**IN THE MATTER OF THE ARBITRATION ACT 1996**
**AND**
**IN THE MATTER OF AN ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT DATED 21 SEPTEMBER 2021 ("THE ARBITRATION AGREEMENT")**

**BETWEEN:**

**VARIOUS INSUREDS UNDER THE RESPONDENT'S SALON GOLD POLICY**

**Claimants**

**and**

**CANOPIUS MANAGING AGENTS LIMITED**

**Respondent**

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# SECOND FINAL AWARD

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**SOLE ARBITRATOR: SIR RICHARD AIKENS**

**Seat of the Arbitration: London, United Kingdom.**

**A. The Parties, the Dispute in summary and the hearing.**

1. By an Arbitration Agreement dated 21 September 2022 ("the Arbitration Agreement") between the persons named in the First Schedule to that Agreement, as Claimants, and Canopius Managing Agents Limited, as Respondent, (together "the Parties"), the Parties agreed to submit to arbitration certain "Disputes", as defined in that Arbitration Agreement. The Parties agreed that there should be a Sole Arbitrator and subsequently I was appointed as that Sole Arbitrator.
2. I shall use the abbreviations that are set out in the Arbitration Agreement in this Second Final Award.
3. The Claimants operate personal care businesses, such as hair and beauty salons, barbers, spas and massage parlours in the UK and the Isle of Man. The Claimants allege that they have each suffered business interruption losses because their business premises (variously "the Premises") were forced to close, or use of or access to the Premises was otherwise restricted by measures introduced in response to the Covid 19 pandemic by the governments in the territories in which the Claimants carried on their business.
4. Each of the Claimants was separately insured for relevant periods under a contract of insurance underwritten by the Respondent, acting as Managing Agent for Lloyd's Syndicate 4444 ("the Policy" or "the Policies" collectively). The policy terms were those of the Henry Seymour Salon Gold Wording 2019, or similar wording.
5. The Claimants say that their losses are covered by the Public Emergency Extension clause of this wording, which states that it will cover:

> *"... loss as insured under this Section resulting from ... the actions or advice of a government or local authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use of or access to the Premises excluding*
>
> 1. *Any incident lasting less than 12 hours*
> 2. *Any period other than the actual period when access to the Premises was prevented*
> 3. *A Notifiable Human Infectious or Contagious Disease as defined in the current legislation occurring at the Premises".*
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> ("The Wording" or "the Public Emergency Extension").

6. The Respondent alleges that, on the true construction of the policy wording, it does not cover the losses alleged.

7. The Arbitration Agreement sets out "the Disputes" between the Parties that are subject to the Arbitration Agreement as follows:

> "Disputes have arisen between the Parties as to the interpretation of the Public Emergency Extension. The Disputes concern the meaning of the words "in the vicinity" in the context of the Public Emergency Extension as a whole and as to what a policyholder has to establish in order to prove there was "an emergency likely to endanger life or property in the vicinity of the Premises" such as to engage the Public Emergency Extension ("the Disputes"). The Parties hereby agree that the Disputes (or any other issue(s) as may be agreed between the Parties) shall be referred to and finally resolved by arbitration on the terms set out below and by reference to test cases, to be selected by agreement between the Parties alternatively, in default of agreement, by the Arbitrator ("the Arbitration")."

8. The Parties exchanged pleadings. In brief, the Claimants set out three cases: a principal case and two alternative cases. The Respondent challenged each case. The Parties' cases are summarised in the Agreed Case Summary, which is Appendix [A] to this Award. I will refer to them as necessary in dealing with the arguments advanced by the Parties. The Parties also prepared Agreed Facts, which are reproduced as Appendix [B] to this Award. Again, I shall refer as necessary to those in the course of this Award.
9. In advance of the hearing fixed for 26-29 September 2023, a preliminary issue arose between the Parties as to the extent of my jurisdiction in relation to the Disputes. In summary the further issue was whether, under the terms of the Arbitration Agreement I had jurisdiction to determine "how" a Claimant could prove that there was an "emergency likely to endanger life or property in the vicinity of the Premises" to establish that the Claimant had cover under the policy ("the Proof of Covid issue"). Having had written submissions on that issue I published a First Final Partial Award on that issue on 26 August 2023. I ruled that I did not have jurisdiction to decide the "proof of Covid issue".
10. The main hearing took place on 27 – 29 September 2023. (The 26 September was used as a reading day). The Claimants were represented by Mr Jeffrey Gruder KC and Mr Peter Ratcliffe, instructed by RLK Solicitors, (as lead solicitors) and Hugh James. The Respondent was represented by Mr Aidan Christie KC and Mr Miles Harris, instructed by CMS. There were no witnesses, so the hearing consisted of oral submissions (supplemented by written submissions) from counsel.
11. As will be explained in more detail below, the Claimants advanced three arguments at the hearing. The Respondent challenged each of them. In summary the three arguments are:
    (1) The policy requirement that there be "an emergency likely to endanger life [or property] in the vicinity of the Premises" is met because the Covid 19 pandemic

constituted a national emergency which endangered life throughout the UK, including endangering life "in the vicinity of the Premises".

(2) The second argument assumes that, on the correct construction of the clause in the Wording set out in (1) above, the Claimants have to prove that "the emergency" is within "the vicinity of the Premises". The Claimants argue that, in the circumstances of Covid 19, "the vicinity" in the Wording must be construed as meaning each individual nation in the UK, or alternatively, the UK as a whole.

(3) The third argument assumes that the correct construction of "an emergency" is the occurrence of one or more cases of Covid 19. It also assumes that the second argument is rejected. Therefore, the requirement that there be "an emergency likely to endanger life [or property] in the vicinity of the Premises" will only be satisfied if one or more cases of Covid 19 occur "in the vicinity of the Premises". For this argument the definition of "the vicinity" depends on the nature of the emergency, the danger it poses to life (or property) and on the location of the individual Premises and whether the impact of "the emergency" may be affected by that location. The third argument requires an answer to two issues. First, what in principle is the meaning of "the vicinity" in the context of the Wording; secondly, what comprises "in the vicinity of the Premises" in each of the 13 Test Cases agreed by Parties.

12. At the end of the hearing I asked the Parties to consider six matters in advance of my publishing any further Award. The six matters were:

(1) Whether I should circulate a draft Award to the Parties, to enable them to suggest corrections, limited to typographical errors and obvious factual errors. It was agreed that I should do so.

(2) Declarations: it was agreed that the Parties should make proposals as to the form of any Declarations once they had seen a draft of the Second Final Award on the Merits.

(3) Publicising the Second Final Partial Award: the Parties agreed that there should be liberty to publicise this Award pursuant to paragraph 31 of the Arbitration Agreement.

(4) Publicising the First Final Partial Award on the "proof of Covid issue": it was agreed that this is not to be published.

(5) Delineation of "vicinity" on maps: The Parties agreed that, for the purposes of "Argument 3", as outlined above, I could, if I chose to do so, delineate the "vicinity" of any set of Premises by marking up a map and that, to facilitate this, the Parties would co-operate in providing such maps as may be required.

(6) Whether, if I should answer "Arguments 1 and/or 2" in favour of the Claimants, I should go on to make a decision on "Argument 3". The Parties could not agree on this. I have decided that I should make a decision on "Argument 3" in any event.

## B. The Factual Background

13. Although a number of Claimants are located in other nations of the UK and the Isle of Man, by agreement between the Parties the Agreed Facts focused on events in England and, in particular, the actions and advice of the government and local authorities in England in response to the Covid 19 pandemic. For the purposes of this arbitration and this Award, the following facts, taken from the Agreed Facts, are important:

(1) On 10 February 2020 the Health Protection (Coronavirus) Regulations 2020 were introduced by the Secretary of State for Health and Social Care ("the S of S"), pursuant to powers under the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). On 14 February 2020 the S of S published a "Serious and Imminent Threat Declaration" under those Regulations, declaring that the incidence or transmission of Covid 19 was at such a point as to constitute a serious and imminent threat to public health. The measures outlined in the Regulations were considered as an effective means of delaying or preventing further transmission. (These Regulations were subsequently replaced by the Coronavirus Act 2020, with effect from 25 March 2020).

(2) On 5 March 2020 Covid 19 was made a "notifiable disease" and SARS-COV-2 made a causative agent in England by amendment to the Health Protection (Notification) Regulations 2010. By 6 March 2020 Covid 19 was made a notifiable disease across the UK.

(3) On 16 March 2020, the Prime Minister, Mr Boris Johnson, announced at a press conference that "everyone should stop non-essential contact with others and…stop all unnecessary travel…and…avoid pubs, clubs, theatres and other such social venues". He also stated that further restrictions would be announced soon.

(4) On 18 March 2020 the Prime Minister announced that schools would be closing ("for the vast majority of pupils") from 23 March 2020.

(5) On 20 March 2020 the Prime Minister announced that cafes, pubs, bars, and restaurants were to close that night "as soon as they reasonably" could, and must not reopen.

(6) On 21 March 2020 the Health Protection (Coronavirus, Business Closure)(England) Regulations were made by the S of S pursuant to powers under the 1984 Act. These provided for the closure of certain types of business but did not include nail, beauty, hair salons and barbers.

(7) On 23 March 2020 the Prime Minister announced, amongst other things, that "from this evening…you must stay at home". People would only be permitted to leave their homes for very limited purposes, one of which was "shopping for basic necessities, as infrequently as possible". To ensure compliance with this, he announced that the government would "immediately close all shops selling non-essential goods".

(8) On 25 March 2020 the Coronavirus Act 2020 was passed and came into force.

