWARD INSURANCE GROUP)
)
)
Defendants

)
) **HEARD:** February 6 to 10, 13 to 16 and 21
) to 24, March 9 and 10, 2023

PENNY, J.

Overview

[1] In December 2019, the World Health Organization announced the discovery of a new strain of coronavirus (named SARS-CoV-2) in Wuhan, China. SARS-CoV-2 causes the disease now known as COVID-19. Confirmed cases grew exponentially and crossed international borders. COVID-19 cases in Canada began to surge in early March 2020. On March 11, 2020 the WHO declared COVID-19 to be a pandemic. Canadian federal and provincial public health authorities issued various forms of guidance. Provincial governments passed regulations under emergency measures legislation in an effort to contain the spread of this disease. What are popularly know as "lockdowns" were imposed.

[2] All of this had a significant impact on the small to mid-sized businesses operated by the plaintiffs. In all cases, the plaintiffs' business models involved people coming into their business premises to purchase goods and services. During significant periods of the ongoing pandemic, no customers, or dramatically reduced numbers of customers, came to the plaintiffs' premises. This had a negative effect on the plaintiffs' business revenues.

[3] The plaintiffs in this class proceeding purchased business interruption insurance policies with various Canadian insurers. They made claims for COVID-19-related business income losses. Those claims were denied. The overall issue for determination in this common issues trial is a narrow one: can the plaintiffs' business losses resulting from the onset of the COVID-19 pandemic qualify as insured losses under the business interruption provisions of their policies?

[4] There are three certified questions:

(i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?

(ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? and

(iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

with "physical loss or damage to property" including "physical loss" or "physical damage" or "direct physical loss" or "direct physical damage", or similar wording as may be used in the business interruption provisions of each defendant's property insurance wordings.

Background

The Representative Plaintiffs

[5] The plaintiffs are small to medium-sized businesses. The plaintiffs' businesses all share this feature: they rely to a significant extent on personal customer/client traffic in and out of their premises to generate sales of goods and services. They have employees. And they utilize equipment of various types and levels of sophistication in the sale of their goods and services.

[6] The COVID-19 pandemic resulted in a material reduction of the plaintiffs' business revenues.

[7] The plaintiffs' insurance contracts are standard form policies. In most cases, the plaintiffs acquired their commercial insurance policies through insurance brokers. In some cases, the plaintiffs acquired their policies through their corporate head office or industry associations.

[8] The plaintiffs are not, as would be expected, experts in insurance underwriting.

[9] There is some evidence that the insurance industry, in the years leading up to the COVID-19 pandemic, was aware of the risk of a serious pandemic and pandemic-related losses. There is also some evidence that the insurance industry had available, and promoted, insurance products specific to pandemic-induced business interruption and other losses.

Certification of the Common Issues

[10] Certification orders were issued on consent by Belobaba J. in this matter on August 20, 2021 and April 12, 2022. The class is defined as persons in Canada (except Québec) that:

(i) contracted with a defendant for business interruption insurance;

(ii) on or before August 31, 2021, made a claim under their business interruption insurance policy for losses due to:

(A) the actual or suspected infection of staff, agents, customers or other persons with the SARS CoV-2 virus or its variants at the insured premises or within such proximity as may be specified in the insured's business interruption insurance policy:

(B) the actual or suspected presence of the SARS CoV-2 virus or its variants on the insured premises; or

(C) the order of a civil authority regarding the SARS CoV-2 virus or its variants; and

(iii) were denied insurance coverage for those losses by any of the defendants.

[11] As noted, for the purposes of this trial, there are three certified common issues:

(i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?

(ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? and

(iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

with "physical loss or damage to property" including "physical loss" or "physical damage" or "direct physical loss" or "direct physical damage", or similar wording as may be used in the business interruption provisions of each defendant's property insurance wordings.

[12] It is important context for this trial, and for these Reasons, that the plaintiffs' Amended Statement of Claim in these proceedings pleads many alternative causes of action beyond specific breaches of contract as a result of the defendants' denial of the plaintiffs' claims under their business interruption policies. Among other things, the plaintiffs seek relief for breach of contract due to the denial of their claims: under other insurance provisions, such as coverage for loss resulting from civil orders and communicable disease outbreaks; and for breach of common law duties of care, unlawful means conspiracy, violations of the federal *Competition Act*, bad faith, and unjust enrichment/restitution.

[13] These other claims, however, by common agreement of the parties and by order of the Court, are being left for another day; they are not issues for *this* common issues trial, which is restricted to the three specific common issues listed above, all of which concern only the business interruption provisions of the plaintiffs' commercial property insurance coverage. The certification of these three questions was expressly without prejudice to the plaintiffs' right to move for certification of some or all of the remaining potential common issues following disposition, in this trial, of the three certified common issues.

[14] With respect to the three common issues that have been certified, it is also important to emphasize that I am not being asked to determine whether the plaintiffs actually suffered any loss from COVID-19 or, if so, what it was. Questions of causation and damages are also being left for another day. The sole task for the court in this trial is to determine whether the presence of SARS-CoV-2 or an order of a civil authority that was made due to SARS CoV-2 *can* cause physical loss or damage to property and, if so, whether there are any exclusions in the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded.

Agreed Statement of Facts

[15] Exhibit 4 is an agreed statement of facts. It deals with the identity of the representative plaintiffs, the identity of the defendant insurance companies which offered commercial property business interruption insurance in the Canadian market at the relevant time, and

the business interruption insurance policies that were issued by the defendants in the relevant period. It also provides a basic chronology of events relating to the onset of SARS-COV-2 and the COVID-19 pandemic together with the measures undertaken by various federal, provincial and territorial governments across the country to limit the spread of SARS-COV-2. I have reviewed the agreed statement of facts. I will not repeat it all in my Reasons but it should be regarded as relevant and necessary background information which is undisputed in this case.

The Policy Structure

[16] The insurance policies in issue are all commercial property insurance policies. The policies include three main components: the Declarations, the Commercial Property coverage, and the Business Interruption coverage.

[17] The Declarations are usually found in the first few pages of the policies. They identify the insurer and the insured, state the policy period, list the coverages that have been purchased, list the forms and endorsements that make up the policy, and set out the limits of insurance, deductibles and premiums.

[18] The Commercial Property coverage insures all risks of physical loss or damage to insured property except as otherwise provided. For example, the Dominion Policy contains language typical of these policies[1]:

> INDEMNITY AGREEMENT
>
> In the event that any of the property insured be lost or damaged by the perils insured against, the Insurer will indemnify the Insured against the direct loss so caused to an amount not exceeding whichever is the least of:
>
> (a) the actual cash value of the property at the time of the loss or damage;
>
> (b) the interest of the insured in the property;
>
> (c) the amount of insurance specified in the "Declarations" in respect of the property lost or damaged.

[19] Perils insured are:

> PERILS INSURED

[1] At different times, different counsel used different defendant's policies as "examples". The full policies of each defendant were by common agreement admitted into evidence. The Joint Brief of Policy Forms was marked as Exhibit 1. A compendium containing the relevant provisions from the representative plaintiffs' policies (starting at CaseLines B-2-7444) was also provided for the assistance of the court during oral argument. I will generally stick to the Dominion policy example but may make reference to others from time to time.

> This form, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

[20] Coverage is restricted to the property insured:

> PROPERTY INSURED
>
> This Form insures the following property but only those items for which an amount of insurance is specified in the "Declarations" as "Building", "Business Contents", and "Property of Every Description". The insurance described in this clause 5 applies only while at the premises specified in the "Declarations".

[21] Various types of property are defined. "Building" means the building at the location described in the Declarations and includes certain fixed structures, additions and extensions. "Business Contents" means property owned by the insured and used in the insured's business at the location described in the Declarations. "Property of Every Description" simply means "Building" and "Business Contents".

[22] The Business Interruption coverage insures losses such as loss of earnings or profits where an interruption of the business has resulted from "physical loss or damage to" property. This requirement of "physical loss or damage to" property is provided for as follows:

- some Business Interruption coverages refer back to insured perils set out or defined under the Commercial Property coverage;
- some Business Interruption coverages refer to "physical loss or damage to" property; and
- some Business Interruption coverages require an insured loss under the Commercial Property coverage before loss of income is covered.

[23] Regardless of how it is done, all of the Business Interruption coverages only apply if there has been "physical loss of or damage to" property. The Business Interruption coverage, for example, in the Dominion Policy provides in relevant part:

> INDEMNITY AGREEMENT
>
> In the event that the "Business" shall be interrupted as a direct result of "Damage", the Insurer shall pay to the Insured the loss of "Business Income" suffered during the "Indemnity Period" in consequence thereof, in accordance with the terms and conditions of this Form.

[24] "Damage" is defined as "direct physical loss of or damage to property insured at the 'Premises' from a peril insured under Form 652000 [the Commercial Property coverage] of this Policy". The perils insured are set out below:

> PERILS INSURED

> The perils insured against under this Form are those applicable to E-CLIPS Property Form 652000 and limited by Perils Excluded, Clause 7A, 7B, and 7D in Form 652000.

[25] The triggering event for the Business Interruption coverage in the Dominion Policy is accordingly "physical loss of or damage to" insured property.

Issues

[26] Although this was a 15-day trial, with opening statements, examination and cross examination of 11 witnesses over 12 days, and written and oral closing arguments, the issues for determination are essentially all questions of contract interpretation.

[27] As noted, there are three basic issues for determination:

(i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?

(ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? and

(iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

with "physical loss or damage to property" including "physical loss" or "physical damage" or "direct physical loss" or "direct physical damage", or similar wording as may be used in the business interruption provisions of each defendant's property insurance wordings.

[28] It is common ground, as can be seen from the agreed wording of the common issues, that the policies, while they may differ slightly in the words used, are all in substance the same—each provides that the plaintiffs' property is insured against "all risks of [direct] physical loss of or damage to the property".

