THE HIGH COURT

COMMERCIAL

[2021] IEHC 489

[2021 No. 2204 P.]

BETWEEN

CHARWIN LIMITED T/A CHARLIE'S BAR

PLAINTIFF

AND

ZAVAROVALNICA SAVA INSURANCE COMPANY D.D.

DEFENDANT

JUDGMENT of Mr. Justice David Barniville delivered on the 14th day of July, 2021

Index

1. Introduction

1. This judgment determines an application made by the defendant insurer in proceedings commenced by the plaintiff in which the plaintiff seeks various declarations and damages against the defendant under an insurance policy arising from the closure of the plaintiff's public house in Loughrea, Co. Galway in March, 2020 as a result of the outbreak of SARS-CoV-2 ("COVID-19") in the State. The defendant has applied for orders under Article 8(1) of the UNCITRAL Model Law (the "Model Law") referring the parties to arbitration and staying the proceedings.

2. While several sets of proceedings involving insurance claims arising from the COVID-19 pandemic have been commenced and have been entered in the Commercial List, a number of which have already been heard and determined, and while, in some cases, the parties have agreed that some or all of the matters in issue be referred to arbitration and the proceedings stayed, this is the first case in which the court has had to resolve a disputed application to refer the parties to arbitration and to stay the proceedings on foot of a clause contained in the relevant insurance policy in these COVID-19 related claims.

3. The defendant's application was opposed by the plaintiff on various grounds. The first and fundamental ground of opposition was that the plaintiff contended that the dispute between the parties was not arbitrable on the grounds that it gave rise to fundamental issues of public policy which were not capable of being determined at arbitration. Subject to that fundamental contention, the plaintiff contended that, on a proper interpretation of the provisions of the relevant clause in the policy, a part, at least, of the case pleaded against the defendant did not fall within the scope of the clause and that, as a consequence, if the court were disposed to referring the parties to arbitration and staying the proceedings, it should

only do so in respect of that part of its case which the court was satisfied came within the scope of the clause and should refuse to do so in respect of the balance of its case.

2. Summary of Decision

4. For reasons which I explain in detail in this judgment, I have found against the plaintiff on its fundamental point that the dispute between the plaintiff and the defendant is not arbitrable and that the court should refuse the defendant's application on that basis. I am satisfied that the dispute is clearly arbitrable and that there is no reason to conclude otherwise on the grounds of public policy.

5. As regards the scope of the arbitration clause in the policy, I have concluded that that part of the plaintiff's case which concerns the interpretation of the clause and the plaintiff's claimed entitlement to an indemnity under the policy is clearly covered by the terms of the clause. As a consequence, I have concluded that I am bound by Article 8(1) of the Model Law to refer the parties to arbitration in respect of that part of the plaintiff's case. However, I have concluded that, having considered and applied the relevant principles of interpretation applicable to contracts in general, to arbitration agreements and to policies of insurance, that part of the plaintiff's case which seeks damages as against the defendant pursuant to s. 44 of the Central Bank (Supervision and Enforcement) Act, 2013 (the "2013 Act") for the alleged breach by the defendant of certain alleged regulatory obligations does not fall within the scope of the clause. In those circumstances, I refuse the defendant's application to refer the parties to arbitration in respect of that part of the plaintiff's case which will, therefore, remain to be determined by the court in these proceedings.

3. The Parties

6. The plaintiff is a limited liability company which is the owner and operator of a public house called *Charlie's Bar* in Loughrea, County Galway. In its statement of claim, the plaintiff pleads that it employs seventeen people on a full-time basis and fourteen people on a

part-time basis. The plaintiff's business has been severely affected by the outbreak of COVID-19 in Ireland and the significant restrictions imposed on public houses in the period since 15th March, 2020.

7. The defendant is an insurance company which is incorporated in Slovenia. It is regulated by the insurance supervision agency of Slovenia. The defendant carries on business within the State subject to the conduct of business rules of the Central Bank of Ireland (the "CBI"). In its statement of claim, the plaintiff contends that the defendant is subject to certain regulatory obligations including those contained in the European Union (Insurance Distribution) Regulations, 2018 (SI No. 229 of 2018) (the "Insurance Distribution Regulations") and the CBI's Consumer Protection Code, 2012 (the "CPC") which was drawn up by the CBI under s. 117 of the Central Bank Act, 1989. The defendant appointed a managing general agent in Ireland, Frost Insurances Ltd ("Frost"), an Irish authorised insurance intermediary, to provide certain services on its behalf to Irish customers including underwriting and claims handling.

4. The Policy

8. The defendant, through Frost, its managing general agent in Ireland, issued a policy of insurance to the plaintiff in respect of the period from 10th December, 2019 to 9th December, 2020. The policy was entitled "Strata Commercial Insurance" and comprised a schedule and a policy document (referred to for convenience in this judgment as the "policy"). The total premium in respect of the policy for the relevant period was €4,998.92. In its statement of claim, the plaintiff contends that the defendant made certain material revisions to the policy for the subsequent period, from 10th December, 2020 to 9th December, 2021. However, any such alleged material revisions to the policy do not appear to be relevant to the present application. The plaintiff claims that under the policy the defendant provided cover in respect

of business interruption in the total sum of €175,000.00 and in respect of "loss of licence" in the sum of €100,000.

5. Background to the Defendant's Article 8(1) Application

9. Following the outbreak of COVID-19 in Ireland in March, 2020, the plaintiff, as with all similar businesses and other businesses in the hospitality sector, was forced to close its public house for several months and thereafter was subject to severe restrictions on its operations. The plaintiff, through its insurance brokers, first notified a potential claim under the policy to Frost on behalf of the defendant on 23rd April, 2020. The plaintiff's brokers were informed that there was no cover under the policies written by the defendant for closure due to COVID-19, on 29th April, 2020. However, it appears to be common case between the parties that the first formal refusal of the plaintiff's claim under the policy came on 12th June, 2020 in a letter from Sedgwick to the plaintiff. Nothing turns on the date of this refusal for the purposes of the present application.

10. Extensive correspondence was exchanged between the plaintiff's solicitors, McCann FitzGerald, and Dundon Callanan, who were the solicitors originally acting for the defendant and Frost in relation to the plaintiff's claim under the policy and in relation to the defendant's rejection of that claim. I am not concerned with the relative merits of the parties' respective contentions for the purposes of the present application. However, it is relevant to note that, at a relatively early stage, the plaintiff's solicitors were raising the possibility that its case against the defendant ought to be treated as a "test case" for the purposes of the CBI's "COVID-19 and Business Interruption Insurance Supervisory Framework" (the "Supervisory Framework") and the defendant was disputing that assertion as well as raising the fact that there was an arbitration clause in the policy on which the defendant would be relying. Matheson Solicitors commenced corresponding on behalf of the defendant in December, 2020. It too disputed the plaintiff's assertion that these proceedings should be treated as a

"test case" under the CBI's Supervisory Framework and confirmed that the defendant would be relying on the arbitration clause in the policy in the event that proceedings were issued and would seek a stay of any such proceedings. After a gap of a number of months, McCann FitzGerald wrote to Matheson again raising the suitability of the proceedings as a "test case" under the Supervisory Framework and contended that the proceedings were not appropriate for arbitration as they ought to be treated as a "test case" before the courts. Matheson continued to dispute that assertion on behalf of the defendant.

11. In the meantime, proceedings were commenced by another plaintiff (Coachhouse Catering Ltd t/a "The Old Imperial Hotel") against Frost and the defendant on 23rd March, 2021 (the "Coachhouse Catering proceedings"). Applications were brought by the defendant and by Frost in the Coachhouse Catering proceedings for orders under Article 8(1) of the Model Law referring the parties in those proceedings to arbitration. It appears that the policy of insurance at issue in that case is in the same or substantially the same terms as the policy at issue in the present case. The parties in the Coachhouse Catering proceedings reached an agreement that those proceedings could be treated as a "test case" for the purposes of the Supervisory Framework. The defendant's Article 8(1) application in those proceedings was withdrawn and Frost's application was adjourned generally. Directions were given for a modular trial of the Coachhouse Catering proceedings on 18th June, 2021 (after the defendant's application in the present case was heard and judgment reserved). The plaintiff was critical of the defendant's agreement that the Coachhouse Catering proceedings be treated as a "test case" under the Supervisory Framework and relied on the apparent inconsistency on the part of the defendant in agreeing to treat that case but not the present case as a "test case". I will return to that issue later in the judgment but note at this point that, as was fairly acknowledged by the plaintiff, it is a matter for the parties to agree that a case is

a "test case" under the Supervisory Framework and the court cannot compel the parties to so agree.

12. Shortly after the Coachhouse Catering proceedings were commenced, the plaintiff commenced these proceedings by issuing a plenary summons on 1st April, 2021. A conditional appearance was entered on behalf of the defendant on 8th April, 2021. The proceedings were entered in the Commercial List on the plaintiff's application on 26th April, 2021. Directions were made by the court in agreed terms which made provision for the defendant to bring this application under Article 8(1) of the Model Law.

13. A statement of claim was delivered by the plaintiff on 18th May, 2021. I will return shortly to consider the causes of action pleaded in the statement of claim.

6. The Defendant's Article 8(1) Application

14. The defendant issued its application under Article 8(1) of the Model Law on 30th April, 2021. That application was grounded on an affidavit sworn by April McClements of Matheson. A replying affidavit was sworn by Brian Winters on behalf of the plaintiff.

15. In seeking an order under Article 8(1) of the Model Law referring the parties to arbitration and staying the proceedings, the defendant relies on the following clause contained in the policy under the heading "*General Conditions, Clauses and Warranties, Endorsements applicable to all sections*":-

> *"**Arbitration***
>
> *Any dispute between the Insured and **the Company** regarding **the Company's** liability in respect of a claim or the amount to be paid shall in default of agreement be referred within twelve months of the dispute arising to an Arbitrator appointed jointly by the Insured and **the Company** in agreement or failing agreement appointed by the President for the time being of the Incorporated Law Society of Ireland and the decision of such Arbitrator shall be final and binding on both parties. If the dispute*

has not been referred to arbitration within the aforesaid twelve months' period, then the claim shall be deemed to have been abandoned and not recoverable thereafter."