(9) On 26 March 2020 the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the 26 March Regulations") were made by the S of S. These replaced the regulations of 21 March 2020. Regulation 4(4) of the 26 March Regulations required persons responsible for carrying on the types of business listed in Part 2 of Schedule 2 to the Regulations to cease carrying on that business, or to provide that service during "the emergency period" as defined in the Regulations. Part 2 of Schedule 2 included (at Item 14) "nail, beauty, hair salons and barbers".

(10) The 26 March Regulations were successively continued in April, May and June 2020.

(11) On 4 July 2020 the 26 March Regulations were replaced by the Health Protection (Coronavirus, Restrictions)(No 2)(England) Regulations 2020 ("the 4 July Regulations"). By Regulation 4(1) persons responsible for carrying on business or providing services listed in Schedule 2 were required not to carry them on during the "emergency period" as defined. Paragraph 7(1) of Schedule 2 identified "spas and beauty salons" as defined; but by paragraph 7(2) a hairdresser or barber which did not provide other services identified in paragraph 7(1) was not obliged to close.

(12) From 4 July 2020 various "local lockdowns" were introduced, the first being in Leicester. Other local lockdowns were subsequently introduced.

(13) On 9 July 2020 the government announced that beauty salons would be permitted to reopen from 13 July 2020, subject to implementing "COVID 19 – secure guidelines" and subject to restrictions concerning the "highest risk zone", viz. in front of the face. Paragraph 7 of the 4 July Regulations was deleted as from 13 July 2020.

(14) On 13 August 2020 the UK government announced that all close contact beauty services could be resumed from 15 August under new guidance.

(15) On 31 October 2020 the Prime Minister announced a second "national lockdown" for a period of 28 days to start with. This was given effect by the Health Protection (Coronavirus, Restrictions)(England) (No 4) Regulations 2020, which came into force on 5 November 2020 ("the 5 November 2020 Regulations"). By Part 4, Regulation 16 and Part 2 of the Schedule to those Regulations, nail, beauty salons, hair salons and barbers were required to close.

(16) The 5 November 2020 Regulations were replaced by the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations of 2 December 2020 ("the 2 December 2020 Regulations"). This created three "Tiers" in England. These regulations permitted salons to remain open in all tiers as a "personal care" service.

(17) On 21 December 2020 a fourth tier was added (embracing London and parts of East and South East England) by virtue of the Health Protection (Coronavirus, Restrictions)(All Tiers and Obligations of Undertakings)(England)(Amendment) Regulations 2020 ("the 21 December 2020 Regulations"). By Schedule 3A, Part 3 paragraphs 10 and 15(7), those providing "restricted businesses" or "restricted services" in the Tier 4 area had to cease doing so. This included nail salons, beauty salons, hair salons and barbers. The Tier 4 area was enlarged from 26 December 2020.

(18) The Tier 4 area was extended to the whole of England with effect from 6 January 2021, thus producing the third national lockdown. This was given effect by the Health Protection (Coronavirus, Restrictions) (No 3) and (All Tiers) (England) (Amendment) Regulations 2021 ("the 6 January 2021 Regulations").

(19) From 12 April 2021, "Step 2" as set out in Schedule 2 of the Health Protection (Coronavirus, Restrictions)(Steps)(England) Regulations 2021 of 29 March 2021, ("the Steps Regulations") was implemented. The "Step 2" measures were given effect by the Health Protection (Coronavirus, Restrictions) (Steps and Local Authority Enforcement Powers) (England) (Amendment) Regulations 2021. From that date on all "personal care businesses" in England, including nail salons, beauty salons, hair salons and barbers were permitted to reopen.

**C. The Salon Gold Policy Wording.**

14. The policy wording runs to 64 pages in total. The relevant elements of the structure of the policy are as follows: first, there is a "contract of insurance" and an explanation of who constitute "the underwriters"; secondly, there are "General Definitions"; thirdly, there are "General Conditions" and "General Exceptions"; fourthly, there is a "Contents Section" which sets out various types of cover and "cover extensions" under different "Sections". One of these "Sections" is the "Loss of Income Section", which contains the relevant policy wording with which this arbitration is concerned.

15. The "Loss of Income Section" is divided into "Cover" and "Cover Extensions". The latter begins by stating: "we will also indemnify You in respect of loss as insured under this Section resulting from…" then there are seven sub-headings, under each of which the particular insured peril is identified. The second of these is headed "Prevention of Access" and its wording is instructive in the context of the present dispute. The insured peril is: "damage to property *in the vicinity of the Premises* caused by any of the Contingencies insured under Contents Section which prevents or hinders use of or access to the Premises."[1] The last of the seven sub-headings is labelled "Public Emergency" and contains the Wording already set out at paragraph 5 above.

16. It is notable that, throughout the policy wording, the draftsman has not used commas to delineate particular clauses or sub-clauses in sentences.

**D. The Principles of Construction of the Policy Wording**

17. There is no dispute about the principles of construction that have to be used to discern the meaning of the policy wording. Many cases in the House of Lords and Supreme Court have set out the general principles over the last twenty five years. The "core principle" was reiterated by the joint judgment of Lords Hamblen and Leggatt in the leading case concerned with business interruption insurances and the Covid 19 pandemic: viz. *FCA v Arch Insurance (UK) Ltd* [2021] AC 649[2], at [47]:

> "…an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the Parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the Parties subjectively intended or understood the contract to mean is not relevant to the court's task."

[1] "Premises" is a defined term as set out in the "General Definitions" section. The italics are mine.

[2] Hereafter "the *FCA Test Case (SC)".* I will refer to the Divisional Court's decision in this case, [2020] EWHC 2448 (Comm), [2020] Lloyd's Rep IR 527 as "the *FCA Test Case (DC)*".

18. However, there are other, equally important, principles of construction, which are referred to in the Divisional Court's judgment in the same case at [62] – [66]. I note in particular (by reference to Lord Hodge's judgment in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10] – [13]) the following points: (1) construction is not a "literalist exercise"; (2) the need to consider the contract as a whole; (3) the construction of a contract is a "unitary exercise" and (4) where there are rival meanings "the court can give weight to the implication of rival constructions in reaching a view as to which construction is more consistent with business common sense. But in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of the drafting of the clause". I have read and re-read Lord Hodge's summary of the principles of construction whilst considering the issues raised by this dispute. I have also taken note of the emphasis of the Supreme Court in this case (at [77] of the judgment of Lords Hamblen and Leggatt) that the "overriding question" is how the words of a contract would be understood by a "reasonable person". In the case of an insurance policy of this kind, "sold principally to SMEs" the person to whom the document should be taken to be addressed is "an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting".[3] But this ordinary policyholder will not be "a pedantic lawyer who will subject the entire policy wording to a minute textual analysis".[4]

**E. The Claimants' First Argument: the rival contentions and discussion.**

19. It is common ground that, by at least 16 March 2020, the Covid 19 pandemic constituted a national public health *emergency*. Under this heading, the first dispute between the Parties is whether, as the Claimants contend, it is sufficient for the purposes of the "Public Emergency" cover that there be a national health *emergency* or whether, as the

[3] In the *China Taiping Insurance* arbitration award of Lord Mance, reported as *Policyholders Specified in Schedule 1 v China Taiping Insurance* [2022] LRIR 379, Lord Mance comments on this passage at [18]. He notes that neither the insurer nor any broker through whom the policy is placed is mentioned in the passage at [77] in the *FCA Test Case (SC).* I do not read Lord Mance's comment as meaning that words of an insurance policy do not have to be construed as having a common meaning to both Parties to the contract. That would be a radical departure from a fundamental principle of construction in English law and inconsistent with [47] of the joint judgment of Lords Hamblen and Leggatt in the *FCA Test Case (SC).* In *Stonegate v MS Amlin* [2023] Bus LR 28, at [52]-[54] Butcher J referred to this issue. At [54] he said: "What is clear is that the question to be asked is what would the language of the policy have been understood to mean to a policyholder, rather than an insurer, who has read through the policy conscientiously and who has been able to consult with well-informed brokers, but who is not a pedantic lawyer". I take that statement to mean that *the common understanding* of the Parties, which is to be taken as the basis for the construction of the insurance policy, is to be that of such a policyholder, rather than an insurer who has specialist knowledge and familiarity with technical terms.

[4] It is not clear whether Lords Hamblen and Leggatt meant that *all* lawyers are pedantic or that there is only one species of lawyer that is; but the drift of their statement is obvious enough.

Respondent contents, the *emergency* has to have manifested itself "*in the vicinity of the Premises"* of each particular policyholder.

20. The second dispute concerns the interpretation of the word "*likely".* The Respondent submits that there has to be a *probability* that life [or property] will be endangered. The Claimants submit that it is sufficient that there is a *reasonable prospect* that life [or property] will be endangered.

21. The third dispute is a timing one: had the *emergency* (whether national or specifically located "*in the vicinity of the Premises"* ) manifested itself by 16 March 2020, as submitted by the Respondent, or at some earlier time (either 3, 5 or 12 March) as submitted by the Claimants.

22. **Issue One:** The key issue is the first one: what is the correct interpretation of "*an emergency likely to endanger life [or property] in the vicinity of the Premises"*? In short, does the emergency have to be one that "endangers life [or property] in the vicinity of the Premises" wherever the emergency may be; or does the emergency have to be one that is specifically *located* "in the vicinity of the Premises" and also one that "endangers life [or property] in the vicinity of the Premises".[5] The importance of the distinction is obvious. The Respondent accepts that, at least from 16 March 2020, there was a nationwide "emergency" caused by the Covid 19 pandemic and that this, generally, endangered life everywhere in the nation. But the Respondent does not accept that Covid 19 manifested itself at any particular time "in the vicinity of" the Premises of each of the Claimants, or that it endangered life there. Proving that Covid 19 had manifested itself in the "vicinity" of the Premises of a particular Claimant would raise the issue of how this was to be proved; a matter which is outside the scope of the Arbitration Agreement, as I held in my First Final Partial Award.