[29] It also seems to be common ground that the use of the word "direct" in the policies addresses issues of causation which are not pertinent to the central task assigned by the certified common issues. The dispute is over the meaning and scope of the expression "physical loss of or damage to property".

Analysis

Onus of Proof

[30] The interpretation of insurance policies involves the application of a three-step framework: *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121. First, a court is to give effect to the clear language of the document. Second, if the language is ambiguous, a court should use "general rules of contract construction" to resolve the

ambiguity. Finally, if the general rules of construction fail to resolve the ambiguity, a court can construe the ambiguity against the drafter (the *contra proferentem* rule).

[31] The Supreme Court held in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co,* 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 52, citing *Progressive Homes Ltd v. Lombard General Insurance Co of Canada,* 2010 SCC 33 [2010] 2 S.C.R. 245, at paras. 26-29 and 51, that: "the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. If the insurer is successful at this stage, the onus then shifts back to the insured to prove that an exception to the exclusion applies."

[32] The starting point, therefore, is the policy's insuring agreement: does the loss fall within it? The plaintiffs bear the onus of proving that it does. The presence or absence of exclusions is irrelevant to determining coverage at this stage of the analysis: *Progressive Homes Ltd v. Lombard General Insurance Co of Canada*, at para. 28.

[33] If the loss does not fall within the insuring agreement, there is no coverage. If the loss falls within the insuring agreement, the analysis typically (and as contemplated by common issue #3) turns to whether there are applicable exclusions also contained within the agreement. The onus of proving that an otherwise covered loss is excluded by the language of the agreement is on the insurer.

[34] Finally, if the insurer is successful in establishing that an exclusion applies, the onus then shifts back to the insured to prove that any exception to the exclusion applies.

Principles of Interpretation

[35] Insurance contracts are subject to the same rules of interpretation as other contracts, although some special rules also apply. The purpose of the interpretation exercise is to determine the objective intent of the parties. Subjective intent is always irrelevant. Objective intent is determined by reading the words of the insurance contract in their ordinary and grammatical sense, in the context of the contract as a whole, with some consideration being given to circumstances surrounding the creation of the insurance policy.

[36] Objective intent begins with the "ordinary meaning" of the words as they would be understood by the average person. Insurance policies are supposed to be understandable to lay persons, and, in particular, to the insured: *Appel (Guardian ad litem of) v. Dominion of Canada General Insurance Co.* (1997), 39 B.C.L.R. (3d) 113 (C.A.), at para. 68. The words used in the agreement must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of 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. 21.

[37] In *Gibbens*, Binnie J. noted that efforts by insurers "to split hairs on causation issues have traditionally been rebuffed". He went on to say that "the courts do not favour the self-serving isolation of a particular element in a chain of events that should be considered in its entirety. Such law office metaphysics would make nonsense of the reasonable expectation of the parties at the time the policy was entered into": *Gibbens* at para. 57.

[38] The ordinary meaning of words depends on their context within the contract as a whole, not just one clause in isolation. Dictionary definitions may be helpful, but parties should not cherry-pick the definitions that suit their arguments. Words may have multiple meanings that depend on context, such that an interpretation divorced from the policy's context will not assist. A court must apply an objective standard to determine what both parties would reasonably have intended the words to mean at the time of entering into the contract.

[39] The surrounding circumstances include "anything which would have affected the way in which the language of the document would have been understood by a reasonable man" at the time the parties made their agreement: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 58. However, evidence of surrounding circumstances may be considered only if those circumstances were reasonably known to both parties at the time of contract formation. Surrounding circumstances does not include evidence of subjective intention and understanding or subsequent conduct (to which different rules apply).

[40] While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because "the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition": *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 33. Standard form contracts are particularly common in the insurance industry. As Professor Barbara Billingsley observed in *General Principles of Canadian Insurance* Law, 3rd (Toronto: LexisNexis, 2014), at s. A.1.a:

> As part of its business considerations and in advance of meeting with any particular client, an insurance company decides the terms and conditions under which it is willing to provide insurance coverage for certain common types of risk. This means that, in most situations, an insurance company does not negotiate the detailed terms of insurance coverage with individual customers. Instead, before entering into any insurance agreements, an insurer typically drafts a series of pre-fabricated contracts outlining the terms upon which particular kinds of coverage will be provided. These contracts are known as "standard form policies". The insurer then provides the appropriate standard form policy to clients purchasing insurance coverage.

The actual conditions of the insurance coverage are generally determined by the standard form contract: Billingsley, at p. 58, cited with approval in *Ledcor* at paras. 28-29.

[41] For standard form contracts, "the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties": *Ledcor*, at paras. 30-31. Relevant factors include the contract's purpose, the nature of the relationship it creates, and the market or industry in which it operates. These factors, however, are "inherently not fact specific" and will "usually be the same for everyone who may be a party to a particular standard form contract". In any event, the surrounding circumstances cannot "overwhelm" or "change" the wording of the agreement: *Sattva,* at para. 57.

[42] Evidence of surrounding circumstances, therefore, has a limited role in the interpretation of standard form insurance contracts. In *Ledcor*, the Supreme Court held that there was "no meaningful factual matrix". Similarly, the Court of Appeal for Saskatchewan held, in a case involving 5,000 pages of documents, affidavits, and expert reports about the creation of standard form life insurance policies, that there was "no meaningful factual matrix": *Mosten Investments LP v. The Manufacturers' Life Insurance Co.*, 2021 SKCA 36 at paras. 109-110.

[43] Certainty of meaning and predictability of insurance contracts are also important factors for insurers and insureds alike. In *Ledcor*, the Supreme Court noted that this principle applies both at the first stage of interpretation as well as where the policy is found to be ambiguous, at para. 40:

> Indeed, consistency is particularly important in the interpretation of standard form insurance contracts. In *Co-operators Life Insurance Co v. Gibbens*, 2009 SCC 59, [2009] 3 SCR 605, at para 27, Binnie J. recognized that "'courts will normally be reluctant to depart from [authoritative] judicial precedent interpreting the policy in a particular way' ... where the issue arises subsequently in a similar context, and where the policies are similarly framed", because both insurance companies and customers benefit from "[c]ertainty and predictability". And where an insurance policy is ambiguous, courts "strive to ensure that similar insurance policies are construed consistently": *Progressive Homes Ltd v Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245, at para 23.

[44] Insurance contracts are to be interpreted to achieve a commercially sensible result without allowing either party to gain a windfall: *Brissette Estate v. Crown, Life Insurance Co*., [1992] 3 SCR 87 at para. 4. 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": *Svia Homes Ltd v. Northbridge General Insurance Corp*., 2020 ONCA 684 at para. 31. Commercial reasonableness is "not judged solely from the perspective of one of the contracting parties but rather must be assessed objectively": *Atos IT Solutions v. Sapient Canada Inc.,* 2018 ONCA 374, 140 O.R. (3d) 321, at para. 60, leave to appeal refused 2019 CanLII 21184.

[45] An ambiguity arises when there are "two reasonable but differing interpretations of the policy". A mere difference of opinion about how a provision is to be interpreted does not create ambiguity: *Sabean* at para. 42. An insured's failure to read or understand the policy does not create an ambiguity; nor does mere difficulty in determining its meaning. The insured's subjective beliefs are irrelevant. Ambiguities must be apparent from a reasonable reading of the policy; they "should not be judge-made": *RBC Travel Insurance Co v Aviva Canada Inc* (2006), 82 OR (3d) 490 at para 10.

[46] Where a true ambiguity is present, the court will use all available rules of construction to try to resolve the ambiguity. Where there are words susceptible of two constructions, the more reasonable one, which produces a fair result, must be taken as the interpretation which

would promote the intention of the parties. In the face of a true ambiguity the coverage provisions are interpreted broadly while the exclusions are interpreted narrowly. Finally, to resolve an ambiguity, the court will strive to give effect to the reasonable expectations of both parties, viewed objectively. However, any interpretation involving reasonable expectations must also be consistent with the plain wording of the policy.

[47] It is only where the ambiguity cannot be resolved that resort may be had to the doctrine of *contra proferentem.*

Common Issue #1 - Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?

[48] The plaintiffs advance essentially three arguments in support of their position that SARS-CoV-2 can cause physical loss or damage to property. First, they argue, on the basis of the words of the policies themselves, that the presence of SARS-CoV-2 in the insureds' premises and on their property causes physical loss or damage. Second, they argue that physical loss or damage to property includes loss *of use* of property and that they lost the intended use of their property to engage in remunerative activity for significant periods of time due to SARS-CoV-2. Third, they argue that the defendants added express pandemic exclusions to their Commercial Property insurance policies after the pandemic. This, they argue, shows that the plaintiffs' policies, issued before the pandemic, must have included coverage for pandemic-related losses, otherwise no further exclusions would have been required.

Wording of Policies

[49] The plaintiffs argue that their policies are "all risks" (or "all perils") policies. All risks insurance provides extremely broad coverage, which is only narrowed by specific exclusions contained in the policy. They argue that a pandemic falls within the rubric of "all risks" and is precisely the kind of event that is insured by all risks policies. Pandemics meet the threefold criteria of being: (a) events; (b) that are fortuitous; and (c) can cause loss.

[50] The plaintiffs concede that the policies, as drafted, cover all risks of "physical loss or damage" to property. This phrase is not defined. The plaintiffs argue that the insured perils flow from the phrase "all risks" and include every possible risk of any nature whatsoever. Thus, they say, the words "physical loss or damage" must be construed in a way which entitles a policyholder to indemnification that is sufficiently broad to reflect the "all perils" nature of the coverage. The insurers undertook to cover loss resulting from all risks—including pandemic risks—provided there is a physical dimension to the loss.