16. I will shortly turn to the applicable legal principles and to the grounds on which the plaintiff contends that the court should not make an order under Article 8(1) and should not refer the parties to arbitration or stay the proceedings by reason of that clause.

7. The Potential Time Bar Issue

17. In further correspondence exchanged between the parties, which was not referred to or exhibited in the affidavits, an issue arose as to whether, in the event that the court were to refer the parties to arbitration on foot of the defendant's application, the defendant would maintain that the plaintiff's claim in the arbitration was barred by the effluxion of time as not having been referred to arbitration within twelve months of the dispute arising.

18. McCann FitzGerald wrote to Matheson on 18th May, 2021 referring to the provisions of the arbitration clause and requesting the defendant to acknowledge and undertake that, should the parties be referred to arbitration and the proceedings stayed, the defendant would not maintain or contend that the plaintiff's claim in any subsequent arbitration is or may be barred by the effluxion of time and that the arbitrator in any such arbitration would proceed on the basis that the arbitration was commenced within time. Matheson did not reply to that letter providing the confirmation requested and a further letter was sent by McCann FitzGerald on 28th May, 2021. Matheson replied on 1st June, 2021 in the following terms:-

"We note that you are concerned that your client has abandoned any potential claim under the policy and that same is not recoverable by reason of your client's failure to refer the dispute to arbitration within twelve months of a dispute arising. We are not in a position to agree that the arbitration is to be treated as though it had been commenced on 1 April 2021 and our client fully reserves all of its rights."

19. In that correspondence, it appeared that it was at least possible, therefore, that the defendant would maintain at any arbitration, in the event that the parties were referred to arbitration and the proceedings stayed, that the plaintiff's claim at the arbitration was time barred by reason of the provisions of the clause. Consequently, in its written submissions dated 4th June, 2021 in response to the defendant's written submissions dated 21st May, 2021, the plaintiff advanced various submissions designed to address the possibility that the defendant might contend that the plaintiff's claim in the arbitration was time barred by reason of the provisions of the clause.

20. However, at the hearing of the defendant's application and in the course of opening that application, the defendant's counsel, for the first time, informed the plaintiff, and the court, that the defendant had instructed him to confirm that, if the matter was referred to arbitration on foot of the defendant's application, the defendant would not take a time bar point at the arbitration. It was, therefore, unequivocally confirmed on behalf of the defendant that, in the event that the court were to refer the parties to arbitration on foot of the arbitration clause contained in the policy, the defendant would not maintain that the plaintiff's claim was time barred.

21. As a result, it was not necessary for the plaintiff to pursue some of the arguments raised in its written submissions which were solely directed to the possibility that the defendant might, having sought to refer the parties to arbitration, then raise a time bar point at the arbitration. I will, therefore, refrain from any comment on whether or not it would be open to a party in a similar position to the defendant to adopt such a course of action or whether it ought to be prevented from doing so and will leave over any consideration of that issue to a case in which it may be necessary to address it. Fortunately, it does not now arise for consideration in this case.

8. Legal Principles Applicable to the Defendant's Article 8(1) Application

22. The defendant seeks an order under Article 8(1) of the Model Law referring the parties to the proceedings to arbitration and staying the proceedings.

23. The Model Law has force of law in the State and applies to domestic arbitrations as well as to international commercial arbitrations, where the seat in the arbitration is Ireland (s. 6 of the Arbitration Act, 2010 (the "2010 Act")).

24. Article 8(1) provides as follows:-

> *"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."*

25. The approach which the court must take in determining an application for an order under Article 8(1) of the Model Law is well established. It was most recently outlined in a judgment which I gave in *Narooma Ltd v. Health Service Executive* [2020] IEHC 315 ("*Narooma*"). At paras. 60 and 61 of my judgment in *Narooma,* I referred to the summary of the required approach which I had set out in *Ocean Point Development Company Ltd (In Receivership) v. Patterson Bannon Architects Ltd & ors* [2019] IEHC 311 ("*Ocean Point*") which I repeated in a number of subsequent judgments including *XPL Engineering Ltd v. K&J Townmore Construction Ltd* [2019] IEHC 665 ("*XPL*") (at para. 34) and *K&J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2019] IEHC 666 ("*Townmore (No. 2)*") (at para. 43).

26. For ease of reference, I will reproduce here the summary of the required approach (which the parties are agreed is the approach which I should adopt in determining the defendant's Article 8(1) application in the present case). At para. 26 of my judgment in *Ocean Point,* I summarised the required approach as follows:-

> *"In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a 'matter which is the subject of an arbitration agreement'. Third, one of the parties must request the reference to arbitration 'not later than when submitting his first statement on the substance of the dispute'. If those requirements are satisfied, the court must refer the parties to arbitration (the word 'shall' is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) 'null and void' or (ii) 'inoperative' or (iii) 'incapable of being performed'. The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them (see Sterimed Technologies International v. Schivo Precision Ltd [2017] IEHC 35 (per McGovern J at para. 12, pp. 4-5))."*

27. It is also well-established that, where the requirements of Article 8(1) are satisfied, the court has a mandatory obligation to make the reference to arbitration and does not merely have a discretion as to whether to do so or not: *BAM Building Ltd v. UCD Property Development Co Ltd* [2016] IEHC 582 ("*BAM*") (McGovern J.); *K&J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770 ("*Townmore (No. 1)*"), *Ocean Point*, *XPL*, *Townmore (No. 2)* and *Narooma* (all Barniville J.).

28. While the parties were agreed that the court must adopt that approach in determining the present application, a fundamental objection raised by the plaintiff to the defendant's application is that the plaintiff maintains that, for public policy reasons, the dispute between the parties is not arbitrable and should, therefore, not be referred to arbitration. I will consider shortly how a contention of that kind must be approached by the court as it has not yet been the subject of detailed consideration by the courts in this jurisdiction.

29. As the summary of the required approach set out at para. 26 earlier indicates, the defendant bears the initial onus of establishing certain matters for the purposes of its Article 8(1) application. In the event that the defendant establishes those matters, the onus then shifts to the plaintiff to establish the existence of one or more of the disapplying factors set out in Article 8(1).

30. The defendant must establish the first three elements in Article 8(1). First, it must establish that an action has been brought before the court in respect of a dispute between the parties. The defendant has clearly established that element here. Second, the defendant must establish that the action concerns a *"matter which is the subject of an arbitration agreement"*. There is a dispute between the parties as to whether some or all of the causes of action pleaded by the plaintiff in the statement of claim fall within the scope of the arbitration clause contained in the policy. The defendant bears the onus of establishing that they do. Third, the defendant must establish that it has requested the reference to arbitration *"not later than when submitting* [its] *first statement on the substance of the dispute"*. The defendant bears the onus of establishing that it has complied with this element of the test. However, since the defendant brought its application before taking any step in the proceedings other than entering a conditional appearance and before setting out its position on the substance of the dispute between the parties in any formal document provided to the court in the proceedings, there is no doubt but that the defendant has established its compliance with this element of the test. I considered some aspects of this element of the test in *XPL* and again in *Narooma*. As I indicated at para. 137 of my judgment in *Narooma*, the statement which is said to constitute the *"first statement on the substance of the dispute"* must be submitted by the party who is alleged to have made that statement to the court as part of some formal document, such as a pleading or affidavit. Even then, as I indicated in *XPL*, not all affidavits or pleadings will amount to a *"first statement on the substance of the dispute"* so as to

preclude an application for a reference to be made. The relevant pleading or affidavit must actually contain a statement on the *"substance of the dispute"* and not merely refer to the fact of the dispute between the parties. In any event, once the defendant confirmed to the court that it would not be making a time bar point in any arbitration, the plaintiff did not press its initial contention that the defendant had failed to comply with this element of the test. In my view, the defendant has clearly established such compliance.

31. In the event that the defendant establishes compliance with these three elements of Article 8(1), the court must make the requested order under Article 8(1) of the Model Law referring the parties to arbitration unless the plaintiff establishes the existence of one or more of the three disapplying factors, namely, that the arbitration agreement is (i) *"null and void"* or (ii) *"inoperative"* or (iii) *"incapable of being performed"*. The plaintiff maintains that the dispute between the parties is not arbitrable by reason of certain claimed public policy considerations on the basis of which it contends the arbitration clause in the policy is *"null and void, inoperative or incapable of being performed"* in the context of the present case.

32. While the principal and fundamental objection of the plaintiff to the defendant's application is the alleged non-arbitrability of the dispute by reason of the claimed public policy considerations, it seems to me that I should first consider whether the defendant has established that the causes of action pleaded by the plaintiff in the statement of claim fall within the scope of the arbitration clause contained in the policy. If they do not, then it is unnecessary to consider the question of the alleged non-arbitrability of the dispute. If some or all of the pleaded causes of action do fall within the scope of the arbitration clause, then it will be necessary to consider the issue of the non-arbitrability or otherwise of the dispute.

9. Scope of Arbitration Agreement

(a) Introduction

33. The defendant must establish (a) that there is an arbitration agreement between the parties and (b) that the causes of action pleaded by the plaintiff fall within the scope of that agreement. There is no dispute between the parties as to the existence of an arbitration agreement. The arbitration clause contained in the policy clearly satisfies the requirements of an *"arbitration agreement"* for the purposes of the Model Law. There is a dispute between the parties on the issue as to whether the causes of action pleaded by the plaintiff in the statement of claim fall within the scope of the arbitration clause. In order to resolve that dispute, I will first examine the causes of action pleaded by the plaintiff in the statement of claim. I will then consider the terms of the arbitration clause and, in that context, will consider the legal principles applicable to the proper construction or interpretation of that clause. I will then set out my conclusions on this issue. I should, however, reiterate that, in the event that I conclude that some or all of the causes of action pleaded by the plaintiff fall within the scope of the arbitration clause, I will have to proceed to consider the fundamental objection raised by the plaintiff based on the alleged non-arbitrability of the dispute between the parties due to the public policy considerations relied upon by the plaintiff.