23. Mr Christie KC, for the Respondent, accepted in argument that there were two equally possible constructions of the wording; the one for which the Claimants contended and the one for which the Respondent contended. However, he heavily relied upon the conclusion on construction reached in the *FCA Test case (DC)* in relation to the wording of two policy wordings that the Divisional Court had to consider. They were known as the "RSA 2.1 and 2.2" policy wordings. The particular clause in both those policies was:

[5] There is possibly a causation issue involved also, although as a result of the *FCA Test Case (SC)* judgment it would seem that all that the Claimant would have to show is that the "emergency in the vicinity of the Premises" was *an* efficient cause of the government measures etc. However, issues of causation are not the subject of the Arbitration Agreement and I therefore can make no ruling on this.

> "F. Prevention of Access-Public Emergency
> What is covered
> The actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises, which prevents or hinders the use or access to the Premises".

24. The Divisional Court stated, at [458] that "the principal matter in dispute between the Parties in relation to [the RSA 2.1 and 2.2] wording is the meaning of "emergency…in the vicinity of the Premises*"*. On this point, the Court held, at [466]:

> "As in the case of the MSA1 AOCA clause, we consider that the principal difficulty which the FCA faces in relation to this wording is the requirement that the "emergency" ("danger" in the MSA 1 AOCA clause) is "in the vicinity of the Premises". We consider that Mr Turner QC is right that these words are a clear indicator that this is a narrow, localised from of cover, the paradigm example of which would be the police cordoning off an area in which the insured Premises are located because of intelligence that materials for bomb-making were located in that area, the example Mr Turner QC gave. It does not seem to us that the fact that, unlike the MSA 1 AOCA clause, this clause also encompasses hindrance and use, in any sense requires an expansion of the geographical limitation of its scope. As we have already said, however elastic the concept of "vicinity" it connotes neighbourhood, the area surrounding the Premises…..What "in the vicinity" means in any particular case may depend on the nature of the "emergency" and the facts of the case….we do not consider that the entire country can be described as in the vicinity of the insured Premises on the wording of this policy. It follows that the government action and advice in response to the national pandemic cannot be said to be due to an emergency in the vicinity, in the sense of in the neighbourhood, of the insured Premises".

25. The Divisional Court then went on to make the point that the insured would have to show that it was the "emergency in the vicinity of the Premises" that led to the action or advice of the government; something which the court held was "highly unlikely" to be demonstrated in any particular case: see [467]. The interpretation of these policy wordings (as opposed to issues of causation) were not the subject of any appeal to the Supreme Court.

26. Mr Christie submitted that I was bound by the construction of the RSA 2.1 and 2.2 wording that was reached by the Divisional Court. He relied on the statement of Lord Goddard CJ in *Huddersfield Police Authority v Watson* [1947] KB 842 at 848 that a judge at first instance is bound to follow "the decisions that are binding on him" which include those of the Divisional Court. Mr Christie also referred me to the published *China Taiping* Award

of Lord Mance,[6] in which he had to consider the construction of similar wording in a business interruption policy. Lord Mance said, at [53] of his Award, when referring to the Divisional Court's construction of the RSA 2.1 and 2.2 wording: "on the basis that construction is a matter of law, and there is no discernible difference in wording or context, [the judgment of the Divisional Court] may even, on the face of it, bind me". Mr Christie also referred me to the judgment of Cockerill J in *Corbin & King Ltd v AXA Insurance UK PLC* [2022] EWHC 409 (Comm), where the judge analysed exhaustively the judgments in the *FCA Test Case (DC)* and *(SC)* as well as the *China Taiping Award.* Cockerill J considered the extent to which she was bound by the Divisional Court's conclusion on the construction of the RSA 2.1 and 2.2 wording in the context of the relevant clause in *Corbin & King* case. That was a "Denial of Access (Non Damage)" or "NDDA" clause in a combined business insurance policy that covered the risk of loss from business interruption. The relevant wording was:

> We will cover you for any loss insured by this section resulting from interruption or interference with the business where access to your Premises is restricted or hindered for more than the franchise period….arising directly from:
> 1 the actions taken by the police or any other statutory body in response to a danger or disturbance at your Premises or within a 1 mile radius of your Premises…"

27. Cockerill J held (at [148]) that she was bound by the decision of *the FCA Test Case (DC)* but only insofar as: (i) the point in question was one which was argued and decided by that court; and (ii) the Divisional Court's analysis was not undermined by the decision of the Supreme Court. Cockerill J agreed with and followed the approach of Lord Mance in the *China Taiping* Award. Cockerill J concluded that despite the "very considerable similarities" which existed between the RSA 2.1 and 2.2 clauses considered in the *FCA Test Case (DC)* and the *Corbin & King* clause, they were not so strong "that it effectively prejudges my own consideration of the Axa NDDA clause": [153].
28. So how should the "Public Emergency" sub-section of the "Loss of Income" Section of the Salon Gold Policy (ie. the Wording) be construed? I note, first of all, some points on the drafting of the policy terms. The wording of the policy has been professionally drafted and is comprehensive. There is no "shorthand". The style is deliberately pitched so that the "ordinary policyholder", who is likely to be the owner of a hair or beauty salon (or perhaps several of them), will be able to understand the cover he (or she) is getting, if

[6] *The Policyholders Specified in Schedule 1 to the Arbitration Agreement v China Taiping insurance (UK) Ltd* [2022] Lloyd's Rep IR 379.

studied carefully. The draftsman eschewed the use of commas as a means of attempting to make the meaning of phrases clearer. If the draftsman deliberately did not use commas, then it seems to me that the policy wording should, if at all possible, be construed without the artificial introduction of them as a means of arriving at the correct interpretation of the words.

29. Secondly, the "Public Emergency" sub-section is one of a number of sub-sections within the "Loss of Income" Section of the policy wording. It is part of a group of sub-sections which are called "Cover Extensions". They are, by definition, widening the scope of the insurance cover provided to the policyholder. Within that group, it is noteworthy that the phrase "in the vicinity of the Premises" is used in the sub-section of cover headed "Prevention of Access". In that case the insurer promises to indemnify the insured "in respect of loss…resulting from damage to property in the vicinity of the Premises caused by any of the Contingencies insured under Contents Section which prevents or hinders use of or access to the Premises". The draftsman has been careful to identify *where* the property that has been damaged has to be *before* then setting out the causes of the damage that will give rise to cover. It would have been possible to phrase the cover thus: "in respect of loss resulting from damage to property caused by any of the Contingencies insured under the Contents section in the vicinity of the Premises which prevents or hinders use of or access to the Premises". That would be less clear, although it could be made tolerably clear by putting imaginary commas after "property" and "section". However, the comparison demonstrates that the draftsman was alive to the need for clarity in defining where the property that was damaged had to be when that was a necessary condition of the right to indemnity under that sub-section.

30. Now I will consider the construction of the right to an indemnity under the Public Emergency Extension. First, a minor point: the heading is "Public Emergency", but not "Public Emergency in the Vicinity of the Premises." Secondly, in order to be indemnified under this sub-section, the insured has to establish: (1) that there was some "action or advice" of a government or local authority, (2) which action or advice is "due to an emergency" – however that is defined, (3) which action or advice "prevents or hinders the use of or access to the Premises". There follow some (for present purposes irrelevant) exclusions. It is significant that the words "the actions or advice of a government or local authority" come at the start of the sub-section. Thus it is that "action" or "advice" that has to prevent or hinder the use or access to the Premises. Next, I note that it can be the

"action" or "advice" of a *government* as well as a local authority that prevents or hinders use or access to the Premises. Thus the draftsman contemplated that it could be the action or advice of a regional or national government, or that of a local authority. That contrast is significant. It adds some context to how "emergency" is to be defined.

31. Coming to the definition of "emergency" itself, it is necessary to give all the words of the clause their "natural meaning" in their context. The natural way to read those words is in the order in which they are written. No words should be excluded in arriving at the meaning of particular words or a clause, unless that is the only way that the relevant phrase can be given some sense. Nor should the order of the words be altered, unless it has to be in order to give the relevant words or clause a sensible meaning. Here the actions or advice of the government or local authority have to be due to "an emergency". The draftsman then goes on to define what type of emergency is relevant. It is one that is "likely to endanger life or property in the vicinity of the Premises". That whole phrase makes perfect sense. There is no need to add commas to make sense of the phrase. Nor is there any need to turn the phrase around so as to read "an emergency in the vicinity of the Premises likely to endanger life or property…" in order that it should make sense. There is no warrant for extracting the words "likely to endanger life or property" in order to arrive at a satisfactory definition of "an emergency" so as to confine that emergency to "the vicinity of the Premises".
32. Thus if I were just construing the Wording in its context, I would have no hesitation in concluding that the only qualification placed on the words "an emergency" is that "the emergency" has to be "likely to endanger life or property in the vicinity of the Premises". I would conclude that it is not necessary that the emergency has to arise "in the vicinity of the Premises" for there to be cover under this Sub-Section. There is nothing in this wording that suggests that it is intended to be only a "narrow, localised" form of emergency to give cover, to use the phrase that appears as a refrain in parts of the *FCA Test Case (DC)* judgment.
33. Mr Christie argued that if "an emergency" is not qualified by "in the vicinity" it could lead to "complicated questions about the level of threat posed by the distant emergency and whether it was likely to endanger life or property within the vicinity of the Premises". I do not accept that submission has any force. The only qualifying feature of the "emergency" that has to be fulfilled is that it is "likely to endanger life or property in the vicinity of the Premises". Subject to what is meant by "likely", to be considered below,

that seems an easy test to apply. An approaching Atlantic storm may be a long way away, but it could be "likely" to endanger life or property in the vicinity of the Premises if the Premises are in the storm's path. An accident at a nuclear power station hundreds of miles from the Premises, but which leads to the emission of dangerous radiation which is blown in a particular direction by the wind might be "likely to endanger life or property in the vicinity of the Premises" if the wind takes the radiation in that direction. On this wording, there is no requirement to limit the "emergency" to one that is generated locally.