[51] The plaintiffs argue that SARS-CoV-2 is a physical thing. That physical thing spread to healthy humans in a physical way, either by covering the surfaces of their personal property and equipment, or by being in the air of their business premises that was breathed. The presence of that physical thing in the plaintiffs' physical premises made their property dangerous to health, or made the plaintiffs change their behaviour to avoid danger to health. This, they say, is the kind of risk that all risk property insurance is meant to cover, unless the risk is explicitly excluded.

[52] I am unable to accept this argument. While I agree with the plaintiffs that "all risks" is a broad category capable of including a world-wide pandemic, the additional phrase "direct physical loss of or damage to property", is properly understood as limiting language that restricts coverage for insurable risks to events that involve direct physical loss or damage.

[53] Normally, an adjective preceding a series of two or more nouns modifies all the nouns in the series and not simply the first one: *British Columbia v Surrey School District No 36*, 2005 BCCA 106 at para 22. I find this to be the case here. The word "physical" in the phrase "physical loss of or damage to property" in the defendants' policies, therefore, modifies both "loss" and "damage".

[54] Physical damage and physical loss have distinct meanings under Canadian law:

> (a) physical damage means a detrimental or harmful "distinct, demonstrable, physical alteration of property" MDS Inc v. Factory Mutual Insurance Company, 2021 ONCA 594, 465 D.L.R. (4th) 294 at para. 96, leave to appeal to SCC refused, 2022 CanLII 23899; or a "harmful" "alteration in the appearance, shape, colour or other material dimension of the property insured": Prosperity Electric v. Aviva Insurance Company of Canada, 2021 BCCA 237 at paras. 18-21; Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company, 2015 BCCA 347, 77 B.C.L.R. (5th) 223.
>
> (b) physical loss refers to a situation where the insured property no longer exists or is lost to the insured; that is, tangible harm or deprival: Fandasia Restaurant Ltd v. Strathcona General Insurance Co, [1984] B.C.W.L.D. 661 at para 2.

[55] This approach to the interpretation of physical loss or damage in the insurance context is supported by other, recent pandemic-related law in Ontario. In *SIR Corp v. Aviva,* 2022 ONSC 6929 at para. 103, this Court held:

> [The 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.

[56] The same question was considered in *Niagara Falls Shopping Centre Inc v. LAF Canada Co.*, 2022 ONSC 2377 at para. 51, where this Court held, in the context of a commercial lease dispute:

> The virus is inert. It does not harm the building but harms persons using the fitness gym (which harm is not covered by s. 15 of the Lease). The fitness gym is closed (or attendance is limited) by Government Orders to prevent harm to people.

[57] The plaintiffs complain that debates about whether the harm to property has to be "tangible" or not is nothing but "law office metaphysics". I do not agree. The nature of the alleged loss goes to the very heart of the matter. In my view, the phrase "physical loss or damage" would convey to the average person that the property has been harmed or lost in

a tangible or concrete way. I find that this expression is not ambiguous. The fact that the phrase or its individual words are not defined does not make them ambiguous. There is no need to define simple words that are easily understood such as "physical", "loss" or "damage": *Encon Group Inc v. Capo Construction Inc.*, 2015 BCSC 786 at paras. 32-33. A requirement that such words require definition would render insurance agreements unreadable and, no doubt, lead to increased, not reduced, lack of clarity or ambiguity.

[58] The fact that, as submitted by the plaintiffs, SARS-CoV-2 is a "physical thing" spread to humans in a "physical way" such that there is a "physical dimension" of some kind to the event is insufficient to bring it within the language of "physical loss or damage to property". In *Prosperity Electric*, for example, a fire caused an elevated level of microscopic chloride ions to be on the plaintiffs' stock of lighting fixtures. The evidence was that there is always some level of chloride ions (up to 10 micrograms) in the environment but post-fire, the level was up to 16 micrograms. The BCCA said this elevated level of chloride ions was not physical loss or damage. Like the SARS-CoV-2 virus in this case, the chloride ions did not harm or have a detrimental impact on the physical property; they did not impair the function of the fixtures or their aesthetic properties; they just sat there.

[59] The plaintiffs rely on *Attorney General (Ontario) v. Fatehi*, [1984] 2 S.C.R. 536 and *Smith v. Inco Limited*, 2011 ONCA 628, 107 O.R. (3d) 321 for the proposition that the presence of hazardous material on a surface constitutes damage to property. In *Fatehi*, the Supreme Court said that a road surface being covered in rocks, auto parts, debris and gasoline that made it dangerous constituted "damage to property". In *Inco,* the trial judge found that nickel particles in the soil caused actual, substantial, physical damage to the plaintiffs' lands. However, neither of these cases involved the interpretation of insurance contracts. *Fatehi* concerned whether a claim in tort was barred because it was for pure economic loss, or whether it was a claim for property damage which could proceed. As a result of a catastrophic vehicle accident blocking the road, the section of highway in question was damaged and found to have "ceased to be a road". In this case, by contrast, the class members' business premises did not cease to be business premises and the virus did not harm property.

[60] *Inco* was about the tort of private nuisance. It also did not consider the wording at issue in the class members' insurance policies. In any event, the Court of Appeal reversed the trial judge's finding of liability. Even if *Inco* were applicable, it would support the defendants' position—the Court of Appeal rejected the plaintiffs' argument that "concerns about potential [human health] risks were in and of themselves sufficient" to establish substantial physical harm to property.

[61] The plaintiffs also rely on an article written by Professor Knutsen which suggests that courts in Canada and the United States "have often found insurance coverage in instances where the policyholder suffered seemingly intangible and transient contamination issues" similar to those experienced in the COVID-19 pandemic: Erik S. Knutsen, "The COVID-19 Pandemic and Insurance Coverage for Business Interruption in Canada" (2021), 46:2 Queen's Law Journal. I do not find Professor Knutsen's argument persuasive. The only two Canadian cases that Professor Knutsen cites in support of his thesis are the since overturned trial decision in *MDS* and a Small Claims Court of Nova Scotia decision in *Jessy's Pizza v. Economical Mutual Insurance Co.*, 2008 NSSM 38. The trial judge in *MDS* relied on *Jessy's Pizza* but was, as noted above, overturned on appeal. In addition, in

Prosperity Electric v Aviva Insurance Company of Canada, 2020 BCSC 1171, at para. 63, Justice Fitzpatrick (whose decision was upheld on appeal, as also noted above) found the decision in *Jessy's Pizza* to be "hardly compelling". Professor Knutsen also cites a number of pre-COVID-19 and other American cases. As I will discuss later below, the U.S. precedents cited by Professor Knutsen have been overwhelmed by subsequent events.

The Expert Evidence

[62] During the trial I qualified three expert witnesses in the science/public health field. Dr. Furness was called by the plaintiffs. Dr. Furness holds a Ph.D. in information management from the University of Toronto. He is an infection control epidemiologist with a focus on the transmission of communicable disease and knowledge use and information behaviour. He is an assistant professor in the teaching stream at the Faculty of Information at the University of Toronto. He is also a Member of the Institute for Pandemics and the Institute for Vaccine Preventable Diseases at the Dalla Lana School of Public Health. Dr. Furness was qualified as an expert in infection control epidemiology with a focus on the relationship between the transmission of communicable diseases and knowledge use and information management.

[63] Dr. Howell and Dr. Allen were called by the defendants. Dr. Howell holds a Ph.D. in physical chemistry and completed a postdoctoral fellowship at Harvard University. She is currently an Associate Professor of Biomedical Engineering at the University of Maine. She was qualified as an expert in biology, physical chemistry, and biomedical engineering with a specialty in the interaction of biological systems with surfaces (i.e., bio-interface science).

[64] Dr. Allen holds a D.Sc. in exposure assessment, environmental epidemiology, and biostatistics. He is currently an Associate Professor at Harvard University and a Certified Industrial Hygienist. He was qualified as an expert in the fields of public health, environmental health and safety, environmental epidemiology and exposure assessment.

[65] Although plaintiffs appear to have opened the door to expert evidence on these topics by serving the report and calling the evidence of Dr. Furness, they submitted in closing argument that whether, as a matter of science, SARS-CoV-2 has a harmful effect on physical property is irrelevant to the interpretation of the policies in issue. They also warned of the dangers of using "a highly credentialed scientist to speak on a highly technical area outside of the expertise of the trier of fact in an attempt to get the trier of fact to defer on a central material issue in the case."

[66] I agree with the plaintiffs that expert evidence on the science of how viruses interact with surfaces is not dispositive of the meaning and scope of the phrase "physical loss or damage to property" in an insurance contract. I find, however, that expert evidence on the underlying science is helpful in determining basic facts about viruses and how they interact, or not, with inanimate surfaces. The expert evidence is both relevant and helpful in placing SARS-CoV-2 in its proper context in relation to the commercial property loss claims in issue in this litigation.

[67] As it turned out, the issue on which these experts disagreed was extremely narrow and limited. Essentially, their disagreement boiled down to a difference of opinion about when,

and to what extent, transmission of SARS-CoV-2 by human contact with viral material on inanimate surfaces (called "fomites") became recognized by public health authorities as a minor or low risk source of disease transmission and airborne transmission became recognized as the principal and most concerning source of disease transmission. On the science of how viruses interact with inanimate surfaces, there is effectively no dispute in the evidence.

[68] The plaintiffs, however, attacked Dr. Howell and Dr. Allen on the basis that they are Americans with no experience in Canadian public health. The plaintiffs also argued that the evidence of Dr. Howell and Dr. Allen should be discounted because of their alleged behaviour during cross-examination. They are, for example, alleged to have strategically declined to answer questions by plaintiffs' counsel on the basis of the scope of their expertise and to have engaged in "advocacy" for the defendants' position.