(b) <u>The Pleaded Causes of Action</u>

34. The plaintiff delivered a statement of claim on 18th May, 2021. A review of the statement of claim discloses that the plaintiff is relying on two separate causes of action. The first consists of two components, (a) a claim for an indemnity in respect of business interruption pursuant to the provisions of s. 2 of the policy, and (b) a claim for an indemnity for "loss of licence" pursuant to the provisions of s. 1 of the policy. The plaintiff claims that the defendant's refusal to provide an indemnity in respect of business interruption and "loss of licence" pursuant to the provisions of the policy amount to a breach of contract. The plaintiff claims that it is entitled to these indemnities under the policy on a proper interpretation of the policy. It pleads that, in refusing to provide the indemnities claimed by

the plaintiff under the policy, the defendant has approached the interpretation of the policy in a manner which is contrary to the defendant's binding regulatory obligations and that, in so doing, the defendant has invited an interpretation of the policy which would be illegal and/or contrary to public policy (see, for example, paras. 22 and 24 of the statement of claim). In support of this pleaded cause of action, therefore, the plaintiff relies on what it says is the proper and lawful interpretation of the relevant provisions of the policy. There is a dispute between the parties on the interpretation of those provisions. The plaintiff seeks various declarations that it is entitled to an indemnity under the provisions of the policy and an order directing the defendant to pay to the plaintiff the sums which it asserts are due on foot of the relevant provisions of the policy (paras. 1 to 8 of the prayer for relief).

35. The plaintiff pleads a second and separate cause of action in the statement of claim. Having pleaded the regulatory obligations to which the plaintiff alleges the defendant is subject, including the Insurance Distribution Regulations and the CPC (para. 23 of the statement of claim), the plaintiff pleads (at para. 25) that, without prejudice to the position that it is entitled to an indemnity under the policy and in the event that a court determines that the plaintiff is not entitled to the indemnification claimed, the plaintiff pleads that the defendant has breached the alleged regulatory obligations and has caused actionable loss and damage to the plaintiff in various respects which are pleaded at paras. 25(a) to (i). Then, at para. 26 of the statement of claim, it is pleaded that in the event that the court determines that the plaintiff is not entitled to the indemnification claimed from the defendant, the plaintiff is entitled to damages as against the defendant pursuant (*inter alia*) to s. 44 of the 2013 Act. It is clear that the cause of action pleaded at paras. 25 and 26 of the statement of claim, being a claim for damages by reason of the alleged breach by the defendant of the alleged regulatory obligations pleaded by the plaintiff for which it is contended the plaintiff is entitled to damages pursuant to s. 44 of the 2013 Act, is a separate and distinct cause of action to the

plaintiff's claim for an indemnity under the various provisions of the policy. It is relied on in circumstances where, contrary to the plaintiff's principal case, it is decided that the plaintiff is not entitled to an indemnity under the policy. The relief sought by the plaintiff in the statement of claim in respect of this cause of action is set out at para. 9 of the prayer for relief where the plaintiff claims *"damages for breach of duty, including breach of statutory duty, including inter alia for breach of s. 44 of the Central Bank (Supervision and Enforcement) Act 2013"*.

36. I agree, therefore, with the defendant that the statement of claim on its face discloses two separate and distinct causes of action. The first being a claim for an indemnity under the provisions of the policy and the second being a separate and an alternative claim in the event that the plaintiff fails in its claim for an indemnity under the policy, for breach of duty including breach of statutory duty for which it is alleged the plaintiff is entitled to damages as against the defendant pursuant to s. 44 of the 2013 Act. It is appropriate to record that the plaintiff did not really dispute this analysis of the claims advanced in the statement of claim.

37. Having analysed the causes of action pleaded in the statement of claim, it is next appropriate to consider the question as to whether the defendant has demonstrated that the arbitration clause should be interpreted so as to apply to one or both of those causes of action.

(c) <u>The Interpretation of the Arbitration Clause: Legal Principles</u>

38. I have set out earlier the full terms of the arbitration clause contained in the policy. The scope of that clause is determined by the words contained in the first two lines of the clause which, for convenience, I set out again below:-

> *"Any dispute between the Insured and* ***the Company*** *regarding* ***the Company's*** *liability in respect of a claim or the amount to be paid shall in default of agreement be referred… to an Arbitrator…"*

39. The defendant bears the onus of establishing that those words, as properly interpreted in accordance with the relevant legal principles, are wide enough to encompass one or both of the causes of action pleaded by the plaintiff in the statement of claim. In order to determine that question, it is necessary to identify what those legal principles are.

40. In *Narooma*, I referred to the general principles applicable to contractual interpretation as derived from cases such as *Investor Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274, *ICDL v. European Driving Licence Foundation Ltd* [2012] 3 IR 327 and *Law Society of Ireland v. Motor Insurer's Bureau of Ireland* [2017] IESC 31 ("*MIBI*"), as well as *Rohan Construction Ltd v. Insurance Corporation of Ireland Plc* [1988] ILRM 373 and *Kramer v. Arnold* [1997] 3 IR 43 (see paras. 85 to 90 of the judgment in *Narooma*).

41. In *MIBI*, in the course of his dissenting judgment, Clarke J. referred to the *"modern approach"* to the construction of contracts as being the *"text in context"* method of interpretation. At para. 10.4 of his judgment, Clarke J. stated:-

> *"It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is*

in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence."

As noted at para. 90 of *Narooma*, although Clarke J. was in the dissent in *MIBI*, his observations did not differ substantially from those made by O'Donnell J. in the lead judgment on the principles applicable to contractual interpretation.

42. In his comprehensive and masterful judgment in *Brushfield Ltd t/a The Clarence Hotel v. Arachas Corporate Broker's Ltd and AXA Insurance DAC* [2021] IEHC 263 ("*Brushfield*"), a case concerning the interpretation of certain clauses in the business interruption section of an insurance policy and their application to cover losses caused by COVID-19 closures and restrictions, McDonald J. very helpfully summarised the legal principles applicable to the interpretation of insurance policies, as a particular species of contract, by reference to the leading cases to which I have just referred. At para. 110 of his judgment, McDonald J. summarised the principles which emerge from those cases as follows:-

"(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;

(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having

all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;

(c) *The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*

(d) *For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;*

(e) *A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As Lord Hoffmann explained in the Investors Compensation Scheme case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context. That said, in the present case, no argument was made about the relevant legal or regulatory context against which the policy of insurance was put in place;*

(f) *While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the*

parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;

(g) *As O'Donnell J. made clear in the MIBI case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-*

> *'It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.';*

(h) *In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the contra proferentem rule. This principle was affirmed by the Supreme Court in Analog Devices v. Zurich Insurance Company and in Emo Oil Ltd v. Sun Alliance & London Insurance plc. In the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, 'usually be an approach of last resort' albeit that he also stated that it may be 'more readily resorted to in respect of routine standard form commercial insurance policies'. Later, in Danske Bank v. McFadden [2010] IEHC 116, Clarke J. (as he then was) explained the contra proferentem principle as follows, at paras. 4.1 to 4.2:-*

> *'4.1 The… contra proferentem rule is… only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself*

unable to reach a sure conclusion on the construction of the provision in question…

4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: The Law of Insurance Contracts, 5th Ed.,… at para. 15-5:-

> *'In the past some courts were quick to find ambiguity in policies of insurance in order to apply the canon of construction contra proferentem, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentem ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First, there must be genuine ambiguity.'";*

(i) Where an insurer seeks to rely upon an exemption clause or exclusion clause in a policy, the insurer will bear the onus of establishing that the relevant exclusionary exemption applies. This was treated by the Supreme Court in Analog Devices as a separate principle to the contra

proferentem rule. At pp. 283-284, Geoghegan J. explained the position as follows:-

> *'The second important general principle in relation to exclusions is that the onus is on the insurer to establish the application of the exclusion or exemption. Counsel for the plaintiffs cite in their written submissions… a passage from the judgment of Hanna J. in General Omnibus Co Ltd v. London General Insurance Co Ltd [1936] I.R. 596 which is in the following terms, at p. 598:-*
>
> > *'The first defence depends upon the interpretation and construction of the exclusions or exceptions as stated in exemption (e). The policy starts by giving an indemnity in general terms and then imposing exceptions. The law is that the Insurance Company must bring their case clearly and unambiguously within the exception under which they claim benefit, and if there is any ambiguity, it must be given against them on the principle of contra proferentes.'*
>
> *On appeal the Supreme Court took a different view on the interpretation of the policy but it was not suggested that the general principle stated by Hanna J. was incorrect. In the same written submissions there is a passage from the standard work Ivamy, General Principles of Insurance Law (6th ed.) which is worth quoting… at p. 286:-*

> *'Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness. It is the duty of the insurers to accept their liability in clear and unambiguous terms.'*

(j) ..."

43. Allied to these general principles, are the further legal principles applicable to the interpretation of arbitration agreements as a species of contract, which I discussed in a number of previous arbitration related judgments including *Townmore (No. 1)*, *Townmore (No. 2)* and *XPL*. I summarised them again at para. 94 of the judgment in *Narooma* as follows:-

> *"(1) In construing an arbitration agreement, the court must give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration agreement.*
>
> *(2) The construction of an arbitration agreement should start from an assumption or presumption that the parties are likely to have intended any dispute arising out of the relationship which they entered into to be decided by the same body or tribunal. In other words, there is a presumption that they intended a 'one-stop' method of adjudication for their disputes.*
>
> *(3) The arbitration agreement should be construed in accordance with that assumption or presumption unless the terms of the agreement make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of the arbitrator.*

(4) A liberal or broad construction of an arbitration agreement promotes legal certainty and gives effect to the presumption that the parties intended a 'one-stop' method of adjudication for the determination of all disputes.

(5) The court should construe the words 'arising under' a contract and the words 'arising out of a contract when used in an arbitration agreement broadly or liberally so as to give effect to the presumption of a 'one-stop' adjudication and the former words should not be given a narrower meaning than the latter words. Fine or 'fussy' distinctions between the two phrases are generally not appropriate."

44. I should also refer in this context to the following *dicta* of Lord Hoffman in the House of Lords in *Fiona Trust & Holding Corporation & ors v. Privalov & ors* [2007] 4 All ER 951 ("*Fiona Trust*") which has been cited with approval and applied by the High Court in a number of cases (including *Townmore (No. 1)* and *Narooma*). There, Lord Hoffman stated:-

"Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language."