34. Looking at the words of the Wording in their context without reference to authority, I would not even accept the submission of Mr Christie KC that they are capable of two "reasonable" meanings; the one contended for by the Claimants and the one contended for by the Respondent. I would say that there is only one reasonable meaning: that the only qualification to "emergency" is that it is one that "endangers life or property in the vicinity of the Premises". The "emergency" itself does not have to be "in the vicinity of the Premises".

35. **Am I bound to follow the construction of the Divisional Court in the *FCA Test Case?*** My conclusion leads to the question: Am I nevertheless bound to follow the construction given to very similar wording in the RSA 2.1 and 2.2 forms of policy by the Divisional Court in the *FCA Test Case*? That decision did not construe this sub-section in this Section of the Salon Gold policy wording. The wording in RSA 2.1 and 2.2 is slightly different; notably it uses the phrase "Competent Public Authority" instead of "government or local authority" in the Wording. Thus I am not strictly bound to follow the interpretation given by the Divisional Court. However, given the similarity of the wording, I would have to regard the Court's interpretation as at least very highly persuasive, provided that the point that was argued before me was also "squarely argued and decided by the Divisional Court", as Lord Mance put it at [54] of the *China Taiping* Award. Mr Christie showed me extracts of the transcripts of the hearing in the Divisional Court in order to persuade me that this point *had* been squarely argued and *had* been squarely decided. However, I have concluded that although there was *some* argument on the present point (in Mr Edelman's reply only), the point was not "squarely decided".

36. In the *FCA Test Case (DC)* Mr Edelman QC[7] for the FCA started his argument on the construction of the RSA 2.1 and 2.2 wording on page 78 of Day 3 of the hearing. He made submissions first of all on the effect of various exclusions. Then, at page 80 line

[7] I will use the titles that counsel had at the time of the *FCA Test Case (DC)*

11, Mr Edelman comes to the clause itself. After a submission on the effect of the word "advice", he states (at 13-16 of page 84) that counsel for RSA had accepted that "the Covid 19 epidemic was a general public health emergency". Next, Mr Edelman makes submissions on the words "in the vicinity". He submitted, at line 17 on page 84 to line 18 on page 85:

> "Then 'in the vicinity'…..the emergency occurred in all areas and therefore we ….submit, in the vicinity of the Premises. The epidemic, and in this case in the context of an emergency its not just the actual cases but the emergency is the serious risk of its further spread and development throughout the population, is of itself an emergency and that was a nationwide emergency and therefore necessarily occurred in the vicinity. And the clause does not say that the emergency has to be only in the vicinity of the Premises. All it needs to do is to be an emergency which is likely to endanger life in the vicinity of the Premises and it was. The Covid emergency was likely to endanger life in the vicinity of everywhere in the country so we say that's satisfied.
> We understand that RSA's case is that the emergency was not in the vicinity, but that, for reasons I have given, ought to be rejected. It presupposes that the emergency contemplated can only be local. That is not what the policy says. Really what RSA is doing is inserting the word "only" in the clause to an emergency likely to endanger life only in the vicinity of the Premises and that is not a permissible approach to construction…."

37. Mr Edelman's main thrusts appear to be that "in the vicinity" in context of this "emergency" meant the whole country; alternatively, that because the emergency was everywhere, it was also "in the vicinity" and that the clause did not say that the emergency had to be "only" in the vicinity. I accept that there is one sentence of argument where Mr Edelman says: "All it needs to do is to be an emergency which is likely to endanger life in the vicinity of the Premises and it was". But he then appears to modify that by saying: "the Covid emergency was likely to endanger life everywhere in the country so we say it was satisfied". What he does not argue clearly is that the phrase "in the vicinity of the Premises" qualifies "endangers life", but does not qualify "an emergency".
38. It appears from the argument of Mr Turner QC, for RSA, that he understood Mr Edelman to be accepting that the words "an emergency" were qualified by the words "in the vicinity of the Premises". Mr Turner started his submissions on the RSA wording on Day 4 at page 179 of the transcript. He comes to his submissions on the construction of the key clause "the actions or advice of a competent public authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use or access to the Premises" at page 182 lines 1 to 4. Having recited the words he says

that "…I am going to show you in due course that the Parties are happily agreed on how that provision should be construed". Mr Turner continued, at lines 10-14:

> "And the agreement, just not to keep you in suspense, is that it should be construed as referring to an emergency in the vicinity of the Premises, likely to endanger life or property, and I will make good that in due course".

In other words, Mr Turner submitted that the FCA, through Mr Edelman, agreed with the insurers that the qualification of "an emergency" was that it was something occurring "in the vicinity of the Premises" and also that this "local" emergency was likely to endanger life or property".

39. Mr Turner returned to identifying "some points of agreement" on page 184 of the transcript at lines 14 and following. He says, at lines 16-17, that RSA accepted that Covid 19 was a "general public health emergency". He continued:

> "But we are not insuring general public health emergencies; we say we are insuring emergencies in the vicinity of the Premises likely to endanger life or property".

Butcher J then said: "Yes. You will have to show me how that works grammatically".

Mr Turner's response, at line 23 of page 184 to line 3 of page 185, is:

> "Grammatically, if one were using punctuation, and it is fair to say that the draftsman is sparing in his use of punctuation, one would put a comma after the word 'emergency' in the second line of the 'Public Emergency' extension, and another comma after the word 'property' in the next line".

After Butcher J thanked Mr Turner for this explanation, Mr Turner continued, at line 5 of page 185:

> "That appears to be common ground. And can I now make good, as perhaps one of my last points for today, that this appears to be common ground."

Mr Turner then referred to a passage in paragraph 610 of the "skeleton argument" of the FCA, which apparently stated that the FCA's primary case was that "the emergency was in the vicinity of the Premises".[8] Flaux LJ pointed out that it was the FCA's case that there was a very wide definition of "in the vicinity" and that there were two ways of construing the wording; one with that wide definition and one with a narrower definition of "in the vicinity".

40. After a little further discussion, at lines 8-15 of page 186 Butcher J put a different construction to Mr Turner:

[8] I was not referred to the "skeleton arguments" of the Parties in the *FCA Test Case (DC).*

> "Without your commas, you could say that the emergency was likely to endanger life, the life being in the vicinity of the Premises, anyone near the Premises was endangered by COVID. On one view, it doesn't say that the actions have to come from the danger to the life near the Premises."

Mr Turner did not have the chance to answer then, as Flaux LJ said that it was time to stop for that day.

41. There are several things to note about this passage. First, Mr Edelman did not interrupt the exchange between the court and Mr Turner on whether the construction being advanced by RSA was "common ground". Secondly, Mr Turner expressly advanced a construction that turned around the wording of the clause, as set out at lines 17 -20 of page 184 of the transcript. Thirdly, at that stage it was only Butcher J who appears to have proposed the construction that is now put forward by the Claimants in this arbitration. Mr Turner did not deal with that point on either Day 4 or the next day.

42. Mr Turner resumed his argument on Day 5. He repeated the submission that "the emergency needs to be in the vicinity" and that "an emergency and any relevant threat to life and property will be co-located": page 2 lines 1-5.

43. Mr Edelman replied to these submissions on the construction of the RSA 2.1 and 2.2 policies on Day 8 at pages 125-126. Mr Edelman started by saying, at page 125 line 9, "the critical question here is what the word "vicinity" means". This reflects the argument Mr Edelman had made in opening that "vicinity" can mean the whole country. He then stated that it was not common ground that the emergency "needed to be in the vicinity". He continued, at lines 16-21:

> "RSA is actually forced, and Mr Turner said this, to put a comma after 'emergency' and after 'property' to try and limit the cover to a local emergency. That is both unimpressive as a matter of impression from the words used, and not necessary because the alternative interpretation makes perfect sense".

Flaux LJ then intervened and said at page 125 line 23 to page 126 line 5 :

> "As a matter of normal grammatical construction, if the words 'in the vicinity of the Premises' were intended to qualify 'emergency', it might be thought they would appear after them…in other words, an emergency in the vicinity of the Premises, likely to endanger life or property".

To which Mr Edelman reposted: "Yes, my lord, exactly".

44. Mr Edelman then made a further submission, which appears (to me at least) to elide two arguments: one on the meaning of 'vicinity' and one on what words qualify 'emergency'. He said, at page 126, lines 7-18:

> "Of course, it would then leave out of account, if Mr Turner is right about what 'vicinity' means, a narrower scope, it means that there is no cover where the emergency itself has a remote effect, from the location of the immediate emergency, where it is something that has more distant effect. But we say it is just a question of ordinary language and there is perhaps not more to be said about it than that. It defines where the emergency is and it is sufficient. If there is an emergency which endangers life or property in the vicinity of the Premises, which is the natural meaning".

45. The argument that Mr Gruder has put for the Claimants was not advanced by Mr Edelman in opening. I acknowledge that it was advanced, briefly, in Mr Edelman's reply. (I was not shown any extracts of any submissions by either Mr Turner or others in response to this). The puzzle, therefore, is why this argument that Mr Edelman made in reply, which both judges seemed to think had some force, judging by their interventions, was not dealt with by the Divisional Court in its judgment on the RSA 2.1 and 2.2 policy wording. So it is necessary to look at the structure of the judgment.