[69] I do not accept these criticisms of their evidence. Essentially, the behaviour complained of was induced by the nature of the questions asked during cross-examination. In an effort to obtain helpful admissions from Dr. Howell, for example, the plaintiffs' counsel strayed outside the witness's expertise. Dr. Howell declined to answer questions about the interaction of SARS-CoV-2 with human cells. This was because her authorized area of expertise was the interaction of viruses with *inanimate* surfaces. Dr. Allen frequently declined to agree with isolated excerpts from complex scientific papers which plaintiffs' counsel put to him. These were papers which he had not authored and with which he was, in many cases, not familiar. It was appropriate, in my view, for him to demur to these questions. In addition, I found during his cross examination that it was argumentive questions which frequently, and unsurprisingly, elicited argumentive responses.

[70] On the scientific question of what happens to SARS-CoV-2 when it comes in contact with inanimate surfaces, I find there is no basis to discount the evidence of Dr. Howell or Dr. Allen simply because they have no experience with the Canadian public health system. There is no suggestion that SARS-CoV-2 behaves or interacts differently with inanimate surfaces in the workplace in Canada than it does in the U.S., or anywhere else for that matter.

[71] I will also say, while on the subject of scientific experts, that the defendants originally planned to call a Canadian epidemiologist from the University of Toronto, Dr. Jha, to respond to Dr. Furness. Following the conclusion of the evidence of Dr. Allen, however, the defendants elected to call no further evidence. This substantially shortened the length of the trial. The plaintiffs now say that an adverse inference should be drawn from the defendants' failure to call Dr. Jha. I do not agree. An adverse inference may only be drawn where there is no plausible reason for not calling the witness. In this case, the defendants concluded that no responding evidence was necessary, having regard to the substance of Dr. Furness's evidence and the evidence of Dr. Howell and Dr. Allen. This was a conclusion they were entitled to reach. A plausible explanation has been proffered. The plaintiffs' request that I draw an adverse inference is declined.

[72] The expert evidence establishes that SARS-CoV-2 is a coronavirus that causes the disease known as COVID-19. A virus is not "alive" in the normal sense of the word— a virus consists of genetic matter within a lipid envelope with protein spikes on the outside. Viruses, including SARS-CoV-2, cannot grow or reproduce without latching onto a

compatible living host cell. Without attaching to a compatible living host cell, SARS-CoV-2 will decay and become inactive with the passage of time.

[73] On most fundamental points, the evidence of Dr. Furness, Dr. Howell and Dr. Allen about SARS-CoV-2 and transmission was essentially the same:

(a) unlike bacteria and fungi, a virus is not alive—a virus cannot respire, repair, or reproduce on its own;

(b) outside a compatible host cell, a virus decays over time in a process known as desiccation, and becomes inactive;

(c) virus droplets may settle from the air onto surfaces;

(d) a fomite is a surface that has virus on it that could act as a source of virus transmission;

(e) SARS-CoV-2 is fragile;

(f) soap and water are very effective at disrupting SARS-CoV-2 and also removing the virus from surfaces;

(g) SARS-CoV-2 spreads primarily through airborne transmission;

(h) fomite transmission of SARS-CoV-2 is possible but unlikely; and

(i) handwashing mitigates risk of fomite transmission.

[74] I accept the evidence of Dr. Howell and Dr. Allen on the biological interaction between inanimate surfaces and viruses such as SARS-CoV-2. Viruses do not alter inanimate surfaces in any tangible or material manner. Viruses do not physically or chemically change a surface they land on. Rather, viruses simply sit on a surface until they desiccate or are removed. Viruses affect people, not inanimate surfaces.

[75] Viruses do not come into the environment in an isolated form. The virus is expelled from a human in a droplet containing a mixture of other biological material such as water, mucus and saliva. Thus, if a virus lands on a surface, it is always accompanied by other compounds. In addition, the surface that the virus and this other material might land upon is never pristine. Other biological material (including all manner of other microbes), non-biological materials, and chemicals are ubiquitous and are already on surfaces typically found anywhere where people live, assemble and work.

[76] When a droplet containing the virus lands on a surface, it may flatten or extend along the material surface or remain as a droplet depending on the nature of the surface. The lipid bilayer of the envelope that encases the genetic material, and the spike proteins on the outside of the envelope, require moisture to remain intact. The lipid envelope will come apart, the spike protein will lose its structure, and the molecules that make up the virus will break apart when it dries out. The droplet containing the virus will begin to dry out almost immediately after it is expelled into the environment. Once the droplet dries out, the virus

contained within the droplet will be permanently deactivated and therefore incapable of infecting a person.

[77] The virus can also be deactivated when the molecular structure of the virus is disrupted as a result of a reaction with other molecules on a surface, ultraviolet light, or exposure to cleaning compounds like soap, alcohol, or bleach.

[78] Dr. Howell testified that viruses do not change the appearance, shape, composition, colour, or other physical dimension of a surface. Viruses are too small to be seen by the naked eye, or even using most optical microscopes. The underlying material of any inanimate surface is unaffected when a virus lands upon it. The virus only sits on top of the surface along with any number of other biological, physical, and chemical compounds. As Dr. Howell explained:

> viruses are not able to act on their own, they're not living, they cannot reproduce or grow without the presence of a cell that they are infecting. They need that cellular machinery to actually do anything at all.
>
> So the virus landing on a surface will not do anything. It will simply sit there and be affected by the environment around it. And it will eventually break apart into its component parts, but it will not affect the surface in any other sense than existing on top of it.

[79] A virus can not change the shape of a surface because viruses do not interact with or modify inanimate surfaces. For the same reason, viruses cannot change the colour or any other physical dimension of an inanimate surface they land on.

[80] Dr. Howell's evidence is corroborated by Dr. Allen. Dr. Allen's evidence is that the virus does not affect surfaces. SARS-CoV-2 can sit on top of surfaces, but cannot multiply on, or take nutrients from, physical surfaces. SARS-CoV-2 does not change a surface at a molecular level and does not affect the physical composition of a surface it lands on. Dr. Allen, as an environmental epidemiologist and certified industrial hygienist, is the only expert who testified at any length about the impact of the virus on air. His evidence was that the air in commercial spaces is constantly changing and in flux, and that the virus deactivates and is removed from air through normal ventilation and filtration. His evidence is that the composition of the air in interior spaces is changing constantly, and a lot of that is controlled or mitigated or influenced by ventilation and filtration systems. All commercial buildings in North America are required to have ventilation systems.

[81] Both Dr. Howell and Dr. Allen testified as well that microbes of all kinds are ubiquitous on surfaces in spaces occupied by humans. There is no difference between the interaction of SARS-CoV-2 and surfaces and any other respiratory viruses (such as the common cold or flu) and surfaces.

[82] The plaintiffs argue that Dr. Allen's assertion that SARS-CoV-2 does not affect physical property at a molecular level is contradicted by a paper which he cited in his report, called "Surface Chemistry Can Unlock Drivers of Surface Stability of SARS CoV-2 in a Variety of Environmental Conditions". The plaintiffs argue that this paper suggests there are

chemical interactions between the virus and surfaces at the molecular level. This criticism of Dr. Allen, however, is not borne out by the evidence.

[83] Passages from this article were put to Dr. Allen in cross examination. Nothing in the article itself was independently proved. Dr. Allen did not agree that the conclusions in the article in any way contradicted his conclusion that SARS-CoV-2 does not affect physical property at a molecular level. He agreed that certain weak, electrostatic relationships could be formed but that would not prevent the easy removal of the viral material with soap and water, which was the essential point of citing the paper and of his analysis of this issue. Further, as the defendants pointed out in oral argument, the molecular interactions referred to in the cited paper were specifically described as being no more than a "*model* of the *potential* molecular interactions among viruses and between virus and different solid surfaces" (emphasis added) given certain assumed characteristics. Dr. Allen also pointed out that the model appeared to assume a "naked" virus on a surface, "meaning it doesn't have respiratory aerosols or respiratory fluids around it, which you would expect to find in the environment. If it didn't have that, the virus would not be active." Finally, and in any event, there is no evidence, even if there were some kind of interaction at the molecular level, that SARS-COV-2 causes any harmful, tangible or concrete alteration to the surfaces involved.

The Lay Evidence

[84] The class witnesses gave evidence about the nature of the businesses operated at the insured locations in the periods before and following the onset of the pandemic. The class witnesses gave no evidence that:

(a) the virus itself caused physical loss or damage to their property;

(b) they were denied access to the insured property;

(c) they were prevented from using the insured equipment or tools; or

(d) the insured property required repair, replacement, or rebuilding because of the virus.

[85] All class witnesses confirmed that they were able to access their insured locations throughout the pandemic. In addition, many of the class witnesses continued to provide goods and services at the insured location throughout the pandemic, albeit on a reduced basis.

[86] The class witnesses testified that their insured corporations were able to operate their businesses, including the use of their premises and equipment, after the lockdowns were lifted and their businesses remained operational, again including their premises and equipment, as of the date each class witness testified. All of the insured corporations are still able to operate their businesses today despite the ongoing pandemic. No remediation of their business premises or equipment was necessary. They simply picked up where they left off when people started returning to more normal patterns of behaviour.

American Authorities

[87] As the Court of Appeal noted in *MDS,* at paras. 60-61, Canadian courts have accepted that American authorities may assist in interpreting the language of insurance contracts where there is little Canadian authority: *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.), at para. 34, leave to appeal refused, [2003] S.C.C.A. No. 33. This is particularly true where similar contracts are used in multiple jurisdictions: *Edmonton (City) v. Protection Mutual Insurance Co.* (1997), 197 A.R. 81 (Q.B.), at para. 149, aff'd 1999 ABCA 6, 250 A.R. 93; *Partners Investment Ltd. v. Etobicoke (City)* (1981), 124 D.L.R. (3d) 125 (Ont. H.C.), at p. 3.

[88] The defendants devoted almost 25 pages of their written argument to the treatment of questions similar to Common Issues #1 and #2 by the American courts. In general, in more than 1,100 trial level American COVID-19 business interruption cases, American judges have overwhelming rejected the plaintiffs' arguments. The overwhelming majority of over 200 appellate level decisions on this issue have, similarly, rejected the plaintiffs' arguments.