(at para. 5)

45. I also draw attention to the *dictum* of McGovern J. in the High Court in, where, having referred to the *dicta* of Lord Hoffman in *Fiona Trust* which I have just reproduced, he stated:-

"If there are two possible constructions of an arbitration clause, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other." (at para. 25)

46. While the particular principles applicable to the interpretation of arbitration agreements to which I have just referred are clearly of relevance in the context of the interpretation of the arbitration clause in this case, it must also be borne in mind that the arbitration clause is contained in an insurance policy and that, as a consequence, the principles applicable to the interpretation of such policies (as comprehensively summarised by McDonald J. in *Brushfield*) are also relevant. Those principles include the *"contra proferentem rule"* where, in the case of a standard form insurance policy produced by an insurer, any ambiguity in the language of the policy will be construed against the insurer. I agree with the submission made on behalf of the plaintiff in this case that, in the case of the interpretation of an arbitration clause in an insurance policy, it is necessary, when interpreting the arbitration clause in the policy at issue in this case, to bear in mind that, in the case of an insurance policy, the terms of the clause will not have been directly negotiated by the parties. While that does not mean that those principles are not applicable in the case of the interpretation of an arbitration clause in an insurance policy, they may have less force than in the case of a freely negotiated commercial agreement in which the parties negotiate and agree the terms of the arbitration clause. To that extent also, therefore, I agree with the plaintiff's submission that there may be scope for a modification of the general principles applicable to the interpretation of arbitration agreements including those summarised at (4) and (5) above where the arbitration agreement is contained in an insurance policy.

(d) Application of the Legal Principles to the Arbitration Clause

47. Bearing in mind those principles and those observations, I will now consider whether the arbitration clause should properly be construed as covering one or both of the causes of

action pleaded in the statement of claim, namely, the indemnity claim and the claim for damages in reliance on s. 44 of the 2013 Act.

(1) *The Indemnity Claim*

48. As regards the plaintiff's claim for an indemnity in respect of alleged business interruption and an indemnity in respect of alleged "loss of licence" on the basis of what the plaintiff claims is the correct interpretation of the relevant policy provisions, the defendant contends that this part of the plaintiff's claim clearly comes within the scope of the arbitration clause. In response, the plaintiff does not really dispute that, on its proper interpretation, the arbitration covers this cause of action, although it maintains the fundamental point that the dispute in its entirety is not arbitrable by reason of the claimed public policy considerations which it has advanced.

49. I have no doubt but that the plaintiff's claim for an indemnity in respect of alleged business interruption and alleged "loss of licence" falls within the scope of the arbitration clause. The dispute as to the plaintiff's entitlement to those indemnities does, in my view, fall squarely within the terms of the arbitration clause. It is a dispute between the plaintiff and the defendant *"regarding"* the defendant's *"liability in respect of a claim or the amount to be paid"*. A reasonable person having all the background knowledge which would reasonably have been available to the parties at the time the policy was entered into would, in my view, clearly understand that a dispute as to the plaintiff's entitlement to an indemnity under the policy on the grounds relied on would be covered by the terms of the arbitration clause. There is no ambiguity in the words used. They clearly cover the indemnity claim.

(2) *The Regulatory Damages Claim*

50. I am, however, satisfied that the position is different in the case of the alternative cause of action relied upon by the plaintiff in the statement of claim, namely, its claim for damages for alleged breach by the defendant of the regulatory obligations pleaded by the

plaintiff. That is a separate and distinct claim to the plaintiff's claim to an indemnity based on the correct interpretation of the policy. It is a claim which only arises in the event that the plaintiff's claim to an indemnity fails.

51. The defendant contends that the words used are broad enough to cover the regulatory damages claim. It relies on the legal principles applicable to the interpretation of arbitration agreements summarised earlier and, in particular, on the presumption that the parties intended a *"one stop"* forum for the adjudication of their disputes and on the principle that a liberal or broad construction should be given to the terms of the clause so as to give effect to that presumption. It relies on a passage from Russell on Arbitration (24th Ed.) ("Russell") where the authors state:-

> *"**Disputes 'in connection with', 'in relation to', or 'regarding' a contract***
>
> *These words, which are frequently encountered and are to be given the same meaning, were at one time given a restricted interpretation, but are now well established as having a broad meaning. They have been held to include claims for rectification of a contract, as well as mistake and misrepresentation. They may also be sufficient to catch disputes arising under another contract related to the contract containing the arbitration clause."* (para. 2-103)

The defendant also relies on the judgment of Gross J. in the English Commercial Court in *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm) ("*ET Plus*").

52. The plaintiff submits that, having regard to the principles applicable to the interpretation of insurance policies and, in particular, having regard to the modern *"text in context"* approach to interpretation, the clause should not be interpreted as covering its regulatory damages claim.

53. The plaintiff contends that on its proper interpretation, in accordance with the various strands of the legal principles applicable, the clause does not cover the plaintiff's claim for damages under s. 44 of the 2013 Act by reason of the alleged breach by the defendant of the pleaded regulatory obligations. The plaintiff contends that the correct interpretation of the clause is that, subject to the plaintiff's overriding contention as to the non-arbitrability of the dispute between the parties, the clause applies to a dispute between the plaintiff and the defendant regarding the defendant's *"liability in respect of a claim"* or *"the amount to be paid"* and that the words used in their context are properly to be interpreted as applying to any dispute between the parties as to the defendant's liability to the plaintiff in respect of a claim for an indemnity under the policy or as to the amount to be paid in respect of such a claim under the policy. It contends that the words are not wide enough to cover the plaintiff's alternative cause of action. While the plaintiff does not dispute the application of the legal principles as set out earlier, it maintains that the proper application of those principles to the terms of the arbitration clause must lead to the conclusion that the alternative damages claim is not caught by the arbitration clause.

54. The plaintiff accepts that if the court agrees with that contention it may mean, subject to its case on the non-arbitrability of the dispute, that part of the dispute (concerning the interpretation of the policy and the plaintiff's entitlement to the various indemnities claimed) would be referred to arbitration and part of the dispute (the alternative claim for damages under s. 44 of the 2013 Act) would remain to be determined by the court. However, that outcome would be as a consequence of the proper interpretation of the clause and is an eventuality which sometimes does arise, as it did in *Kelly v. Lennon* [2009] 3 IR 794 ("*Kelly*"). The plaintiff contends that the judgment of Gross J. in *ET Plus* can be distinguished and that the result in that case turned on the particular terms of the clause at issue.

55. Contrary to the case made in the plaintiff's written submissions, the plaintiff does not contend that the two causes of action pleaded in the statement of claim are so inextricably bound that if, on the proper interpretation of the clause, one of those causes of action will fall to be determined by the court that that means that the other cause of action must also be determined by the court. A submission to that effect was contained in the plaintiff's written submissions because of its concern on the time bar issue. Having regard to the confirmation provided on behalf of the defendant that a time bar point would not be made at any arbitration between the parties, the plaintiff does not now make the case that the causes of action are so inextricably bound together that they must both be determined by the court on that basis.

56. I agree with the plaintiff's contention that, properly interpreted in accordance with the different strands of the applicable legal principles set out earlier, the arbitration clause in the policy does not cover or apply to the plaintiff's cause of action for damages under s. 44 of the 2013 Act based on the alleged breach by the defendant of the regulatory obligations pleaded in the statement of claim. The dispute between the plaintiff and the defendant as to the defendant's liability to such damages does not, in my view, amount to a dispute between the plaintiff and the defendant *"regarding"* the defendant's *"liability in respect of a claim or the amount to be paid"* and the clause containing those words in the context of the policy as a whole would not be understood by a reasonable person having all the background knowledge which would have reasonably been available to the parties at the inception or renewal of the policy as covering such a claim.

57. It is undoubtedly the case that, in interpreting an arbitration clause, the court should start from an assumption or presumption that the parties intended a *"one stop"* forum for the adjudication of their disputes and that, if possible, the arbitration agreement should be construed to give effect to that presumption, unless the terms of the agreement require a different construction. However, in my view, the words used in the clause require that the

clause be interpreted so as to encompass the plaintiff's claim for an indemnity under the policy but not to encompass the plaintiff's claim for damages for alleged breach of certain regulatory obligations by the defendant.

58. The words used must be considered in the context of the policy as a whole. Where the clause speaks of a dispute *"regarding"* the defendant's *"liability in respect of a claim or the amount to be paid"*, it is necessary, first, to consider what is meant by the defendant's *"liability in respect of a claim"*. What sort of claim and what sort of liability is being referred to? In my view, the clause must be referring to the defendant's liability in respect of a claim for an indemnity under the policy.

59. While the word *"claim"* is not a defined term under the policy, the word is used on several occasions in the policy. Some examples will suffice. On p. 4 of the policy, there is a reference to the obligation on the part of the insured to provide updated information in relation to the risks as otherwise it might *"affect* [the] *policy and* [the insured's] *ability to claim under it"*. Here, the word *"claim"* is clearly being used to refer to a claim under the policy, in other words a claim for an indemnity or cover provided by the policy. Pages 9 and 10 of the policy contain the *"Claims Conditions"* which are stated to be applicable to all sections of the policy. Under the heading *"Action by Insured"*, it stated that the insured must *"on the happening of any event which could give rise to a claim under* [the] *Policy"* do certain things. It is also said that if the insured is *"unsure of any event which could give rise to a claim under* [the] *Policy"*, the insured must contact its broker or claims manager. The use of the word *"claim"* in this context is also clearly referable to a claim for an indemnity under the policy.

60. The word "*claim*" is also used in the policy to refer to claims against the insured, such as under the heading *"Control of Claims"* on p. 9 of the policy, where it said that the defendant is entitled to do certain things including to take over and conduct in the name of

the insured *"the defense or settlement of any claim and to prosecute at its own expense and for its own benefit any claim for indemnity or damages against any other person/s…"*. Here, the policy is first addressing a claim against the plaintiff which might in turn lead to a claim by the plaintiff for an indemnity under the policy as well as any claim for an indemnity which the defendant might wish to maintain against another person or entity. Later in the same part of the policy (at para. f), it is provided that the defendant is entitled to *"close a claim"* which is clearly a reference to a claim for an indemnity under the policy.

61. Viewed in the context of the policy as a whole and by reference to the words used in the arbitration clause, it seems to me to be very clear that the clause is referring to a dispute concerning the defendant's *"liability in respect of a claim"* under the policy. That is made even more clear by the following words *"or the amount to be paid"*. That can only be a reference to the amount to be paid under the policy.