46. Immediately before dealing with that wording, the judgment considered a number of policy wordings which granted cover for loss caused by denial of access to the insured Premises where there was no damage to the Premises; so called "non damage denial of access" clauses or "NDDA" clauses. The clauses considered immediately before the RSA 2.1 and 2.2 wording were those in various MSA policy wordings. The MSA 1 "action of competent authorities" (or AOCA) clause granted cover for loss "resulting from interruption or interference with the business following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the Premises where access will be prevented…". The Court agreed with the submission of Mr Kealey QC on behalf of MSA that the cover provided under this wording was "a narrow, localised form of cover". The Court also held that the word "vicinity" in that clause had "a local connotation of the neighbourhood of the Premises". The Court rejected Mr Edelman's argument that "the vicinity of the Premises" could equate to the entire country: see [416]. The Court held that the cover provided by the wording of MSA 3 was equally a "narrow, localised cover".

47. The Court then considered the relevant "Prevention of Access-Public Emergency" section of the RSA 2.1 and 2.2 NDDA clauses, which it held were in "very similar" terms: [449]. In summarising the Parties' positions, the Court stated (as already noted above), at [458], that "the principal matter in dispute between the Parties in relation to this wording is the meaning of "emergency…in the vicinity of the Premises". There is no explanation by the

Court as to why it had left out the words in the clause between "emergency" and "in the vicinity of the Premises". Paragraphs [458] and [459] of the judgment then continued:

> "As in relation to the MSA 1 AOCA clause which refers to a danger or disturbance in the vicinity of the Premises, Mr Edelman QC submitted that the emergency was the pandemic, as RSA accepted and, since the pandemic was everywhere in the UK, occurring in all areas, it was "in the vicinity of the Premises" for the purpose of this provision. He submitted that the provision does not require that the "emergency" is only in the vicinity. RSA's interpretation, that the insurance is intended to cover where there is a local "emergency" did involve inserting the word 'only'.
> 459. Mr Turner QC on behalf of RSA submitted that the broad purpose of this clause is to provide an indemnity against the effect on access to and use of insured Premises of restrictions imposed by the emergency services. By their very nature emergencies which affect access to or use of the insured Premises are likely to be in the vicinity of the Premises".

48. I have already quoted [466] of the Court's judgment where it deals with the construction of the policy wording "the actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use or access to the Premises". The Court states that, "as in the case of the MSA 1 AOCA clause, the principal difficulty which the FCA faces in relation to this wording is the requirement that the "emergency" ("danger" in the MSA 1 AOCA clause) is "in the vicinity of the Premises". But to put the issue in that way is, with respect to the Court, to beg the very question that has to be answered. That is whether, as Flaux LJ put it during the course of Mr Edelman's reply, the words "in the vicinity of the Premises" were intended to qualify 'emergency'".[9] The Court does not deal at all with the argument that Mr Edelman put in reply that the words "in the vicinity of the Premises" do not qualify "emergency" or identify where the "emergency" has to be situated. The Court does deal with Mr Edelman's argument that the word "vicinity" is elastic and could, in the context of Covid 19, mean the whole of the country and it rejects it. But that is a separate point.
49. It is useless to speculate why the Divisional Court posed the question of construction the way it did at [458] and [466] of its judgment; or why it did not deal specifically with Mr Edelman's argument that he put forward in reply and which Flaux LJ commented upon. Neither Mr Gruder nor Mr Christie could provide a satisfactory answer.[10] But I am satisfied that the specific argument raised by the Claimants in this case was not dealt with

[9] Transcript, Day 8 page 125 lines 24-25.
[10] Only Mr Miles Harris, Mr Christie's junior before me, represented a party in the *FCA Test Case (DC).*

squarely in the Divisional Court's judgment. Therefore, I am not obliged to follow the construction given to the RSA 2.1 and 2.2 wording when considering the very similar wording in the Salon Gold policy. I will not do so, preferring the construction that I have given above to that wording.

50. **"Emergency": actual Covid 19 or the threat of it?** During the hearing, there was some debate (prompted by me I fear) on whether there was only an "emergency" if Covid 19 was actually present or whether the threat of it was sufficient to create "an emergency". The distinction only matters if I had concluded that "an emergency likely to endanger life or property in the vicinity of the Premises" means that the emergency has to be "in the vicinity of the Premises". Because the Respondent accepted that there was generally an "emergency" created by Covid 19 in the UK at some stage, (precisely when being the subject of Issue Three below), the issue of "threat" or 'real thing" does not matter on the construction I give to the phrase "emergency likely to endanger life or property in the vicinity of the Premises". Therefore I need not consider it further.

51. **Issue Two.** The next issue is the correct construction of the word "likely". Two things are important when deciding what the word means in this clause. First, the meaning has to be that as understood by the "reasonable insurer" and "reasonable policyholder" of this type of business interruption insurance. I doubt either would be concerned with the difference, which *would* worry the pedantic or even non-pedantic lawyer, between "likely" meaning more probable than not, or "likely" meaning "a real possibility".

52. More importantly, the word has to be construed in its context. There is only cover if there has been action or advice of a government or local authority which action or advice is due to an emergency "which is likely to endanger life or property [in the vicinity of the Premises]". The trigger for cover is the government/local authority action/advice which is "due to an emergency". If the Respondent's construction is correct then it would mean that there would only be cover if the government/local authority action or advice was due to an emergency in circumstances where that emergency would, more probably than not, endanger life or property in the vicinity of the Premises. But if the action or advice was taken or given when there was only a "real possibility" that the emergency would endanger life or property in the vicinity of the Premises, then, on the Respondent's construction, there would be no cover. Therefore, (on the Respondent's construction), to determine whether there was cover, it would be necessary to investigate whether, at the time the

action/advice was taken/given, the emergency was more probably than not going to endanger life etc or there was only a reasonable possibility of it doing so.

53. I am confident that the reasonable insurer and insured of this type of cover would not have understood the language of this clause to produce such a fine distinction. Moreover, it is unrealistic to think that a government or local authority would ask the question "is it more probable than not that there will be a danger to life or property or is there only a real risk of that?" before deciding whether to take action or give advice in relation to a particular emergency. Take this very case. Before the Prime Minister announced the "action" or "advice" on 23 March 2020 that "you must stay at home", did the government ponder whether the danger of Covid 19 was more probable than not to endanger life in the UK or that there was (only) a real possibility that it would do so? I doubt it. If that is so, then the meaning of the policy wording should reflect what, in practice, would trigger action or advice by a government or local authority.

54. The only realistic common sense construction is that "likely to" means a real possibility of there being a danger to life or property.

55. **Issue Three: the timing issue.** There can only be cover under this sub-section if there was some action or advice of the government or local authority "due to an emergency etc". Thus, if government action or advice was given before the emergency had started then even if that resulted in prevention of access to the Premises, there could be no cover under the policy wording. The timing issue is a very narrow one. The Respondent appears to accept that there was a "national emergency" by the time of the Prime Minister's statement on 16 March 2020 (para 61 of the written submissions). The Claimants submit various earlier dates, but in particular 12 March 2020.

56. By 12 March 2020, the following had occurred: (1) Covid 19 had been designated a "notifiable disease" throughout the UK; (2) the WHO had declared that Covid 19 was a pandemic; (3) it was stated by the Prime Minister in his announcement that day that the number of cases of Covid 19 was going to rise sharply and that the number of cases was "perhaps much higher" than the number of confirmed cases; so that "this is the worst public health crisis for a generation"; and (4) the first death from Covid 19 in the UK had been reported. On that date the Prime Minister announced that the risk level presented to the UK by Covid 19 was to be raised from "moderate" to "high".

57. For the purposes of the Public Emergency sub-section of the Loss of Income section of the Salon Gold policy terms, I find, as a fact, that there was an "emergency" as at 12 March

2020. I also find that, as of that date, this emergency was such that it was "likely" to endanger life within the vicinity of the Premises, within the meaning of the clause, as discussed above.

58. **A further point:** The Respondent had a further point on the construction of "emergency", which falls partly under all three of the Issues raised by the First Argument. The Respondent argues that for there to be an "emergency that is likely to endanger life or property in the vicinity of the Premises" it is necessary for a claimant to prove that, at or before the announcement of the relevant action or advice: (a) there existed a person who had been diagnosed as suffering from Covid 19, who (b) was "within the vicinity of the Premises" and (c) that this diagnosis had been reported to or was known by these persons who were authorised to take measures to respond to "the emergency" and who had done so. It is argued that it is only when these requirements have been fulfilled that there can be "an emergency that is likely to endanger life or property in the vicinity of the Premises".

59. I reject that argument for several reasons. First, on the construction I give to the clause, the "emergency" does not have to be "in the vicinity of the Premises"; it is sufficient if the "emergency" is a national one. Everyone agrees that the spread of Covid 19, by a certain date, constituted a national public health "emergency". If so, then there is no need to have to prove that there was a diagnosed case of Covid 19 "in the vicinity of the Premises" and that it had been reported to the relevant authority/authorities. No one Covid 19 case caused the national "emergency" which led to the government to give advice and take action.

60. Secondly, even on the construction of the wording "an emergency…in the vicinity of the Premises" given by the Divisional Court in the *FCA Test Case*, there was no suggestion in that case that the Claimant had to prove that a case of Covid 19 had been diagnosed and reported *before* the action/advice of the relevant authority. Nor was that argument introduced in the Supreme Court. It appears to have been a later invention of the legal teams of the insurers. It was either withdrawn or rejected in the *LIEC Case* before Jacobs J.[11]

61. Thirdly, even in policy wordings where there has to be "an occurrence" or "a danger" giving rise to a risk to life or property in the vicinity of the Premises, no Court has yet found that, in order to prove that Covid 19 was the "occurrence" or "danger", both the diagnosis and report of that case of Covid 19 to a relevant authority must be proved.