[89] American courts have rejected the plaintiffs' argument that the nature of "all risks" insurance is to cover "all risks", however caused. For example, in *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.,* 535 F Supp (3d) 152 at 157 (WDNY 2021), aff'd 2022 WL 258569 (2nd Cir.), the Court said "it has long been recognized that 'all-risk' does not mean 'all-loss' … Instead, 'all-risk' means any risk of the type for which the Policy provides coverage. In this case, coverage is limited to events causing 'direct physical loss of or damage to [the covered] property.' The scope of coverage depends on the meaning of that phrase". See as well, *Santo's Italian Café LLC v. Acuity Ins. Co.,* 15 F (4th) 398 at 403 (6th Cir. 2021): "Even when called 'all-risk' policies, as these policies sometimes are, they still only cover risks that lead to tangible 'physical' loss or damages, say by fire, water, wind, freezing and overheating, or vandalism".

[90] American courts have commented extensively on the meaning of "direct physical loss of or damage to" property in the context of business interruption claims relating to COVID-19. While they have sometimes used different formulations to define what it requires, with some courts focusing on both "direct physical loss or damage", and some focusing on "direct physical loss" alone, each formulation involves a distinct, demonstrable physical alteration of property, complete physical dispossession of property, or both. These courts have overwhelmingly concluded that the presence of the virus does not constitute "direct physical loss or damage" within the meaning of insurers' business interruption wordings. I will cite only five examples.

[91] In *Colectivo Coffee Roasters, Inc v. Soc'y Ins.*, 974 N.W. (2d) 442 at 672 (Wisc Sup. Ct. 2022), the Wisconsin Supreme Court recently summarized the law in this area:

> As the overwhelming majority of the other courts that have addressed the same issue have concluded, the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not "alter the appearance, shape, color, structure, or other material dimension of the property." The virus does not necessitate structural "repairs or remediation"; it can be removed from a surface with a disinfectant. Likewise, COVID-19 does not render property "inherently dangerous" or "uninhabitable" in the

> same way as "ongoing rockfalls" or wildfire smoke might, because COVID-19 is not a "physical peril" that ma[kes merely] entering a structure hazardous. Rather, the danger of the virus is to "people in close proximity to one another," not to the real property itself. [citations omitted]

[92] In *Verveine Corp v Strathmore Insurance Co.*, 184 N.E. (3d) 1266 at 1275 (Mass Sup. Ct. 2022), the Massachusetts Supreme Judicial Court found that the question is not whether the virus itself is physical, but rather if it has a direct physical effect on property that can be fairly characterized as "loss or damage". The Court stated that "[a]lthough caused, in some sense, by the physical properties of the virus, the suspension of business at the restaurants was not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage. As demonstrated by the restaurants' continuing ability to provide takeout and other services, there were not physical effects on the property itself."

[93] In the decision of the Indiana Court of Appeals, *Ind Repertory Theatre, Inc v. Cin Cas Co.*, 203 N.E. (3d) 555 (Ct. App. 2023), on a summary judgment motion brought by the insurer, the plaintiff argued that there was a genuine issue of material fact as to whether the virus physically altered the air and surfaces inside its premises. It relied on opinions from three experts. The Court upheld the lower court's decision to grant summary judgment to the insurer, holding "as a matter of law, that virus particles do not cause physical loss or damage to property so as to qualify as a covered loss" under the policy in question. The Court stated at para. 10:

> The trial court did not take issue with the opinions that virus particles can linger in the air and attach or bind to surfaces. However, the court found that these facts do not amount to physical alteration of the air and surfaces because it is undisputed that "the SARS-CoV-2 virus can be cleaned or dies on its own naturally." On appeal, IRT emphasizes that its experts opined that cleaning and air filtration, while helpful, are not completely effective in eliminating the virus. But the experts agreed that virus particles not eliminated by cleaning eventually die on their own. The trial court acknowledged that the virus can "repopulate"—new particles take the place of the old—but found that fact to be irrelevant because the new particles will also die naturally if not eliminated by cleaning first. Ultimately, the court believed "IRT and its experts conflate the potential presence of SARS-CoV-2 inside the theatre with physical alteration to property." We agree with and adopt all these conclusions.

[94] *Estes v. Cincinnati Insurance Company,* 23 F (4th) 695 at 700 (6th Cir. 2022) involved a series of dental offices. The court held that the phrase "physical loss" would convey to the average person that a property owner has been tangibly deprived of the property or that the property has been tangibly destroyed. If a thief stole the furniture from Estes's dental offices, a person might say that Estes suffered a physical loss of the furniture. Or if a fire completely destroyed one of Estes's dental offices, a person might say that Estes suffered a physical loss of the building and its contents. But the average person would not say that

Estes suffered a physical loss of its dental offices when describing the harms that befell it in this case. COVID-19 did not destroy its dental offices, and the government shutdown orders did not dispossess Estes of its offices or equipment. An average person would instead say that COVID-19 and the government shutdown orders caused economic or business losses unrelated to physical loss of or damage to Estes's property. Thus, the court reasoned, a physical loss is a physical deprivation such as theft or total destruction. The virus does not cause a physical deprivation of the property. The Estes offices were able to use and continued to use their property, despite the ongoing pandemic and the ongoing presence of the virus. The virus did not dispossess the insureds of their property in any way.

[95] Finally, at the close of trial, the plaintiffs relied in particular on one intermediate appellate level decision from Louisiana in their favour, in respect of which an appeal was pending. Post-trial, the Louisiana Supreme Court issued its decision, which was provided to me on the consent of all counsel. The Louisiana Supreme Court reversed the intermediate appeal court's ruling: *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, 2023 La. LEXIS 563. The Court wrote at p. 10:

> The subject policy provides business income coverage during a suspension of operations that is "caused by direct physical loss of or damage to property." COVID-19 required Oceana to decrease its capacity, spread out its guests and allocate greater attention to cleaning and sanitation. However, COVID-19 did not cause damage or loss that was physical in nature. Oceana never repaired, rebuilt or replaced any property that was allegedly lost or damaged. While we are sympathetic to the immense economic challenges faced in responding to the pandemic, we cannot alter the terms of an insurance contract under the guise of contractual interpretation when the policy uses unambiguous terms.

[96] The plaintiffs advance five reasons why the American authorities should be rejected as providing no assistance in the analysis of the issues in this case:

(1) essentially all of the American decisions result from either the equivalent of Rule 21 motions or summary judgment motions. This case, of course, involves a full evidentiary hearing at a trial;

(2) some American cases involve either a concession that insured property was not physically affected or a failure to plead that property was physically affected by the SARS-CoV-2 virus. The plaintiffs do not concede insured property was not affected. Both parties' expert evidence established that SARS-CoV-2 virus particles on surfaces was, and was thought to be, a potential source of infection and therefore affected or potentially affected the use that could be made of insured property;

(3) unlike in the American cases, there was expert evidence in this case demonstrating that the risk of loss from a global coronavirus pandemic was part of the loss the defendant insurers could have reasonably expected to cover. Under *Ledcor*, this

evidence is admissible and probative of the insurance market in which the all risks business interruption insurance policies were sold;

(4) unsuccessful American plaintiffs often sought coverage under policies that included viral exclusions. The courts reading of the undefined phrase "physical loss or damage to property" was influenced, in part, by these important exclusions; and,

(5) there is clear Ontario Court of Appeal and Supreme Court of Canada authority that the presence of a dangerous hazard on the surface of property constitutes damage to property. To the extent that any American case reached the opposite conclusion, it should not be followed.

[97] I agree with the plaintiffs that although reference to American authority in the field of insurance law in particular may be made, a certain caution is necessary. The sheer volume of American litigation and decided cases arising out of so many different levels court means that there can be great diversity of outcome. The U.S. is a different country with a somewhat different legal system. The words used in a contract matter, and the language of the policies considered in the U.S. cases is not all the same. And, to state the obvious, American authorities, no matter which court has issued them, are not binding in Ontario.

[98] That said, I do not find the plaintiffs' attempt to write off entirely American authority on questions of insurance coverage for COVID-19 related losses, to be persuasive. It is true that the American authorities cited by the defendants do not involve evidentiary trials. Given the narrow scope of the questions asked in common issue one and two, which are essentially issues of contract interpretation, and the constraints on the role of evidence in contract interpretation generally and with standard form contract interpretation specifically, it is hard to see how that really matters. The plaintiffs tendered their evidence and were cross-examined. The defendants tendered their evidence and were cross-examined. The only material disputed issues of fact in the end surrounded whether, the extent to which, and when, fomite transmission was thought to be a significant contributor spread of SARS-CoV-2.

[99] It may well be the case that in some of the American cases there was no claim that property was physically affected. But the fact remains that a fair reading of the American case law, taken as a whole, discloses a thorough discussion of essentially all of the same arguments made by the plaintiffs in this case.

[100] While there was evidence in this case that a pandemic risk was known in the industry, there was also evidence that specific pandemic-related insurance coverage was available. The defendants did not dispute the fact that pandemic risk was known. Indeed, the defendants concede that pandemic risks fall within the category of "all risk". The issue joined in this case, however, is whether the presence or potential presence of SARS-CoV-2 in business premises can cause physical loss of or damage to property.

[101] The fact that some of the policies considered in the American cases contain viral exclusions is no different from this case. Some of the policies of the defendants contain viral exclusions. I do not see that fact as undermining the analysis of what physical loss of or damage to property means in American or Canadian insurance law.

[102] And, while the plaintiffs did rely on Canadian tort cases finding that the presence of hazardous substances on a surface may constitute physical damage, I have found that these cases, being focused on the issue of pure economic loss in tort, or the law of nuisance, are unhelpful in resolving the critical contractual interpretation questions raised by the case at bar.