62. I do not believe that those words used in the context in which they are used in the policy can reasonably be interpreted as referring to a dispute concerning the alleged liability of the defendant for damages in respect of alleged breaches of regulatory obligations. A claim for damages for breach of regulatory obligations is not *"regarding"* or concerning the defendant's *"liability in respect of a claim"* under the policy *"or the amount to be paid"* under the policy. It is something completely different and is advanced by the plaintiff as an alternative to its indemnity claim. While there may be an overlap in the evidence which the plaintiff may wish to adduce in respect of this cause of action with the evidence which it may wish to adduce in respect of its claim for an indemnity under the policy, they are separate and alternative claims or causes of action. One is regarding or concerning the defendant's liability in respect of a claim or the amount to be paid and the other is not.

63. While the general principles applicable to the interpretation of arbitration agreements, as most recently summarised in *Narooma*, include a presumption or assumption that the

parties intended a *"one stop"* forum for the adjudication of their disputes and while the court should generally give a liberal or broad construction to the words used in the arbitration agreement so as to give effect to that presumption, nonetheless the starting point in the construction of an arbitration agreement must be the words used by the parties in the relevant clause. Those words must be considered in the context in which they appear in the agreement. In the case of an arbitration clause contained in an insurance policy, while the general principles discussed earlier are applicable to the construction or interpretation of that clause, there is an additional element which may require to be considered and that is that in the event of any genuine ambiguity in the words used, the court should construe the clause *contra proferentem*, in other words against the insurer and in favour of the insured. That approach will only be appropriate where there is a genuine ambiguity in the words used. I do not believe that there is any ambiguity in the words used in the arbitration clause at issue in the policy here and I have not, therefore, found it necessary to construe the words used *contra proferentem*.

64. I am satisfied that the clause is very clear in terms of the scope of disputes falling within its scope. The plaintiff's claim for an indemnity for business interruption and for loss of licence based on its claimed interpretation of the relevant parts of the policy does, in my view, clearly fall within the scope of the arbitration clause. However, the plaintiff's claim for damages pursuant to s. 44 of the 2013 Act by reason of the alleged breach by the defendant of the regulatory obligations pleaded in the statement of claim does not, in my view, come within the scope of the clause. Irrespective of my conclusion on the non-arbitrability point (which I address next), this alternative cause of action will fall for determination by the courts and not by an arbitrator appointed pursuant to the arbitration clause.

65. I do not believe that the extract from ***Russell*** on which the defendant relies is of any assistance. In that passage, the authors were considering the meaning to be given to the words

"in connection with", *"in relation to"* and *"regarding"* a contract. While the authors state that those words *"are to be given the same meaning"* and should be given *"a broad meaning"*, and while that is consistent with the general principles applicable to the interpretation of arbitration agreements most recently summarised in *Narooma*, the starting point for the analysis must always be a consideration of the particular words used by the parties in the arbitration agreement (and in this case in the arbitration clause contained in the policy). It would not be correct simply to pluck from the words used one of the words or phrases referred to by ***Russell*** and, without more, conclude that those words should be given a broad meaning. In the case of the arbitration clause at issue here, while the word *"regarding"* is used, it is used in a particular context, namely, *"regarding the* [defendant's] *liability in respect of a claim or the amount to be paid…"*.

66. While I agree that generally words in arbitration agreements should be given a broad meaning, the words and the context in which they are used must be carefully considered first and should not be seen as subservient to any overall requirement to give a broad meaning to those words. This is particularly so in the case of a clause contained in an insurance policy. Therefore, while I fully agree with the sentiment expressed in the extract from ***Russell*** relied upon by the defendant, it does not seem to me that, in light of the particular words used in the arbitration clause at issue here, the court should give those words a different interpretation to the one at which I have arrived.

67. Nor do I believe that the judgment of Gross J. in *ET Plus* requires me to adopt a different interpretation. The clause at issue in that case provided that the parties agreed *"to submit any potential disputes regarding the performance or the interpretation of"* the contract at issue to arbitration. The defendants contended that the clause was in wide terms and that there was a presumption that the parties intended to refer all their disputes to a single forum for resolution. The claimants contended that the clause was a deliberately narrow

clause and was not to be equated with clauses expressly covering all claims *"connected with"* or *"arising out of"* the contract and that the parties had not chosen such wide wording. They contended that the clause could not be stretched to cover certain tortious claims advanced in the case.

68. In determining the true construction of the clause, Gross J. commenced with the words of the clause itself and noted the broad terms used, such as *"any potential disputes"*. He stated that, as a matter of language, the term *"regarding"* should be treated as equivalent to *"concerning"* the *"performance"* or *"interpretation"* of the contract. He concluded that, the scope of the clause did cover any potential disputes concerning the performance or non-performance or construction of the contract and that there was no warrant, as a matter of language, for excluding claims in tort provided that they were *"sufficiently connected to the performance or non-performance of the contract so as to satisfy the requirement contained in the word 'regarding'; i.e., the language of the clause extends to disputes going beyond the four corners of the contract"* (per Gross J. at para. 41). Gross J. concluded that there was no basis in the language used for concluding that the clause covered contractual claims regarding non-performance of the contract but not closely connected claims in tort relying on the same facts. He referred to the presumption in favour of *"one-stop adjudication"* and noted that the court should be slow to attribute to reasonable commercial parties an intention that there be two sets of proceedings between the same parties. He stated that that presumption and the context in which the clause appeared served to reinforce the view of the scope of the clause to which he was inclined to come on the basis of the language used, namely, that, as between the relevant parties, there should not be one set of proceedings for claims in contract regarding non-performance of the contract and a second set of proceedings for claims in tort regarding the non-performance of the contract (para. 42). Gross J. observed that one indication of the wide scope of the clause was that the clause extended to disputes

"regarding" non-performance of the contract and that the term *"regarding"* should be read as synonymous with the term *"concerning"* (in effect agreeing with the view expressed in *Joseph "Jurisdiction and Arbitration Agreements and their Enforcement"* (Sweet and Maxwell, 2005) at pp. 116-117). He also observed that the court had to consider and construe the wording chosen by the parties as a whole and in context (para. 43). In doing so, he concluded that all the claims in tort advanced by the claimants as against the relevant defendants came within the scope of the arbitration clause.

69. The defendants relied on *ET Plus* primarily to support a submission that the word *"regarding"* used in the arbitration clause in the policy should be regarded as synonymous with *"concerning"* and that reading the clause as if it said that any dispute between the plaintiff and the defendant *"concerning"* the defendant's *"liability in respect of a claim or the amount to be paid"* should lead the court to the conclusion that both causes of action pleaded in the statement of claim are covered by the clause. However, I do not agree. The defendant runs into precisely the same difficulty as regards the scope of the clause and its potential extension to the plaintiff's alternative cause of action by treating the word *"regarding"* as synonymous with *"concerning"*. Even if the word *"regarding"* was replaced in the clause with the word *"concerning"*, the plaintiff's alternative cause of action would still not be covered as the dispute would have to *"concern"* the defendant's *"liability in respect of a claim or the amount to be paid"*. Adopting the same analysis of the clause but replacing the word *"regarding"* with the word *"concerning"* leads one to precisely the same outcome. The alternative cause of action for damages pursuant to s. 44 of the 2013 Act does not, in my view, fall within the scope of the clause.

(e) Conclusions on the Scope of the Arbitration Clause

70. Leaving aside the non-arbitrability point to which I will next turn, the result of my interpretation of the arbitration clause is that the plaintiff's cause of action for an indemnity

in respect of business interruption and "loss of licence" falls within the scope of the clause but the plaintiff's alternative cause of action for damages pursuant to s. 44 of the 2013 Act does not. That is not an ideal outcome as it means that one of the plaintiff's claims would be determined at arbitration and the other by the court. While it is undesirable that the dispute between the parties would require to be determined in two different fora, that outcome arises by virtue of the terms of the arbitration clause and, in my view, cannot be avoided by applying general presumptions or assumptions as to a *"one-stop"* forum for the determination of the disputes between the parties. Sometimes, it is inevitable that parties' disputes have to be adjudicated upon in different fora where that conclusion is required as a result of the proper interpretation of the terms of the clause or agreement: see, for example: *Kelly v. Lennon* [2009] 3 IR 794 as discussed in *Ocean Point* (at paras. 68 to 73) and *Narooma* (at paras. 121 to 124). As is clear from *Kelly*, where some of the claims are required to be determined at arbitration and others by the court, it may be necessary for the court to decide on the proper sequencing of the determination of the various issues in order *"to maximise the likelihood of a speedy and just resolution of all issues between the parties"* (per Clarke J. at para. 35, p. 806). I return to this issue at the conclusion of the judgment.

10. The Non-Arbitrability Issue

(a) The Position of the Parties

71. I now turn to consider the fundamental overriding submission made by the plaintiff which is that, for various public policy reasons, the dispute between the parties is not arbitrable and that for that reason the proceedings in their entirety should be heard and determined by the court and not at arbitration.

72. The plaintiff contends that certain types of dispute are non-arbitrable in the sense that they are not capable of being determined at arbitration in circumstances where there are important public policy considerations involved. In the course of the hearing, the plaintiff's

submission in this issue was succinctly put as follows. The plaintiff submitted that in the unique and unprecedented circumstances in which the dispute between the plaintiff and the defendant has arisen, with particular reference to the COVID-19 pandemic and the CBI's intervention in the form of the Supervisory Framework, the issues arising in the proceedings are of sufficient public importance that they should be determined in public by a court whose judgment will have precedential value, whether as a "test case" or otherwise, rather than in a private forum by an arbitrator whose award will have no precedential value.

73. In its written and oral submissions, the plaintiff highlighted the unprecedented nature of the COVID-19 pandemic, the number of public houses which held insurance policies with the defendant during the relevant periods of the closures and restrictions (over 800, according to the plaintiff), the number of publicans who wished to pursue similar claims against the defendant (more than 20, according to the plaintiff), the CBI's intervention in the form of the Supervisory Framework, the suitability of the plaintiff's claim as a "test case" under the Supervisory Framework and the public policy imperative of ensuring that a decision in the plaintiff's case will have precedential value. The plaintiff relies on various authorities in support of the contention that it is open to the court to refuse to refer a dispute to arbitration and to stay proceedings where the court takes the view that the dispute is not arbitrable for public policy reasons. I will consider the relevant authorities below.