[11] See [2023] EWHC 1481 (Comm) at [10] and [250] of Jacob J's judgment.

62. Fourthly, the requirement is unrealistic, even assuming the Supreme Court's approach to the question of causation. Would each policyholder have to show that there was a case of Covid 19 that was diagnosed and reported which was "in the vicinity of the [relevant] Premises" which led to advice or action by the national or local government authorities? I am sure that a reasonable insurer and a reasonable policyholder of the type concluding a contract with this Sub-Section for business interruption cover would not have thought that the wording required such proof.

**F. The Second Argument: the rival contentions.**

63. My conclusion on the First Argument, particularly on Issue One, means the question raised by the Second Argument is no longer relevant. But I will decide it anyway. The issue on the Second Argument is the correct construction of the phrase "in the vicinity of the Premises" in the key clause in the Public Emergency Extension.

64. The Claimants submit that this term is flexible. How it is applied will, it is submitted, depend on the nature of the particular "emergency" being considered. "Vicinity of the Premises" will refer to an area around the Premises which would reasonably be expected to be endangered by an emergency of the particular kind which has occurred, or is expected to occur. In the present case, it is argued that because the Covid 19 "emergency" was a national public health emergency, endangering life throughout the UK, therefore "the vicinity" means each individual nation of the UK or even the UK as a whole.

65. The Respondent submits that, in the context of this policy wording, "the vicinity of the Premises" principally connotes the "neighbourhood of the Premises." If it was anything else, the concept would be too uncertain to be workable. The Respondent relies on the fact that in the *FCA Test Case (DC)* the Divisional Court took a restrictive view of the meaning of "vicinity" in the various policies it considered, in contrast to the particular definition of "Vicinity" in the terms of the RSA 4 policy[12]. No such definition is present in the Salon Gold policy wording. The Respondent also relied on statements about the definition of "vicinity" made by Jacobs J in the *LEIC Case*[13] at [190].

66. The Respondent submits that the test of what is "in the vicinity of the Premises" will always be an objective one. The requirement for a "very close" geographical connection will mean that, in many contexts, "the vicinity of the Premises" will be an area of "far

[12] Set out at [127] of the *FCA Test Case (DC).* The Respondent also drew attention to the concession made by the policyholders in the ***China Taiping Award*** that neither the entirety of the UK, nor any of the four nations of the UK could be described as "in the vicinity" of any particular insured Premises: see [33] of that Award.
[13] [2023] EWHC 1481 (Comm).

less than one mile" from the Premises. It was submitted that the "vicinity" should not be defined by reference to the distance to certain services or amenities that might be used regularly by the customers of "the Premises"; or by reference to the distance to a hospital; the nearest railway station or a supermarket. However, the Respondent did accept that natural or man-made barriers, such as a river, or a park, or a City Wall or a motorway, could assist in delineating what was the "vicinity" in a particular case.

67. The Respondent also repeats the argument that the "emergency" has to be within the "vicinity of the Premises" for there to be cover.

68. **The Second Argument: Conclusion.** I must construe the words "in the vicinity of the Premises" in their context and give the words their ordinary meaning as would reasonably be understood (objectively) by the insurer and the reasonable policyholder of the type who would have taken out the Salon Gold policies and who would have read through the wording in order to understand what it meant. On that basis I have concluded that, for the purposes of the Salon Gold policy wording, the phrase "in the vicinity of the Premises" has a clear meaning. It means an area that is around the relevant Premises, that is, broadly speaking, within "the neighbourhood" of the relevant Premises. What that area is in each case will also depend on two factors. First, the actual location of the particular Premises covered by a particular policy. The area cannot be pre-determined in all cases as being within eg. "a 500 m radius" or "a 1 km radius" of the Premises. "The neighbourhood" will depend on whether "the Premises" are in a city, a town, a village, or in the country. To that extent "in the vicinity of the Premises" is a description that must be applied flexibly in individual cases.

69. The second factor, in the context of the clause under discussion, is the nature of the "emergency" which is "likely to endanger life or property *in the vicinity of the Premises".* I accept the argument of the Claimants that the nature of the emergency is a relevant consideration in determining, in each case, what is "in the vicinity of the Premises". This is because it is the nature of that "emergency" that will give rise to the "action or advice" of the relevant authority which is said to lead to the "prevention of access" to the Premises, thus triggering cover. The Covid 19 "emergency" was regarded at the time as being the most serious public health emergency for decades. Coronavirus was regarded as being highly contagious. In the early days no one was sure how it spread; was it by touch or by air or both? Paragraph 140 of the Divisional Court's judgment in the *FCA Test Case*

appears to reflect this view, although I acknowledge that the court was there dealing with the terms of RSA 4, which wording defined "Vicinity".

70. I therefore reject the argument that "in the vicinity of the Premises" means, in the context of the present wording and the present claims, the whole of the UK or each of the four nations. That strikes me as an unnatural meaning and one that the reasonable insurer and policyholder would not have understood the words to mean in their context.

71. How this definition works out in practice requires an examination of each case. Although, given my conclusion on the First Argument, the Second and Third Arguments are not strictly relevant, I will give my ruling on how my interpretation of "in the vicinity of the Premises" works under the Claimants' Third Argument and for each of the 13 Test Cases.[14]

**G. The Claimants' Third Argument: the rival contentions.**

72. For the purposes of this argument, the Claimants treat "the emergency" as being the occurrence of a case of Covid 19. It is argued that the requirement that there be "an emergency likely to endanger life…in the vicinity of the Premises" is satisfied when it is proved by a policyholder that a case of Covid 19 occurred "in the vicinity of the Premises".[15] There are two issues: (1) what is meant by "the vicinity" in general terms for these purposes; and (2) how is that construction to be applied to each of the 13 Test cases that the Parties have selected for consideration at this stage.

73. The Claimants advance three, alternative, broad approaches on how to define "the vicinity" for each of the 13 Test Cases. First, "the vicinity" should encompass "at least" the same city, town, village or other settlement in which "the Premises" are located. If an occurrence of Covid 19 took place within that area, it is within "the vicinity of the Premises". The first alternative is to define "the vicinity" by reference to a radius around the Premises in each case. It is submitted that "the vicinity" means an area of at least 1 kilometre radius of the relevant Premises and in some cases more than that. The second alternative is a different approach: that of identifying "the neighbourhood" of the Premises. To identify "the neighbourhood" the features of the area surrounding the Premises have to be considered. "The features" include facilities such as major

[14] I have re-read and taken account of the letters written by CMS (on behalf of the Respondent) and RLK (on behalf of the Claimants) dated 3 October 2023. Given all the circumstances, it seems both sensible and just that I should decide the Third Argument Issues, despite my conclusions on Argument One.

[15] As already noted, I held in my First Final Partial Award that the issue of "how" a case of Covid 19 is proved to have occurred is outside the scope of the current Arbitration Agreement.

supermarkets or shopping centres, general hospitals and other healthcare facilities; public recreational amenities such as parks or squares or playing fields; educational facilities and hospitality venues such as restaurants or pubs. The Claimants emphasise that the nature of "the emergency" in this case is important. Generally, because Covid 19 was everywhere and "the emergency" was so serious, this should mean, the Claimants submitted, that "the vicinity of the Premises" in individual cases is likely to be a larger area than in the case of other, different types of "emergency", such as a fire or unexploded bomb.

74. The Respondent identifies five[16] "principles and considerations" to be applied in determining what constitutes "in the vicinity of the Premises" in the 13 Test Cases. First, the principle that "vicinity" equates to "neighbourhood" in the context of this clause. So there must be a close geographical connection. Secondly, therefore, the area will be small, particularly in towns and cities. In those cases "the vicinity of the Premises" will be far less than 1 mile. Thirdly, although some public or general facilities may be within "the vicinity", they do not all have to be encompassed to designate what is "in the vicinity of the Premises" in a particular case. Fourthly, account must be taken of natural or man-made boundaries, such as a river, a park or an old City Wall. Lastly, the question of what is "in the vicinity" of a particular Premises is an objective test; what the policyholder subjectively thinks is "in the vicinity" is irrelevant.

75. On the basis of these principles, the Respondent submits that four broad categories of "vicinity" can be identified, all of which are determined by a radius from the Premises. First, in the case of London "in the vicinity of the Premises" means a radius of 250-500 metres from the Premises. Secondly, in the case of larger suburban centres or other medium to large urban centres outside London, "the vicinity" is within a radius of 500 metres from the Premises. Thirdly, in the case of smaller suburban centres and smaller towns, "the vicinity" is within a radius of 500 -750 metres. Lastly, in rural areas: "the vicinity" is within a radius of 1 km. The Respondent produced a table setting out the radius for each of the 13 Test Cases at para 85 of its written submissions. Although by the hearing the Respondent's three categories had become four, I understood that this table still applied.

[16] The written submissions stated, at section H 74 to 83 that there were eight principles. But: (a) principle three is irrelevant as the assumption of the Third Argument is that "vicinity" cannot be national or even regional (b) principles four and five put the same point different ways; and (c) principles one and seven embody the same idea: closeness to the Premises.