[103] So, while I agree that particular caution is warranted in the use of American authority generally, I do not think the American authority relied on by the defendants in this case presents any particular or unusual problem. Of course care must be taken to assess the comparability of the contractual language being interpreted as well as the nature and scope of the evidence and other relevant context. And of course dispositive Canadian law must prevail. In this case, I find that the American authorities cited by the defendants tend to be consistent with Canadian authority including *MDS*, *Prosperity Electric, Acciona,* and the like and are, in any event, helpful in assessing the answers required for Common Issues #1 and #2.

Conclusion

[104] Bringing the foregoing law and evidence together, I conclude as follows:

(a) The overall purpose of the business interruption provisions of the commercial property coverage is to provide coverage for loss of income (economic loss) resulting from loss of or damage to insured property;

(b) the phrase "physical loss or damage to property" requires that the property have been altered, harmed, lost or destroyed in a tangible or concrete way;

(c) as a matter of scientific fact, SARS-CoV-2 does not adversely alter, harm or cause the loss or destruction of inanimate surfaces and does not, therefore, physically harm or deprive the plaintiffs' of their property; and,

(d) the witnesses for the plaintiffs all confirmed that, throughout the pandemic:

- they had possession of and access to their premises and equipment
- they used, or at least were physically capable of using, their premises and equipment
- once lockdowns were lifted, they returned to using, or were physically capable of using, their premises and equipment, and
- neither their premises nor their equipment required any repair, reconstruction or replacement due to SARS-CoV-2.

[105] Using one optometrist's office as an example, patients came to the office. Tests were administered using the necessary machines and equipment. After each use, the equipment was simply disinfected by wiping it down with a cleaning agent before use on the next patient. The same equipment that was used before the pandemic was used during the pandemic (during lockdown on an emergency basis and, after the lockdowns were lifted,

more generally) without the need for repair, replacement or reconstruction. There was no physical loss of or damage to the property.

Loss of Use

[106] The plaintiffs' second, alternative argument is that the presence, or potential presence, of SARS-COV-2 in and on their commercial property caused a "loss of use", and that loss of use falls withing the meaning of physical loss of or damage to property. They say anything that could make the use of their property dangerous causes a loss of use, which is physical loss of or damage to property.

[107] In order to ground this argument in any Canadian or English law, however, the plaintiffs have to rely, again, on tort cases, not insurance contract cases. The plaintiffs cite two shipping cases in which, following damage from a collision at sea, the ships were tied up in dry dock for repairs. Lost profits from loss of use during repairs was found to be compensable: *Sunrise Co. v. Lake Winnipeg (The)*, [1991] 1 S.C.R. 3; *The Greta Holme*, [1897] A.C. 596.

[108] The plaintiffs also rely on *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461. In that case, the Supreme Court of Canada dealt with a loss of use resulting from a latent defect in a boiler under civil law. The Court found that if the defect in the boiler rendered it "unfit for its intended use", lost business income from an inability to "use" the boiler would be recoverable. The loss of use need not be total; it was sufficient for the defect to simply "reduce its usefulness significantly in relation to the legitimate expectations of a prudent and diligent buyer".

[109] I do not find this argument persuasive for several reasons.

[110] First, in ordinary usage, physical loss of or damage to property simply does not, and would not be understood by the ordinary policy holder to, include loss of use.

[111] Second, the cases relied on by the plaintiffs cited above, are tort cases dealing with pure economic loss, not insurance contract interpretation cases. In any event, and most importantly, in those cases there was demonstrable physical damage to property which grounded the loss of use/lost income claim.

[112] Third, as noted earlier, the business interruption coverages in this case insure business interruption losses (including, among things, lost income from loss of "use") only if the loss has been caused by "physical loss or damage to" property. If the plaintiffs' argument that "physical loss or damage to" property includes loss of use, the business interruption coverage would insure *loss of use* (the interruption of the business) caused by *loss of use*. Put another way, the plaintiffs' argument would mean that business interruption insurance provides coverage for losses suffered due to the inability to use property resulting from the inability to use property. This results in a nonsensical circularity. In the context of property damage, physical loss or damage refers to the effect the covered peril must have on the insured property to trigger coverage, not the covered peril itself.

[113] There is ample support in Canadian law cited by the defendants for rejecting the plaintiffs' argument. One example is *Hypnotic Clubs Limited o/a Muzik v Rossington* (17 April 2017), Toronto CV-16-0054672-0000 (Ont. Sup. Ct.). That decision involved the question of

whether "physical loss or damage to property" included loss of use. Justice Chiapetta held it did not, stating that the circularity of the plaintiffs' argument distorted the meaning and intent of the policy language. She said:

> As noted, the plaintiff's interpretation of the policy is that loss of business itself represents the damage sufficient to trigger the loss of business coverage. I do not agree. This interpretation is not supported by the clear wording of the policy which reads that the loss of use shall be the direct result of the damage. The loss of use cannot represent the damage itself. Even if the plaintiff is correct in its interpretation, then, that the definition of damage includes injury and is not limited to physical damage, it cannot be said that the business was interrupted as a direct result of injury when the injury relied upon by the plaintiff is the actual interruption.

[114] A second, more recent example is from the Court of Appeal in *MDS*, referred to earlier in these Reasons. The Court of Appeal held that the absence of the phrase "loss of use" in the relevant language is significant. The Court of Appeal in *MDS* said that "[t]o read in coverage for 'loss of use' distorts the plain language of the Policy". Thorburn J.A., writing for the Court, went on to say that "where policies are intended to include economic losses, they have specifically defined property damage to include "loss of use"". In particular, the Commercial General Liability (CGL) policy contained such a definition. In contrast, the Commercial Property and Business Interruption coverage, did not. Considering the contract as a whole, the Court of Appeal in *MDS* compared the presence of "loss of use" coverage in the CGL definition of property damage to its absence from the Commercial Property coverage definition and concluded: "where a policy is intended to include not only physical but economic losses, insurance policies have specifically defined property damage to include 'loss of use'": at para. 89.

[115] In the present case, to use the Dominion example again, the Dominion Policy includes CGL coverage in addition to the Commercial Property and Business Interruption coverages at issue in this trial. The CGL policy's definition of "property damage" expressly includes "loss of use":

> "Property damage" means:
>
> (a) Physical injury to tangible property, including all resulting loss of use of that property;
>
> (b) Loss of use of tangible property that is not physically injured …

[116] On the other hand, as noted above, the Commercial Property and Business Interruption insuring agreement in the Dominion Policy does not refer to "loss of use". Rather, it refers to "physical loss of or damage to" insured property. Put another way, the CGL policy expressly contains broader coverage for third party liability claims (which include loss of use) than it does for Commercial Property and Business Interruption claims (which does not include loss of use).

[117] The insurance provisions in issue must be read in the context of the agreement as a whole. If "loss of use" was intended to be insured as "physical loss of or damage to" property

under the Commercial Property and Business Interruption coverages, "loss of use" would have been expressly included in those coverages, as it is in the CGL wording. As "loss of use" is not found in the coverages at issue, I conclude—as the Court of Appeal did in *MDS*—that the Commercial Property coverage does not insure "loss of use".

[118] Fourth, in oral argument and in their written submissions, the plaintiffs rely heavily on the decision of the United Kingdom Supreme Court in *The Financial Conduct Authority v. Arch Insurance (UK) Ltd*, 2021 UKSC 1. The plaintiffs rely on statements from this decision to support their claim that physical loss of or damage to property includes loss of use. The circumstances of *Arch*, however, are very different; so different that nothing said in that decision, in my view, has any bearing on Common Issues #1 of #2 as framed in the certification order.

[119] *Arch* dealt with the interpretation of four types of clauses found in relevant policy wordings. The four clauses were identified (at para. 4) as:

> i) "Disease clauses" (clauses which, in general, provide cover for business interruption losses resulting from the occurrence of a notifiable disease, such as COVID-19, at or within a specified distance of the business premises);
>
> ii) "Prevention of access clauses" (clauses which, in general, provide cover for business interruption losses resulting from public authority intervention preventing or hindering access to, or use of, the business premises);
>
> iii) "Hybrid clauses" (clauses which combine the main elements of the disease and prevention of access clauses); and
>
> iv) "Trends clauses" (clauses which, in general, provide for business interruption loss to be quantified by reference to what the performance of the business would have been had the insured peril not occurred).

[120] None of these clauses contained the language of physical loss of or damage to property which constitutes the focal point of Common Issues #1 and #2. The "disease clause", while located under basic coverage for business interruption which was the consequence of physical loss or destruction of or damage to property, was contained in a separate extension which expressly provided coverage for business interruption "that is *not consequent on* physical damage to property" (emphasis added).

[121] The policy language also specifically contemplated coverage for the insured's "inability to use the insured premises due to restrictions imposed by a public authority" as a result of notifiable disease.

[122] Thus, the policy language in the cases before the U.K. Supreme Court in *Arch* specially contemplated *non-physical* loss or damage to property and specifically contemplated *inability to use* the insured premises as a result of restriction imposed by a public authority. That is completely unlike the policy provisions engaged by Common Issues #1 and #2 in this case, which condition coverage on physical loss of or damage to property.

[123] Finally, American authority is overwhelming of the view that physical loss of or damage to property does not include functional loss of use: for example, *Tapestry, Inc v Factory Mut Ins Co*, 482 Md 223 at 245 (Sup. Ct. 2022); *Michael Cetta Inc v Admiral Insurance Co*, 506 F Supp (3d) 168 at 177 (SDNY 2020).

[124] For the foregoing reasons, I conclude that loss of use does not fall withing the meaning of physical loss of or damage to property.

Post-Pandemic Exclusions Added to the Defendants' Policies

[125] The plaintiffs argue that the defendants implemented COVID-19 pandemic-related exclusions that were created not long after the civil authority orders were issued in 2020 and this litigation was commenced. These exclusions reinforce that pandemics—and the communicable diseases at the heart of them—are insurable risks that would be covered under the plaintiffs' insurance policies. The endorsements have language to the effect that the exclusion "modifies any coverage otherwise provided by this policy or any forms or endorsements that are attached to this policy." If pandemics were uninsurable events, then the language of the exclusions would not suggest otherwise. The plaintiffs also argue that these post-pandemic exclusions highlight the ability of the insurance industry, as a whole, to react rapidly to changing risk profiles, to carefully draft exclusions that circumscribe if not eliminate that risk, and to disseminate that exclusion to policyholders.