74. In response the defendant maintains that the dispute between the parties is arbitrable and that there are no countervailing public policy considerations at play which might, in an exceptional situation, lead the court to refuse to refer a dispute to arbitration. The defendant contends that the dispute between the parties concerning the plaintiff's entitlement to an indemnity under the policy (as well as the alternative claim which I have addressed in the previous section of this judgment) is typical of the sort of disputes routinely dealt with at arbitration and is perfectly suitable for arbitration. It draws attention to the provisions of the

Supervisory Framework which appear expressly to envisage arbitration as a means of resolving a dispute as to the entitlement of an insured to an indemnity for business interruption due to COVID-19. It also refers to the agreement between the defendant and Coachhouse Catering Ltd t/a The Old Imperial Hotel in the Coachhouse Catering proceedings to treat that case as a "test case" for the purposes of the Supervisory Framework which the defendant says will require the court to interpret the very same policy. It disputes the existence of public policy considerations sufficient to elevate the dispute to one which is non-arbitrable. It contends that, in effect, what the plaintiff is seeking to do is to undermine the mandatory nature of the court's jurisdiction to refer parties to arbitration under Article 8 of the Model Law and to invite the court to assume a discretion which is not permitted by Article 8. The defendant also relies on a number of authorities in support of its position.

(b) "Test Case" under CBI's Supervisory Framework

75. Before turning to consider the extent to which, and the circumstances in which, the court may be required to determine whether a dispute is arbitral or not before exercising its jurisdiction under Article 8 of the model law, I should address the plaintiff's contention that the defendant ought to agree that these proceedings should be treated as a "test case" under the Supervisory Framework and that the "test case" selected by the plaintiff, namely, the Coachhouse Catering proceedings is in some way inappropriate as a "test case" for publicans who have the same or similar policies issued by the defendant.

76. As fairly acknowledged by the plaintiff, the court cannot compel an insurer to agree that particular proceedings should serve as a "test case" under the Supervisory Framework. While the Supervisory Framework does make provision for "test cases", it is clear that a case will only be treated as a "test case" where the parties to the case so agree. Paragraph 14 of the Supervisory Framework makes that clear in stating as follows:-

> *"Where policyholders have commenced litigation against an* RFSP [Regulated Financial Service Provider], *and it is agreed between the parties that the case has the potential to act as a 'test case' for the determination of issues in relation to BI* [Business Interruption] *insurance policies for wider groups of customers, the Central Bank has the following expectations…"*

77. A case can, therefore, only be treated as a "test case" where the parties so agree. The plaintiff, understandably from its own perspective, strongly believes that the defendant ought to agree to treat these proceedings as a "test case". However, for its own reasons, the defendant has not agreed to that. I cannot compel the defendant to do so. Nor can I in anyway interfere with the agreement between the parties in the Coachhouse Catering proceedings to treat those proceedings as a "test case". It was open to the parties to agree to do so and once the parties so agreed, it was not for the court to interfere with that agreement. While the plaintiff may have concerns about the ability of the Coachhouse Catering Proceedings to determine the legal issues which may be common to that case and the present case by reasons of certain differences in the factual circumstances of each case, that is not a matter which I can determine. I would, however, say that from what I have heard in the course of this application and from giving directions for the trial of the Coachhouse Catering proceedings on a modular basis, the plaintiff's concerns in relation to the issues to be determined in that case may be misplaced. However, for present purposes, I should merely make clear that I do not accept that any dissatisfaction or concern on the part of the plaintiff as to the failure by the defendant to agree that these proceedings should be treated as a "test case" for the purposes of the Supervisory Framework or as to the defendant's agreement to treat the Coachhouse Catering proceedings as a "test case" has any relevance to the issue as to whether to dispute between the plaintiff and the defendant in this case is arbitrable or not.

(c) <u>The Concept of Arbitrability: Legal Principles</u>

78. Referring to the concept of arbitrability, the authors of *Dowling-Hussey and Dunne "Arbitration Law"* (3rd Ed.) ("*Dowling-Hussey and Dunne*") state at para. 1-77:-

> "*The concept of arbitrability, and the term 'arbitrability', may be defined as referring to the issue of whether specific classes of disputes are excluded from arbitration, or* [are] *incapable of being arbitrated. Many, if not all, legal systems exclude certain matters from the range of disputes that may lawfully be determined by arbitration, often for reasons of public policy prevailing in the jurisdiction in question. Such exclusions may take the form of legislative provisions in arbitration legislation, general legislation or judicial decision…"* (para. 1-77, p. 47, footnotes omitted)

79. At para. 1-78, the authors state:-

> *"It has been remarked that the drawing of the line between arbitrable and non-arbitrable disputes involves a consideration of two distinct policy objectives: ensuring that sensitive matters of public interest are debated and resolved before national courts; and promoting arbitration as a vibrant system of dispute resolution for parties who freely choose to arbitrate rather than litigate their differences."*
>
> (para. 1-78, p. 47, footnotes omitted)

80. In any assessment of public policy considerations, it must be stressed that the policy of the 2010 Act, as is expressly stated in the long title to that Act, is to "*further and better facilitate resolution of disputes by arbitration*". That policy is evident in many of the judgments under the 2010 Act including *BAM* and the various subsequent judgments which referred with approval to the comments of McGovern J. in that case to the effect that the Irish courts have *"long been supportive of the arbitral process".* It is also evident in the judgment of Dunne J. in the Supreme Court in *Grassland Fertiliser v. Flinter Shipping BV* [2016] IESC 81 (at p. 11).

81. There was an express recognition by the court in *O'Meara v. the Commissioners of Public Works in Ireland* [2012] IEHC 317 ("*O'Meara"*) that certain types of disputes are not capable of resolution by arbitration. In that case, Charleton J. in the High Court stated:-

> *"It can also happen, under the model law, that the subject matter of a dispute is not capable of resolution by arbitration under the law of the State, in this case Ireland, as for instance where there is a law passed forbidding the courts of a country being deprived of jurisdiction in respect of certain subject matter, be it human reproduction or some other sensitive issue, or where such an award would be in conflict with public policy of the State."* (at para. 14)

Charleton J. made clear, however, that there was no question of any of those situations arising in the case before him. He made an order referring the parties to arbitration under Article 8 of the Model Law and stayed the proceedings.

82. While certain disputes or classes of disputes may be non-arbitrable under Irish law and incapable of being arbitrated, it is necessary to explain how that concept fits in with the scheme provided for in Article 8 of the Model Law. While it is possible that the concept of non-arbitrability could be dealt with as an overarching objection to an application to refer parties to arbitration under Article 8 by reason of overriding public policy considerations, it seems to me that the concept is best accommodated and viewed within the scheme provided for in Article 8 (1) itself. While Charleton J. in *O'Meara* did not have to analyse the concept in any detail and did not have to address specifically how it could be accommodated within the scheme provided for in Article 8 (1), some of the judges in the judgments from other jurisdictions have considered the concept of non-arbitrability as part of their consideration of disapplying factors such as those provided for in Article 8(1) on which the party resisting the reference to arbitration bears the onus of proof.

83. Section 9 (4) of the English Arbitration Act, 1996 (the "English 1996 Act") provides for similar disapplying factors to those contained in Article 8 (1|) of the Model Law. Under the English provision, the court is required to grant a stay unless satisfied that the arbitration agreement is *"null and void, inoperative, or incapable of being performed".* These are precisely the same disapplying factors as are contained in Article 8 (1). Many of English cases which have considered the arbitrability or otherwise of a particular dispute have done so in the context of the disapplying factors referred to in s. 9 (4) of the English 1996 Act. In most of those cases, the arbitrability or otherwise of the dispute is considered in terms of whether the arbitration agreement, to the extent that it purported to apply to a particular dispute, was *"null and void"* or *"inoperative"*: see, for example, *Fulham Football Club (1987) Ltd v. Sir David Richards* [2011] EWCA Civ. 855, [2012] Ch. 333 (*"Fulham Football Club"*) (per Patten LJ at paras. 35-37 and per Longmore LJ at para. 97); *Assaubayev v. Michael Wilson and Partners Ltd* [2014] EWCA Civ. 1491 (*"Assauvbayev"*) (per Christopher Clarke L.J. at para. 67) and *Bridgehouse (Bradford No. 2) Ltd v. Bae Systems Plc* [2020] EWCA Civ. 759 (*Bridgehouse"*) (per Newey L.J. at para. 28). That is so notwithstanding that s. 1 of the English 1996 Act contains a term which is not contained in the 2010 Act to the effect that the provisions of the relevant part of the 1996 Act are founded on certain principles and must be construed accordingly. Among the principles referred to at para. (b) of s. 1 is that *"the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest …".* It seems to me that that also holds good under the 2010 Act albeit that it is not expressly stated in that Act.

84. I conclude that the question of the arbitrability or otherwise of a dispute by reason of public policy considerations does arise for consideration under Irish law and falls to be considered, at least, as one of the disapplying factors contained in Article 8 (1) of the Model Law, namely, whether the arbitration agreement is *"null and void"* or *"inoperative".* The

party resisting the reference to arbitration, in this case, the plaintiff, bears the burden of establishing the existence of one or more of those factors. The onus, therefore, rests on the plaintiff to establish that the arbitration clause is *"null and void"* or *"inoperative"* by reasons of the existence of the public policy considerations on which it relies. It is not necessary for me to determine whether the court has a wider inherent jurisdiction to consider whether certain disputes are non-arbitrable. The existence of an inherent jurisdiction of that nature may be undermined by the fact that the issue can be considered in the context of the disapplying factors in Article 8(1) of the Model Law but it is unnecessary for me to expressly so find in this judgment.

85. The next question is how the court should determine whether the particular dispute is arbitrable or not and how significant must be public policy considerations be before the court could conclude that the dispute was not arbitrable and that the arbitration agreement was, therefore, *"null and void"* or *"inoperative"* with respect to the dispute. Some guidance can be found in cases from other jurisdictions, including England and Wales and Singapore.

86. Before turning to consideration of those cases, I would reiterate the observations made by the authors of *Dowling-Hussey and Dunne* that the consideration of whether a dispute is arbitrable or not requires the court to consider two distinct policy considerations, namely, the need to ensure that *"sensitive matters of public interest are debated and resolved before national courts"* and the promotion of arbitration as *"a vibrant system of dispute resolution for parties who freely choose to arbitrate rather than litigate their differences"* (para. 1-78, p. 47).