76. **Conclusions: general approach to meaning of "the vicinity".** I have effectively given my answer on the general approach as to what is "the vicinity of the Premises" in answering the issue under the Second Argument. So I repeat what I said in paragraphs 68-70 above. I would emphasise four points. First, the exercise in determining what is "in the vicinity of the Premises" in each case is an objective exercise. It cannot be what a particular policyholder believes it is. Secondly, in relation to particular Premises, local features such as a river or a canal, an arterial road or a motorway, a railway track that does not have a road crossing it (over, under or a level crossing), or a park or other open space, may well be relevant in defining the boundary of "the vicinity". It all depends on the particular circumstances. Thirdly, the fact that a particular facility, such as a hospital, Town Hall, school or supermarket store that is in the general area of "the vicinity" is "the nearest" to the particular Premises, will not necessarily mean that the "vicinity" in that case has to stretch as far as that facility. Fourth, in general "the vicinity" is going to be smaller if the relevant Premises are in a conurbation and will be larger if in a village or the country.

77. Beyond that, no more general guidance can be given.

**H. The Individual Test Cases**

78. Given my conclusions on the general principles to be used in determining what is "in the vicinity of the Premises", I will give my conclusion in descriptive terms for each Test Case. However, if the Parties conclude that the description given in a particular case is inadequate, I would be prepared to mark the boundaries on a map of the type provided in Bundle C, but the scale will need to be larger in most if not all cases.

79. **Test Case 1: Mrs Hardish Tiwana t/a Pura Vida Beauty: 5A High Street Sutton Coldfield.** These Premises are in a medium sized town (population 93,000) in the West Midlands. The Claimants submit that the "vicinity" in this case must take in the Good Hope Hospital; the Manor Practice GP surgery and Falcon Medical Centre; the Town Junior School, the Moor Hall golf club; the Wyndley Leisure Centre, the residential areas surrounding the town centre; and the Belfry Hotel and Resort. The majority of these locations are within a radius of 1-2 km of the Premises, but the Belfry Hotel and Resort is 6.2km to the East. The Respondent submits that the "vicinity" is within a 500m radius of the Premises.

80. **Test Case 1: Conclusion.** I find that "the vicinity" of the Premises in this case is within a radius of 750 m of them. I have taken into account the size and nature of the town and

its configuration. Between 750-1000m to the west of the Premises there is Sutton Park, which must create a natural boundary to the neighbourhood.

81. **Test Case 2: Nilson and Petra Limited t/a Headmasters: 29 West 12 Shopping Centre Shepherd's Bush, London W 12 8PP.** These are Premises in an area of West London that has its own name. "Shepherd's Bush" is a well-recognised London neighbourhood. It is bounded on the East by the motorway which runs from South to North and divides Shepherd's Bush from Holland Park (now designated the A3220). To the North of Shepherd's Bush is the area known as White City. The boundary there could be taken as the Westway/A40 dual carriageway. To the South the boundaries are more amorphous, but the neighbourhood merges into "Hammersmith" before reaching the King Street in Hammersmith To the West the natural boundary is Ravenscourt Park.
82. **Test Case 2: conclusion.** Taking all factors into consideration, I would say that "the vicinity" in this case is bounded by the North-South A3220 on the East; the Westway/A40 to the North; Ravenscourt Park to the West; and Studland Street to the South.
83. **Test Case 3: Ni & Poi (UK) Ltd t/a Headmasters: 105 King Street, London W6 9JG.** These are also Premises in West London in an area that is widely known as "Hammersmith". These Premises are quite close to those of Test Case 2 and the "vicinity" of each is bound to overlap. The Respondent says that "the vicinity" is a 250-500m radius from the Premises.
84. **Test Case 3: conclusion.** In this case there is a "natural" boundary to the South, in the form of the A4 dual-carriageway running westwards from the large Hammersmith roundabout. To the East the natural boundary is Shepherd's Bush Road which runs from Shepherd's Bush to that Hammersmith roundabout. To the West the natural boundary is Ravenscourt Park. To the North the boundaries are less obvious, but there is certainly a division between "the neighbourhood" of Hammersmith and that of Shepherd's Bush. It probably runs along the line of Adie Road and Aldensley Road, then west to Ravenscourt Park. I find that the area within those boundaries is "the vicinity" in this case.
85. **Test Case 4: Mrs Laura Brook, t/a Luxe Hair Boutique: 23 Gillygate, Pontefract WF8 1PH.** These Premises are in the smallish town of Pontefract (population 33,000 in 2021), which is North of Barnsley, East of Leeds and West of Selby in the West Riding of Yorkshire. The Claimants point to several institutions or facilities which they say are within "the vicinity". These include schools, Pontefact Monkhill railway station, Xscape

Leisure centre and the South Bailey Gate retail park. The Respondent submits that the vicinity in this case is within a 500-750m radius of the Premises.

86. **Test Case 4: Conclusion.** Pontefract has some obvious natural boundaries. To the West is either the Jubilee Way or, further out, Pontefract Racecourse. To the North and East there is the M62 motorway. To the South it soon becomes countryside, after Pease Park and Grove Town. I find that "the vicinity" is within an area roughly bounded, on the West, by a line running down from the M62 motorway past the eastern side of the park (with Pontefract Racecourse within it), running down to Grove Town; in the south to the east from Grove Town up Cobblers Lane and then on north from the junction of Cobblers Lane and the A645 to the M62.

87. **Test Case 5: Mr & Mrs Meredith t/a Bespoke You: 3 Hove Park Villas, Hove, BN3 6HP.** The Premises are in the centre of Hove, which has a population of 11,072 (in 2021) but the town runs into Brighton to the East. The Claimants submit that "the vicinity" will include facilities and institutions that are within a radius of roughly 1 km, such as the Hove Park Neville Campus, a secondary school, two supermarkets, a leisure centre, the Brighton Mosque and the residential area surrounding the Premises. The Respondent submits that "the vicinity" is within a 500-750 m radius of the Premises.

88. **Test Case 5: Conclusions**. The Channel is a natural boundary to the south but it is not contended that this is the southern boundary of "the vicinity". I find that "the vicinity" comprises the area running from Aldrington station in the West down to the Tesco Supermarket in the South West, to the junction of the B2066 and B2122 in the South East, to Seven Dials in the East, to the Droveway in the North.

89. **Test Case 6: Mrs Julia F Rowe t/a as Labou: HATC Shopping Village, London Road, Lichfield WS14 9QR.** These Premises were in an area which had a population of 969 in 2021. It is in the countryside in Staffordshire, south of Lichfield, East of Tamworth and North East of Shenstone. The Claimants submit that "the vicinity" includes a surgery, a primary school, a supermarket and Lichfield Cathedral and railway station, which are roughly within 3 -4 km of the Premises. The Respondent submits that "the vicinity" in this case is a radius of 750m to 1 km.

90. **Test Case 6: Conclusions.** In this case it is particularly difficult to designate "the vicinity". Although customers might come to the Premises from some way off, such as Lichfield or Whittington (to the East) that does not mean those areas are within "the vicinity" of the Premises. Bearing in mind that the test is "neighbourhood", I would

define "the vicinity" in this case as the area from the A5148 in the West up to the junction with the A38, running down past the East side of Swinfen lake then meeting the A38 at its junction with the Hints Bypass in the South, then running along the A5 West to the junction with the A5148.

91. **Test Case 7: Brooks & Brooks International Ltd t/a Brooks&Brooks: 13-17 Sicilian Avenue, London, WC1A 2OH.** These Premises in Sicilian Avenue are in a pedestrian shopping parade, which runs between Southampton Row and Bloomsbury Way in the Bloomsbury area of central London. To the North is Bloomsbury Square Gardens, to the North West is the British Museum, to the East is Red Lion Square Gardens, whilst to the South East is Lincoln's Inn Fields and in the South West is Covent Garden.
92. The Claimants submit that "the vicinity" includes Covent Garden, the University of London campus to the North (and University College Hospital), the Brunswick Centre to the North, Euston Station to the North West, the Aldwych in the South and all four Inns of Court which are to the East and South of the Premises. The majority of these sites lie within a radius of about 1km of the Premises.
93. The Respondent submits that "the vicinity" is within a radius of 250-500m of the Premises.
94. **Test Case 7: conclusion.** The Claimants accept that "the vicinity" has to be based on the "neighbourhood" for this Case as much as the others. In this area the "neighbourhood" surrounding a shop in Sicilian Avenue is more difficult to define. I find that "the vicinity" in this case is an area bounded by the southern corner of the British Museum (by Bury Street), running South as far as Great Queen Street, then to western side of Lincoln's Inn Fields, then northwards across Holborn and up Red Lion Street then West along Great Ormond Street to Southampton Row.
95. **Test Case 8: Ms Hayley Handy & Mr Nick Brinson t/a Madelyn Hairdressing: 6 High Street, Berkeley, Glos. GL13 9BJ.** These Premises changed location during the policy period. At first the Premises were in the centre of the village of Berkeley, which is in the western part of Gloucestershire, not far from the Severn Estuary to the West. Berkeley had a population of 2252 in 2021. There are no large (or even medium sized) towns nearby. The village is based on a staggered cross-roads and the High Street runs south from that junction. To the South, running North West, is the Little Avon River. Just beyond that to the South is the village of Ham. To the North and East of the village runs the B4066.

96. The second location is at Stone, which is a separate village to the South of Berkeley. It also had a population of 2252 in 2021. The A38 trunk road runs through Stone. At this point the Little Avon River runs North on the East side of Stone. To the South East is the M5 motorway. From Junction 14 of the M5 a road called Moorslade Lane runs North West from Fairfield to Lower Stone, which is to the West of Stone.

97. **Location One.** The Claimants rely on various institutions or facilities such as Rednock School, SGS Berkeley Green UTC, a Tesco supermarket, a pub and the Cam and Dursley railway station as all being within "the vicinity". They are within a radius of about 10 km. The Claimants submit that "the vicinity" in this case is the area within a 10km radius. The Respondent submits that "the vicinity" is within a radius of 750m-1km of the Premises.