[126] The doctrinal basis upon which this "evidence" and submission are tendered is unclear. In *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 41-42, Chief Justice Strathy confirmed that "subsequent conduct, or evidence of the behaviour of the parties after execution of the contract, is not part of the factual matrix," which is temporally limited to facts known to the parties at the time of contracting and that it is precisely because such evidence post-dates contract formation that it "has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language". Chief Justice Strathy identified three inherent unreliability issues that arise from relying on subsequent conduct evidence:

a) using subsequent conduct evidence may permit the interpretation of contracts to fluctuate over time with the result that a contract may mean one thing one day and something else the next;

b) evidence of subsequent conduct may itself be ambiguous or equivocal, admitting more than one inference; and,

c) relying upon subsequent conduct may reward self-serving conduct by contracting parties.

[127] Evidence of subsequent conduct is inadmissible at the outset of the contract interpretation exercise and is only admissible if the contract is found to be ambiguous—and then, only with appropriate caution as to its use given the inherent unreliability and dangers associated with this type of evidence.

[128] *Shewchuk* was recently applied in *SIR Corp*, cited above, where the court rejected the plaintiff's argument that the insurer's introduction of a contagious disease exclusion was

evidence that coverage existed for COVID-related business interruption losses under the pre-amendment policy.

[129] The plaintiffs say that they are not relying on the post-pandemic exclusions as post-contractual conduct which informs the interpretation of what was agreed to in the original insurance agreements. Rather, they say, the post-pandemic exclusions simply serve to show how the insurers *could* have drafted their policies in the first place. I find this to be a distinction without a difference. What the defendants *could* have done is not really pertinent. The interpretation exercise is focussed on what *was* agreed to, not what *could have been* agreed to.

[130] I give little to no weight to the post-pandemic amendments to the defendants' Commercial Property Business Interruption policies. First, the policy wordings in question in this case are not ambiguous, as I have found above. Second, exclusions do not create coverage: *Progressive Homes Ltd.* at para. 27. Insurance companies may, and frequently do, use a "belt and suspenders" approach to the drafting, or amending, of their policies. The law does not prevent this or impose a "penalty" upon drafters who do so. The Supreme Court of Canada in *Ledcor* has also stated that there need not be "perfect mutual exclusivity" between an insuring agreement and exclusions; the Court held that the Alberta Court of Appeal had erred by approaching its analysis of the coverage issue by relying on exclusions to imply coverage.

Conclusion

[131] Thus, on the basis of this analysis, I conclude, reading the words of the policies, in proper context and in light of the relevant factual matrix, that the mere presence of SARS-CoV-2 in the plaintiffs' premises and on their property and equipment can not cause physical loss or damage to the plaintiffs' property.

Common Issue # 2 - Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?

The Plaintiffs' Argument

[132] As noted as the outset of these Reasons, the plaintiffs' policies contain provision for coverage of specified loss arising out of what are typically called "civil authority orders". Coverage under specific civil authority order provisions, however, is not what is contemplated under Common Issue #2. By common agreement, that is one of the many issues that has been left for another day. Common Issue #2 is, like Common Issue #1, concerned only with the interpretation of the business interruption provisions of each defendant's commercial property insurance wordings, and addresses whether the business interruption provisions of the plaintiffs' policies were triggered by the fact of civil authority orders having been being made by provincial and territorial authorities across Canada. The focus of this common issues trial is, therefore, on the interpretation of the *business interruption* provisions of the plaintiffs' commercial property policies, not the interpretation of separate *civil authority order provisions* in other endorsements or coverages within of the plaintiffs' policies.

[133] It is agreed that between March 13 and 27, 2020, each of the provinces and territories declared states of emergency. These declarations were made in several different ways, and the wording of the declarations varied. For example, on March 17, 2020, Ontario declared an emergency, stating that "the outbreak of a communicable disease namely COVID-19 coronavirus diseases constitutes a danger of major proportions that could result in serious harm to persons". Alberta declared a state of emergency on March 17, 2020 because "a public health emergency exists and prompt co-ordination of action or special regulation of persons or property is required to protect the public health." British Columbia declared a state of emergency on March 18, 2020, because "prompt coordination of action and special regulation of persons or property is required to protect the health, safety and welfare of the residents of [BC], and to mitigate the social and economic impacts of the COVID-19 pandemic on residents, businesses, communities, organizations and institutions throughout the Province of [BC]."

[134] Nor is it disputed that these orders had a profound impact, for material periods of time, on the ability of the plaintiffs to engage in their normal day-to-day profit-making activities using their business premises, tools, machines and other equipment.

[135] The plaintiffs argue that the civil authority orders were issued because of the perceived ubiquity of SARS-CoV-2 virions in and on insured premises and the potentially transmissive effect of SARS-CoV-2 virions on property. In Ontario, for example, government orders: closed specific physical "establishments" and "facilities" and locations; closed specific physical properties: e.g., indoor recreational programs, public libraries, private schools, childcare centres, bars and restaurants, theaters, and concert venues; and targeted the "business or place, or part of a business or place" that was ordered closed. The plaintiffs also point to the enabling legislation, the *Emergency Management and Civil Protection Act,* R.S.O. 1990, c. E.9, which sets out the criteria for making civil orders. These criteria include that "[t]here is an emergency that requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons *or substantial damage to property*" (emphasis added).

[136] While the plaintiffs concede that the civil orders do not, on their own, cause physical loss of or damage to property,[2] the orders were nevertheless made in response to the effects of SARS-CoV-2 on insured property. And, more importantly, the orders legally deprived the plaintiffs of the use of their insured property in pursuing their businesses—the sale of their goods and services to customers. The plaintiffs say that regardless of whether SARS-CoV-2 was actually present on their property, civil authority orders prevented or restricted them from accessing or using their premises for their intended purpose; the civil authority orders were made on the *assumption* that SARS-CoV-2 virions were present in all premises frequented by people.

[137] The expert report and evidence of Dr. Furness deals with the prevailing wisdom, at the outset and early stages of the pandemic, about how SARS-CoV-2 is transmitted from one person to another. The WHO, in March 2020, said that "you can be infected by breathing in the virus if you are within 1 metre of a person who has COVID-19, or by touching a

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[2] As might be the case, for example, with an order requiring the destruction of an unstable building or a herd of infected animals

contaminated surface and then touching your eyes, nose or mouth before washing your hands." The CDC, in March 2020, said that "a person can get COVID-19 by touching a surface or object that has the virus on it" although "this is not thought to be the main way the virus spreads." The Lancet COVID-19 Commission Task Force on Safe Work, Safe School and Safe Travel stressed, in a hindsight report, that early guidance from the WHO and the CDC "emphasized the importance of droplet and fomite transmission for COVID-19". The Lancet Commission noted that it took ten months for health authorities such as the CDC and WHO to finally recognize the role of airborne transmission. This view, that SARS-CoV-2 was spread by fomites, meaningfully although not predominantly, was reinforced by a number of research studies published in early 2020. As late as the summer of 2021, fomite research stressed there was not yet sufficient research done to fully grasp the role of fomite transmission or its contribution to infection risk. Domestic Canadian public health organizations also emphasized well into the pandemic that droplet *and* fomite transmission was the main way SARS-CoV-2 spread. All of this led to the public perception that both surfaces and proximity to other people were potentially dangerous.

[138] The plaintiffs go on to argue that this perception extended to the class members' property. As a result, class members could not use their property for its intended purpose. In the case of café or dine-in restaurants, customers generally refused to visit the premises even to pick up a takeout order. In the case of restaurants or juice bars in food courts, public health orders effectively shut them down completely. In the case of indoor activity centres like dance studios or amenity-oriented businesses like clothing stores, public health orders likewise shut them down. While class members could, in principle, enter their own premises, provided they could otherwise comply with public health guidance (such as capacity limits and social distancing), the practical reality was that, following the pandemic declaration and the civil authority orders, the plaintiffs' businesses were largely shut down.

Analysis

[139] I do not accept the plaintiff's attempt to recharacterize the purpose for the civil orders as being based on the ubiquity and physical effect of SARS-CoV-2 on insured premises and property. The fact that damage to or loss of property might be one possible basis for a civil order under Ontario's *Emergency Management and Civil Protection Act* does not mean that it formed the basis for the civil orders made in connection with the COVID-19 pandemic. Indeed, a fair reading of the civil orders themselves makes it clear that the purpose of these orders was to prevent or mitigate harm to human health, not to property. The Court of Appeal for Ontario held in *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134 at para. 29, that: "the government objectives at issue were among the most compelling imaginable: the protection of human life in the face of an unprecedented and unpredictable virus, carrying a threat of devastating health consequences." There is no evidence that the civil orders were made because of damage to property caused by the virus. Dr. Furness himself testified that "the goal of public health policy" reflected in the Ontario orders made in March 2020 was "to keep people apart".

[140] In any event, the wording of the policies limits coverage to physical loss of or damage to property. While the purpose behind the civil orders may not be completely irrelevant to an understanding of government policy, the important question is the *effect* of the civil orders on insured property, and whether the orders caused a loss resulting from physical loss of or damage to that property. The plaintiffs concede that this did not happen. The orders did

not require the destruction of the insured property. Even if it is accepted that fomite transmission was a potential source of infection by SARS-CoV-2, putting it at its highest, the orders did no more than regulate the plaintiffs' use and occupation of their property. The loss, therefore, if there was one, was a loss of the ordinary course use of that property in the conduct of the plaintiffs' business. As I have already found in connection with my analysis of Common Issue #1, the business interruption provisions of the plaintiffs' commercial property policies do not insure against loss of use in the absence of physical loss of or damage to property.