87. In *Fulham Football Club,* Patten L.J. quoted with approval the following statement of principle contained in *Born on International Commercial Arbitration (2009)* (at p. 768) ("*Born*") where the author stated (with respect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards):

"Although the better view is that the Convention imposes limits on Contracting States' applications of the non-arbitrability doctrine, the types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offenses; labor or employment grievances; intellectual property; and domestic relations.

The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect". (quoted by Patten LJ. At para. 59)

88. Patten LJ. noted that the scope of even the most widely drafted arbitration agreements would have to yield to restrictions derived from other areas of the law including statute law. He gave some examples of statutory intervention designed to preserve the right of access to the courts including in the area of matrimonial law and in employment discrimination cases. He observed that in a number of areas the right of a party to apply to the court or to a particular statutory tribunal is expressly preserved by legislation and that such legislative provision would be inconsistent with an agreement to submit the dispute to arbitration. The existence of such restrictions would, therefore, defeat any application for a stay of the proceedings under s. 9 of the English 1996 Act or under any inherent jurisdiction that the court might possess. None of the members of the Court of Appeal *Fulham Football Club* felt that the disputed issue was non-arbitrable notwithstanding that the arbitrator was not empowered to grant certain of the reliefs sought. In his judgment, Longmore L.J. observed

that the test to establish non-arbitrability of a dispute based on public policy considerations as distinct from any statutory intervention was a *"demanding test"* (para. 99).

89. In *Assaubayev*, Christopher Clarke L.J. stated:

> *"There are some circumstances in which a dispute may not be arbitrable. A statutory provision or a rule of public policy may, in rare circumstances, render an arbitration agreement in effective insofar as it purports to bind the parties to an arbitral determination of the issues sought to be referred…"* (para. 67) (emphasis added).

Christopher Clarke L.J. made clear, therefore, that while a statutory provision or a rule of public policy may render an arbitration agreement ineffective with respect to the particular dispute, this would be so *"in rare circumstances".*

90. In *Bridgehouse,* Males L.J. noted that certain kinds of cases or applications were incapable of being arbitrated (for statutory or public policy reasons) but that this should be *"a conclusion of last resort"* (para. 79).

91. Many of the English cases which have considered the concept of non-abitrability by reason of statutory provisions or public policy considerations have also stressed the countervailing policy which seeks to promote arbitration as a consensual means chosen by parties to resolve their disputes. In *Nori Holding Ltd & Ors v. PJSC 'Bank Otkritie Financial Corp'* [2018] EWHC 1343 (Comm) ("*Nori Holding")* Males J., in commenting upon an earlier decision of Judge Weeks QC in *Exeter City Association Football Club Ltd v. Football Conference Ltd* [2004] 1 WLR 2910 in which arbitration was viewed as a procedure which deprived a party of its inalienable rights, noted that the decision of HHJ Weeks was not followed in *Fulham Football Club.* Males J. continued:

> *"…the view that arbitration represents a deprivation of inalienable rights is with respect a very outmoded view. The days have long gone when arbitration was regarded as an unacceptable 'Alsatia … where the King's writ does not run' ... The*

modern view in English law, as is apparent from the Arbitration Act 1996, is that commercial parties who agree to arbitrate do not deprive themselves of fundamental rights. They merely choose an alternative method of resolving disputes between them. The law does not regard arbitration as intrinsically better or worse than litigation. It is just different, having both advantages and disadvantages. Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain." (per Males J. at para. 66)

92. Males L.J. (as he had by then become) reiterated those observations in his judgment in the English Court of Appeal in *Bridgehouse* where he stated:

"In considering whether a dispute is arbitrable, the fact that the parties have agreed that it should be arbitrated is an important starting point. What that means is that they have agreed, not only that it should be arbitrated, but also that it should not be decided by a court. The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so. …" (per Males L.J. at para. 73)

93. Males L.J. concluded that there was nothing in the legislation at issue in that case to suggest that the claim at issue was inherently capable of being arbitrated and that there was *"no principle of public policy capable of outweighing what is already an important principle of public policy that the parties' agreement to arbitrate should be respected"* (para. 74). Similar observations were made by Newey L.J. in his judgment *Bridgehouse* where he observed that it was *"of significance that the parties chose to enter into an arbitration agreement"* which he considered applied to the particular relief sought in the proceedings (at para. 57). Both Longmore L.J. and Rix L.J. in *Fulham Football Club* had also stressed the importance of party autonomy in the context of an arbitration agreement subject to overriding public policy considerations. Similar observations were made by Mance L.J. (as he was)

concerning party autonomy in *Wealands v. CLC Contractors Ltd* [2000] 1 All ER (Comm) 30.

94. I completely agree with these observations which, in my view, also reflect the law in Ireland and the important public policy objective intended to be advanced by the Oireachtas in enacting the 2010 Act and in adopting the Model Law to promote arbitration as a consensual means of resolving disputes and, in that context, respecting and encouraging party autonomy.

95. As a further comment on the English and other cases to which the parties referred in their submissions, I should record that in its written and oral submissions the plaintiff placed considerable reliance on the decision of the Singapore Court of Appeal in *Larsen Oil and Gas PTE Ltd v. Petroprod Ltd* [2011] SGCA 21 (*"Larsen Oil").* In that case the Singapore Court of Appeal held that a dispute between the parties in the context of proceedings brought by a liquidator to recover allegedly unfair preferential payments or transactions at an undervalue was not arbitrable even though the parties may expressly have included such a dispute within the scope of the arbitration agreement. VK Rajah JA, in delivering the judgment of the Singapore Court of Appeal, held first that the liquidator's claims did not actually fall within the scope of the relevant arbitration agreement. It was further held that even if those claims did fall within the scope of the agreement, the claims would be non-arbitrable having regard to the overall objective of the insolvency regime of facilitating claims by a company's creditors against the company. In the course of his judgment, VK Rajah JA commented on the concept of non-arbitrability. He stated:

> *"44. The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a*

> *dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute."*

96. While a number of the English judgments have disagreed with the overall conclusion in *Larson Oil*, and while the defendant in this case contended that the decision was of no assistance to the plaintiff and could be distinguished by reason of the particular provisions of the Singapore arbitration legislation, I accept that this paragraph does succinctly summarise the concept of non-arbitrability and how it might operate. I might however differ slightly from the elevation of the concept of non-arbitrability to a "*cornerstone"* of the process of arbitration but that quibble is of no significance to the outcome of the present application. Where the parties significantly disagreed and where the defendant diverged from the approach taken in *Larson Oil* is with respect to the outcome of that case. As noted, the Singapore Court of Appeal held that the dispute between the parties in the proceedings was non-arbitrable. The Court concluded that the

> *"… insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."* (per VK Rajah JA at para. 46)

97. That conclusion followed from an earlier finding (at para. 21) that *"arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the contrary…".* Males J. in *Nori Holding* interpreted this as the creation

by the Singapore Court of Appeal of a *"general presumption applicable to the construction of arbitration clauses that in the absence of express language (which must be unusual) such clauses do not extend to claims to avoid a transaction made by a liquidator or other office holder in insolvency proceedings."* (at para. 52). He held that such a presumption does not form part of English law (at para. 61). Newey L.J. in *Bridgehouse* did see some room for argument as to whether disputes arising from the operation of the statutory provisions of the insolvency regime were non-arbitrable even if expressly included within the scope of the agreement although he noted the contrasting views of Males J. in *Nori Holding.* Reference was also made by Newey L.J. in *Bridgehouse* to a more recent decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v. Silica Investors Ltd* [2015] SGCA 57, [2016] 1 SLR 373 where that court held that a dispute as to whether relief could be granted under the Singapore companies legislation for oppression or unfairly prejudicial conduct was arbitrable.

98. I mention the Singapore cases as some space was devoted in the plaintiff's written submissions to *Larson Oil* and some time was spent during the oral submissions of both parties at the hearing on that case. The ultimate conclusion in that case and the disagreement with that conclusion by the court in *Nori Holding* is irrelevant to the outcome of this application and I express no view on whether an Irish court would adopt a similar approach. I do note, however, that there is a significant difference between s. 6 (2) of the Singapore Arbitration Act and Article 8 (1) of the Model Law which forms part of Irish law under the 2010 Act. Under s. 6 (2) of the Singapore Arbitration Act the court has a discretion to make a reference to arbitration (the word *"may*" is used) whereas there is a mandatory obligation to make a reference to arbitration under Article 8 (1) of the Model Law where the requirements of that Article are satisfied (the word "*shall*" is used). That may explain the ultimate conclusion reached in *Larsen Oil* but that is of no moment in the context of the present application.

99. I agree with the English cases which make clear that a party who seeks to resist a reference to arbitration on the basis that, although the particular dispute may fall within the scope of the arbitration agreement, it is non-arbitrable by reason of overriding public policy considerations faces a high bar. The test is a *"demanding"* one and the conclusion that public policy considerations render a dispute non-arbitrable should be a *"conclusion of last resort".* There must be *"compelling reasons"* of public policy in order for such a conclusion to be reached. The public policy must be Irish public policy. Some idea of the type of public interests at play (which were described by *Born* in his leading text as being interests which *"so pervasively involve public rights, or interests of third parties")* can be seen in the brief comments of Charleton J. *O'Meara* to which I referred earlier.