98. **Location Two.** The Claimants rely on two GP surgeries as well as the institutions referred to in relation to Location One as all being within "the vicinity" of Location Two. The Respondent submits "the vicinity" is within a radius of 750m-1km of the Premises.

99. **Test Case 8: Conclusions:** In relation to **Location One**, I find that "the vicinity" includes the whole of the village of Berkeley. The boundaries are the Little Avon River and the B4066 and an imaginary line running from the roundabout on the B4066 to the East of Berkeley going South West to the river.

100. In relation to **Location Two**, I find that "the vicinity" includes the whole of the village of Stone. The boundaries are the Little Avon River to the North on the East side of Stone; to the South East the M5 motorway; from Junction 14 of the M5 the boundary is Moorslade Lane running North West from Falfield to Lower Stone, which is to the West of Stone; then from there to the North, the road which runs from Lower Stone towards Ham, with an imaginary line going North East from the junction of that road with the Stone-Ham road to the Little Avon River.

101. **Test Case 9: Mrs Lisa Lock t/a Synergy Salon: 17 Lower Park Drive, Plymouth PL9 9DA.** These Premises are in an easterly suburb of Plymouth on the East side of the River Plym. Plymouth had a population of about 27,000 in 2021. The Claimants rely on a number of "neighbourhood" facilities such as Church View GP Surgery, a school, a shopping centre and supermarket, restaurant and church as all being within "the vicinity", as well as the residential area to the North and East of the Premises. It is said "the vicinity" is within a radius of 1-2km of the Premises. The Respondent submits that "the vicinity" is within a radius of 750m-1km.

102. **Test Case 9: Conclusion:** I find that "the vicinity" in this case comprises the neighbourhood which is bounded on the south by Leyford Lane, to the West by the green open space leading towards the coast, to the North by Dean Hill and Furzehatt Road and to the East by Wembury Road and the green area to the East beyond that road.

103. **Test Case 10: Alexandra Wright and Aaron O'Halloran t/a Do..Salon.** At the relevant time the Premises were at 2 Lind Street, Ryde, Isle of Wight. The town of Ryde had a population of about 24,000 in 2021. Ryde is on the North Eastern coast of the Isle of Wight, looking out to the Eastern Solent and Portsmouth. Lind Street is towards the western side of the town.

104. The Claimants rely on a number of "neighbourhood" facilities, such as St Mary's Hospital to the East, Ryde Academy secondary school to the South West, a Tesco supermarket to the South East, St John's Road railway station to the South West and the residential area surrounding the Premises. The Respondent submits that "the vicinity" is within a 500-750m radius of the Premises.

105. **Test Case 10: Conclusion.** I find that "the vicinity" of the Premises comprises an area that is bounded on the West by West Street, to the South by Green Street, running East to Player Street, then North to the Solent. This is a compact area, but I am not convinced that "the neighbourhood" could, objectively, be said to stretch further.

106. **Test Case 11: Artianne Ltd: 179 High Street Guildford, Surrey GU1 3AW.** As the name implies, the High Street is in the centre of the city of Guildford, which had a population of about 144,000 in 2021. The River Wey runs through Guildford, roughly from South to North. To the North of the High Street is the A246 then beyond that Stoke Park. To the South and East there is a green area known as Chantry Wood and Pewsey Down. To the East is the A25, then further East are West and East Clandon.

107. The Claimants rely on "neighbourhood" facilities and institutions such as the Royal Surrey Hospital to the West, Austen Road surgery and Guildford Golf Club to the East, Guildford main line railway station to the West and Guildford Cathedral to the North West. It is said that "the neighbourhood" embraces the residential areas to the South East, South West and West of the Premises. The Respondent submits that "the vicinity" is within a radius of 500-750m of the Premises.

108. **Test Case 11: Conclusion.** These Premises are in a built -up area in the centre of a smallish city. The "neighbourhood" is bound to be comparatively compact. I find

that "the vicinity" is an area bounded on the West by the River Wey, to the South-East by Chantry Wood and Pewley Down, to the East by the A25, and to the North by Stoke Park.

109. **Test Case 12: Anne Veck Ltd: 33 St Clement's Street, Oxford, OX4 1AB.** These Premises are on the eastern side of Magdalen Bridge, which crosses the River Cherwell, which runs South West then South through Christchurch Meadow towards the Thames. St Clement's Street itself runs through the area on the East side of Oxford called St Clement's. The street becomes Headington Road to the East, leading up to Headington Hill. To the South East is Cowley, bordered on its western side by the Thames. The city of Oxford had a population of about 162,000 in 2021.

110. The Claimants rely on a number of institutions as creating a "neighbourhood", including the John Radcliffe Hospital to the North West, a school and supermarket to the East, Cowley Road shops and restaurants to the South East, the Bodleian Library to the North West, Exeter and Keble Colleges to the North West and Oxford railway station to the West, as well as the residential areas to the South, South East and North East of the Premises. The Respondent submits that "the vicinity" in this case is within a radius of 500 metres of the Premises.

111. **Test Case 12: Conclusion.** In this case, the "neighbourhood" area must be that of St Clement's. Thus I find that it is bounded on the North West and West by the Cherwell and Thames rivers, to the South and South East by Howard Street and Oriel, Lincoln and Jesus College playing fields; and to the East and North by South Park, Headington Hill Park and Church Meadow.

112. **Test Case 13: Helen Porter UK Ltd, 75 Stour Street, Canterbury CT1 2NR.** Stour Street is in the centre of Canterbury, which had a population of about 157,000 in 2021. To the West, South and East there is an arterial road (Pin Hill/Broad Street) which divides the centre of Canterbury, around the area of "the King's Mile", from the more suburban areas outside. To the North and North West is the Great Stour river and beyond that another arterial road and the B2248, which crosses Kingsmead Road in the North East at a roundabout.

113. The Claimants rely on "neighbourhood" institutions and facilities such as Kent and Canterbury Hospital in the South; Canterbury College in the South East, a supermarket in the North West and a leisure centre to the North of the Premises, as well as the residential areas to the South West, West and North West of the Premises. The

Respondent submits that "the vicinity" in this case is an area within a radius of 500m of the Premises.

114. **Test Case 13: Conclusion.** The Premises are in an area of Canterbury which is well defined, which must be "the neighbourhood" and thus "the vicinity". This definition is clear from the aerial photograph at page 684 of Bundle C. I find that "the vicinity" of the Premises in this case is an area that is bounded (going anti-clockwise) by Pin Hill, Broad Street, Tourtel Road, Kingsmead Road, the B2248, St Peter's Place and Rheims Way.

## I. Conclusions

115. The Parties agreed that they would make proposals as to the form of declarations that I should make once they had considered this Second Final Award. This they have done. However, it seems sensible that I should also summarise the conclusions made in this, my Second Final Award in this reference, which I do below.

116. Paragraph 10 of the Arbitration Agreement stipulates that the Respondent is responsible for the Arbitrator's fees and expenses. Paragraph 18 stipulates that any disputes as to the Claimants' "reasonable and proportionate legal costs", as referred to in paragraphs 11 and 12 of the Arbitration Agreement, will be resolved via the 4 New Square Costs ADR Procedure. I therefore have no jurisdiction to consider such costs issues. Therefore, there are no further outstanding matters for me to consider under this reference.

117. In summary I conclude:

(1) On the correct construction of the words "an emergency likely to endanger life or property in the vicinity of the Premises" in the Public Emergency Extension of the Salon Gold policy wording a Claimant has to prove that there was "an emergency" at the relevant time. However, that "emergency" does not have to be "in the vicinity of the Premises". The "emergency" can be widespread or national. The "emergency" has only to be one that is "likely to endanger life or property in the vicinity of the Premises".

(2) I am not bound to follow the construction of the relevant RSA 2.1 and 2.2 wording given by the Divisional Court in the *FCA Test Case (DC).*

(3) In the context of the Wording "likely" means that there is a "real possibility" of the "emergency" endangering life [or property] "in the vicinity of the Premises". It does not mean that "it is more probable than not" that the "emergency" will "endanger life [or property] in the vicinity of the Premises".

(4) For present purposes "the emergency", meaning the Covid 19 emergency, began no later than 12 March 2020.

(5) In the context of the Wording, "the vicinity" cannot be construed to mean either the UK as a whole, or any of the four nations that make up the UK.

(6) In general, "the vicinity" in the Wording means the "neighbourhood" surrounding the relevant Premises. How this principle is applied to individual Premises depends upon their precise location.

(7) What constitutes "the vicinity of the Premises" in the 13 Test Cases is as set out in paragraphs 79 to 114 above.

**J. Specific Declarations**

118. IT IS DECLARED THAT:

(1) On the correct construction of the Public Emergency Extension:

(a) There is no requirement that the relevant emergency be in the vicinity of the Premises. The emergency may be wholly or partly outside the vicinity of the Premises, provided only that it is "*likely to endanger life or property in the vicinity of the Premises*".

(b) In the phrase "*likely to endanger life or property*", "*likely to*" means a real possibility. It does not mean more probable than not.

(2) There was an emergency "likely to endanger life in the vicinity" of all Premises in the UK by no later than 12 March 2020.

(3) The actions or advice set out in paragraph 11 of the Statement of Case (save for the UK Government's guidance on social distancing published on 4 March 2020) were each actions or advice of a government for the purposes of the Public Emergency Extension, and were each capable of preventing or hindering access to or use of Premises.

This Second Final Award is made on 31 January 2024.

Sir Richard Aikens, Sole Arbitrator