[141] This is the same approach adopted by the Superior Court of Québec in *Centre de santé dentaire Gendron Delisle inc. c. La Personnelle, assurances générales inc.*, 2021 QCCS 3463, a proposed Québec class action seeking COVID-19 business interruption coverage under the commercial property policies of some of the same defendants in this case. Davis J. held at paras. 70-72:

> …the factual allegations can be summarized as an acknowledgement that the proposed class members purchased insurance policies with business interruption coverage and were all forced to suspend most of their operations after the government's March 24, 2020 order in council without their property being directly affected.
>
> Clearly, this situation has resulted in a loss to the plaintiff, but is this loss caused by direct damage to insured property? Does the order in council ordering dentists to limit their activities to urgent procedures qualify as a covered peril and, if so, did it affect the insured property?
>
> No, this situation does not result in the coverage requested.

The Superior Court of Québec further stated that damage required deterioration or destruction of tangible property and that there was no coverage for loss of enjoyment of property that had not sustained any damage or loss of income due to the government orders. The Court of Appeal of Québec dismissed the appeal: 2021 QCCA 1758.

[142] I am also unable to accept the plaintiffs' argument that the reasonably but wrongly held belief early in the pandemic that fomite transmission was a significant risk and that "[i]n rendering physical property hazardous to public health—or creating a perception that property was so hazardous that it could not be used safely—the SARS-CoV-2 virus caused physical loss or damage to property". The evidence in this case shows indisputably that, in fact, fomite transmission, while possible, was not a significant contributor to the spread of SARS-CoV-2 and the COVID-19 disease. A reasonable but wrongly held belief in the existence of a peril is not a sufficient basis upon which to ground coverage. Coverage depends upon whether the insured peril has actually occurred: *Canadian General Electric Co. v. Liverpool & London & Globe Insurance Co.,* [1981] 1 SCR 600, at pp. 615 and 619-620.

American Authority

[143] Numerous American appellate courts have also held that similar government orders cannot cause physical loss of or damage to insured property. Restriction of business activities, whether partial or total, does not, in and of itself, amount to physical loss or damage to property. For example, in *Creative Services, Inc v. Hartford Fire Insurance Co.*, 2022 U.S. Dist. LEXIS 119568 at 15 (Dist. Mass 2022), the U.S. District Court explained that "distinguishing between partial or total loss of use is meaningless where the decision turns on the fact that there was not a 'direct physical loss' of any degree". More recently, the U.S. Court of Appeals for the 3rd Circuit, in *Wilson v. USI Ins Serv LLC*, 57 F (4th) 131 at 19-20 (3rd Cir 2023), found that partial or total loss of use of property caused by similar government orders did not amount to physical loss or damage:

> The businesses argue that their loss of the ability to use their properties for their intended business purposes meets this standard. We disagree. The businesses' argument is completely divorced from the physical condition of the premises. The businesses lost the ability to use their properties for their intended business purposes because the governors of the states in which they operate issued orders closing or limiting the activities of nonessential businesses, not because there was anything wrong with their properties. The properties were not destroyed in whole or in part; their structures remained intact and functional.
>
> Regardless, the loss of the ability to use property in certain ways does not render the properties useless or uninhabitable. The properties could certainly be used or inhabited, just not in the way the businesses would have liked. Restaurants remained open for carry out, and medical providers could perform emergency procedures. While we recognize that some wholly nonessential businesses, such as Toppers Salon & Health Spa, Inc. ("Toppers"), had to close entirely for a time, again, that closure and resultant loss of use was due entirely to the closure orders and had nothing to do with the physical condition of the premises. No one was "physically restrained" from entering the businesses' properties, as counsel for Toppers suggested during oral argument. The closure orders simply prohibited the businesses from using their properties in certain ways.
>
> At bottom, loss of use caused by government edict and untethered to the physical condition of the premises is not a physical loss or damage to the properties. We therefore hold that loss of use of intended purpose under the circumstances presented here is not a physical loss of property within the meaning of the policies.

Conclusion

[144] For the foregoing reasons, I conclude that the civil authority orders in respect of business activities that were made due to the SARS CoV-2 virus or its variants can not cause

physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings.

Common Issue #3 - If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

[145] Common Issue #3 by its terms is premised on the circumstance that the answer to Common Issue #1 or #2 is in the affirmative. As I have explained earlier in these Reasons, I have answered both Common Issue #1 and #2 in the negative. Accordingly, the premise upon which the need for an answer to Common Issue #3 rests is not present. This raises the question of whether I should go on to deal with Common Issue #3 in the abstract, so to speak, as if I had answered either Common Issue #1 or #2 affirmatively.

[146] I asked counsel for the parties for their submissions on how best to deal with this situation. The plaintiffs submitted, essentially for judicial economy reasons and to avoid the need to "re-invent the wheel" with respect to all of the evidence, etc. that, even if I answered Common Issues #1 and #2 in the negative, I should deal with Common Issue #3 in the abstract as if I had found in favour of the plaintiffs on either Common Issue #1 or #2.

[147] The defendants took no position on this issue and left the matter to my "discretion".

[148] The defendants rely on five exclusions in their policies. They are:

(i) the "contamination" exclusion. This provision excludes loss or damage caused directly or indirectly by contamination;

(ii) the "loss of market, loss of use or loss of occupancy" exclusion. This provision excludes losses caused directly or indirectly by loss of market, loss of use or loss of occupancy (that is, where the loss is not caused by physical loss of or damage to property);

(iii) the "communicable disease" exclusion;

(iv) the "governmental action" exclusion. These this provision excludes coverage for any losses due to shutdowns caused by orders of civil authority or which otherwise regulate the construction use or repair any property;

(v) the "microbe" and "wear and tear" exclusion. The microbe exclusion relates to any non-fungal microorganism that causes infection or disease.

[149] The plaintiffs make various submissions as to why the exclusions do not apply but focus mostly on the doctrine of nullification. This doctrine applies where the exclusion would render the coverage for the most obvious risks for which the endorsement was issued nugatory. This requires an assessment of the extent to which the coverages acquired by the insured are, or are not, completely nullified by the alleged scope of the exclusion. It may be that evidence is not strictly necessary to address this aspect of the issue, but I do note that there is none in this case to assist the court with evaluating the strength or weakness of this argument.

[150] And, more generally, other than the policies themselves, there was no evidence adduced during the trial touching directly on the question of the exclusions.

[151] Each side was permitted to deliver a 100-page written argument. The defendants, who bore the onus on this issue, devoted seven pages to all five exclusions. The plaintiffs, in response, devoted eight pages to all five exclusions. Neither side spent any time in oral argument on the exclusion issue, choosing to rely exclusively on their brief written submissions.

[152] This is an unusual case in that the first two certified common issues which occupied this trial represent only some of the claims brought by the plaintiffs. In addition to various tort and common law claims, there are at least two additional insurance contract-based coverage questions still to be decided. These are:

(1) the civil order coverage claims; and

(2) the pandemic coverage claims.

In addition, there is a lingering and largely unaddressed question about the applicability of the post-pandemic exclusions which were introduced by the defendants after the onset of COVID-19 and the extent to which these post-pandemic exclusions are said to be directly applicable, or not applicable, to any of the plaintiff's claims in this class action proceeding.

[153] In different circumstances I might well have agreed with the plaintiffs that, even though not strictly necessary, the third common issue should be addressed on the basis of efficiency and judicial economy. However, several factors lead me to a different conclusion in this case.

[154] My main concern arises from the fact that my decision in this trial will by no means bring these proceedings to an end. In particular, there will continue to be outstanding coverage issues in dispute arising out of other provisions and insurance endorsements issued to the plaintiffs by the defendants. I am concerned that if I were to begin addressing exclusion questions in the abstract, or on a theoretical basis, things might be said, or decisions made, that could affect as yet un-litigated coverage and exclusion claims arising out of the same policies issued by the same defendants to the same plaintiffs in the same litigation. It seems to me the safer course is to address all exclusion issues after all coverage issues have been addressed. This approach is also more in keeping with the overall logic of how coverage and exclusion disputes are ordered and who bears the onus for what/when, etc.

[155] Further, given how little time and effort was devoted to the exclusion questions in this case, it does not seem there really are any material efficiencies to be had by answering hypothetical questions on the exclusion arguments at this time.

[156] Finally, the absence of any evidence to inform the analysis of the exclusion issues, the brevity of the written submissions and the lack of any oral submissions lead me to the conclusion that the record is insufficient to reach a just determination of the exclusion issues that have been raised.

[157] For these reasons, therefore, I find that because Common Issues #1 and #2 have been answered in the negative, it is not necessary to address Common Issue #3.

Conclusion

[158] For the foregoing reasons, I answer the common issues as follows:

(i) (i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? Answer: No.

(ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? Answer: No.

(iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded? Answer: In the circumstances, it is not necessary to answer Common Issue #3.

Costs

[159] The parties shall confer on the question of costs. If any party intends to seek costs, the parties shall exchange cost summaries before determining whether an agreement can be reached. If there is agreement, counsel shall advise the court accordingly. If further direction is required, a case conference shall be arranged on a mutually convenient date. In order to avoid forty lawyers having to attend the case conference, defence counsel shall select a representative who can act as a go-between.

Penny J.

Released: June 5, 2023

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CITATION: Workman Optometry Professional Corporation v. Certas Home and Auto Insurance Company, 2023 ONSC 3356
COURT FILE NO.: CV-22-00676162-00CL
CV-20-643488-CP
DATE: 20230605

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WORKMAN OPTOMETRY PROFESSIONAL CORPORATION, et al

Plaintiffs

– and –

CERTAS HOME AND AUTO INSURANCE COMPANY, et al

Defendants

REASONS FOR JUDGMENT

Penny, J.

Released:, June 5, 2023