100. Further guidance can, in my view, be found in the approach taken by Kelly J. in *Broström Tankers AB v. Factorias Vulcano* S.A. [2004] 2 IR 191 of (*"Broström Tankers").* That case concerned an application to enforce an award of a foreign arbitrator under s. 9 of the Arbitration Act, 1980 (the "1980 Act") (and was, therefore, decided prior to the enactment of the 2010 Act) which dealt with the enforcement of awards under the New York Convention. The comments of Kelly J. on the nature of the public policy considerations which it would be necessary to establish in order to resist enforcement of a foreign arbitral award are, in my view, of some relevance to the concept of non-arbitrability on public policy grounds. Under s. 9 (3) of the 1980 Act enforcement of an award could be refused if the award was in respect of a matter which was not capable of settlement by arbitration under the law of the State or if it would be contrary to public policy to enforce the award. Kelly J. was satisfied that the public policy referred to in s. 9 (3) was the public policy of the State. He examined the notion of public policy in the context of the enforcement of an arbitral award and stated:

> *"The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice."* (para. 28, p. 197)

101. Kelly J. approved of the description of the public policy defence to the enforcement of a foreign arbitral award given by Circuit Judge Smith of the United States Court of Appeals for the 2nd Circuit in *Parsons & Whitmore Overseas Co. Inc. v. Société Général de L'Industrie du Papier* 508 F.2d 965 (2nd Cir, 1974) where he said that enforcement of foreign arbitral awards may be denied on the basis of a public policy defence "*only where enforcement would violate the forum state's most basic notions of morality and justice."* Kelly J. then referred with approval to an extract from *Cheshire and North's Private International Law (13th ed.)* where the authors stated that to resist enforcement on public policy grounds it would be necessary to establish:

> *"... some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public."* (quoted by Kelly J. at para. 30, p. 198)

102. Kelly J. found that the objections to enforcement in that case failed and that there was no illegality or even a suggestion of illegality and no aspect of Irish public policy which could justify a refusal to enforce the award. The attempt to resist the enforcement of the award on the basis that it was contrary to Irish public policy, therefore, failed.

103. While it is not necessary definitively to decide whether the public policy considerations which might be sufficient to persuade the court that a particular dispute was non-arbitrable are the same or similar to the type of public policy considerations which would have to be established in order for a court to refuse to enforce a foreign arbitral award under

Article 36 (1) (b) of the Model Law or that would provide a basis for an award to be set aside under Article 34 (2) (b), I have nonetheless derived some assistance from the treatment of the public policy defence to enforcement given by Kelly J. in *Broström Tankers.*

(d) Application of Principles of Non-Arbitrability

104. It is unnecessary for me definitively to conclude that the public policy considerations at issue would have to be such that to conduct an arbitration in respect of the dispute would amount to a breach of the most basic notions of morality and justice, as I am convinced that there are no real policy considerations at issue which, on any view, of the test could persuade a court that the dispute between the plaintiff and the defendant in respect of either of the causes of action pleaded by the plaintiff is not arbitrable. I will leave over for consideration in another case if it arises the issue as to whether precisely the same approach to the notion of public policy as was adopted by Kelly J. in *Broström Tankers* with respect to the enforcement of a foreign arbitral award should be adopted when considering public policy considerations which are said to render a dispute non-arbitrable.

105. While the COVID-19 pandemic is undoubtedly an unprecedented event and while the closures and other public health restrictions imposed or required by the Government have undoubtedly had extraordinarily serious consequences for the plaintiff and many other publicans in the State, those factors do not, in my view, bring into play public policy considerations which might render non-arbitrable the dispute between the plaintiff and the defendant as to the plaintiff's entitlement to an indemnity under the terms of the policy or to damages for breach by the defendant of the alleged regulatory obligations relied upon by the plaintiff. The plaintiff's strongly held desire that his dispute with the defendant should be determined by a court and not at arbitration in order to ensure that a precedential value is attached to the decision determining the dispute is, in my view, a manifestly insufficient public policy consideration to render the dispute non-arbitrable. It ignores the fact that a

similar dispute (although recognising that some factual differences may exist between the cases) is likely to be determined by the court in the context of the "test case" agreed to by the defendant in the Coachhouse Catering proceedings. Those proceedings will involve the same policy terms and the interpretation issues arising in that case are likely to be the same or very similar to those arising in the present case.

106. In addition, underlying the plaintiff's contentions on this issue is a view that arbitration is in some way inferior to litigation for resolving disputes between a policy holder and an insured. That assumption entirely ignores the fact that disputes between policy holders and insurers are almost routinely determined at arbitration rather than in court proceedings. It also overlooks the strong public policy objective contained in the 2010 Act and in the Model Law which is part of the law of the State which encourages the resolution of disputes in accordance with a consensual process which the parties have agreed. It significantly understates the importance of parties keeping to their agreements.

107. Perhaps most significantly, it ignores the fact that the CBI's Supervisory Framework expressly envisages arbitration as a means of resolving disputes between policy holders and insurers in relation to business interruption claims arising from the COVID-19 pandemic. There are several references to arbitration as one of the means of resolving such disputes in the Supervisory Framework. Those references include the following: on p. 10 under the heading "*Final Outcomes from Legal Actions*", reference is made to the CBI monitoring "*ongoing litigation, arbitrations, Financial Services and Pensions Ombudsman (the "FSPO") …complaints and settlements in relation to BI insurance policies concerning COVID-19 related claims".* At para. 25 (on p. 12) reference is made to the CBI obtaining information relating to *"ongoing legal actions including court litigation, arbitration and FSPO complaints".* Similarly, at para. 28 (on p. 14), reference is made to the policy holder or

"customer" having *"the option of bringing a complaint to the FSPO and/or arbitration and/or litigation".*

108. There are also references to arbitration as one of the forms of "*legal action*" concerning or involving disputes relating to COVID-19 related claims in a section of the Statutory Framework headed "*Module 4 – Legal Action Outcomes – Wider Beneficial Impact Assessment*" (pp. 19 and 20). At para. 37 the Statutory Framework makes clear that the term "*legal action*" includes arbitrations as well as proceedings before the courts and before the FSPO together with appeals from those courts or bodies (where applicable) concerning such disputes. It is also noted in the same paragraph that a legal action is "*concluded"* where there has been a "*final decision and/or determination in an arbitration or by a court and/or the FSPO*". At para. 38, where "*a legal action*" has been "*concluded*" certain information must be provided by the insurer to the CBI for the purposes of module 4.

109. These references in the Statutory Framework make clear that CBI expressly envisaged arbitration as being one of the means by which disputes between policy holders and insurers concerning COVID-19 business interruption claims would be determined. There is, therefore, in my view no basis whatsoever for the plaintiff's contention that the fact that a dispute or a part of a dispute between a policy holder and an insurer in respect of a COVID-19 related claim will be determined at arbitration rather than in court proceedings offends any public policy considerations, still less the sort of fundamental public policy considerations which might engage the concept of non-arbitrability.

(e) Conclusions on the Non-Arbitrability Objection

110. For these reasons, I have concluded that the dispute between the plaintiff and the defendant as to the plaintiff's entitlement to the various indemnities claimed under the policy is arbitrable and, for the reasons set out in the earlier part of this judgment, such claims do fall within the scope of the arbitration clause contained in the policy. The plaintiff's claim for

damages for breach by the defendant of the alleged regulatory obligations relied upon by the plaintiff does not fall within the scope of the arbitration clause and it is, therefore, unnecessary to express a concluded view as to whether, if the wording of the arbitration clause was wide enough (which it is not), such a claim would be arbitrable. My tentative view is that provided the terms of the arbitration clause are wide enough, a dispute in relation to such a claim would be arbitrable and an application to refer the parties to arbitration in respect of such a dispute would not be refused by the court on the basis that it involves a non-arbitrable dispute.

111. For these reasons, therefore, I reject the plaintiff's contention that the dispute concerning its entitlement to the indemnities claimed under the policy is non-arbitrable. Since that dispute is clearly covered by the terms of the policy (for the reasons outlined earlier), I am required by Article 8 (1) of the Model Law to refer the parties to arbitration in respect of that dispute.

11. Conclusions

112. I have concluded that the plaintiff's claim for the various indemnities sought under the policy does fall within the scope of the arbitration clause contained in the policy. However, I have found that the plaintiff's claim for damages for breach by the defendant of certain alleged regulatory obligations does not fall within the scope of the arbitration clause.

113. I have also rejected the plaintiff's contention that the dispute between the parties concerning its entitlement to the indemnities claimed under the policy is non-arbitrable. In my view, the dispute is clearly arbitrable and the purported public policy considerations advanced by plaintiff come nowhere near the sort of fundamental and far reaching public policy considerations which might lead a court to conclude that a particular dispute is not capable of being determined by arbitration. The dispute which I have concluded does fall within the scope of the arbitration clause is the sort of dispute between a policy holder and an

insurer which is routinely determined by arbitration. The fact that the dispute arises in the context of the unprecedented COVID-19 pandemic and the closures and other restrictions imposed by the Government and the fact that several hundred publicans may be involved, many of whom may wish to advance claims against the defendant, does not give rise to the sort of fundamental public policy considerations which must be demonstrated in order to establish the non-arbitrability of a dispute. This is particularly so in circumstances where an identical policy is to be considered by the court as part of a "test case" agreed for the purpose of the CBI's Supervisory Framework between the defendant and another policy holder in other proceedings (the Coachhouse Catering proceedings). The plaintiff does not have an entitlement to have its case dealt with as a *"*test case" under the Supervisory Framework as the defendant would have to agree to this and it has refused to do so. The defendant cannot be compelled to agree that these proceedings should have *"*test case" status. It is also highly significant that the CBI's Supervisory Framework expressly envisages arbitration as a means of legal action by a policyholder against an insurer in the case of a dispute business interruption COVID-19 claim.

114. The outcome of this application is, therefore, that the court is compelled to make an order under Article 8 (1) of the Model Law referring the parties to arbitration and staying the proceedings in respect of the plaintiff's claim for the indemnities sought under the policy. However, I refuse the defendant's application to refer the parties to arbitration and to stay the proceedings in respect of the plaintiff's claim for damages as against the defendant for alleged breach of certain regulatory obligations. That claim will remain to be determined by the court.

115. In circumstances where the first module of the trial of the Coachhouse Catering proceedings which will consider the proper interpretation of the policy insofar as the business interruption and "loss of licence" claims are concerned will be heard by the court over three

days commencing on 26th October, 2021, it might make sense for the parties to await the court's determination of that issue before attempting to have an arbitrator determine the same issue at arbitration between the parties to those proceedings. In addition, as the plaintiff's action for damages is an alternative cause of action and may only arise in circumstances where the plaintiff fails in its indemnity claims under the policy, it would also seem to make sense that that action should await either or both of the determination by an arbitrator of the plaintiff's indemnity claim or a determination by the court of such a claim in the Coachhouse Catering proceedings. However, these are tentative observations and I will defer giving any further directions in these proceedings until I hear from counsel once they have had the opportunity of considering this judgment.