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Case No: LM 2022-000206

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2023

Before :

MS CLARE AMBROSE
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

BELLINI (N/E) LTD TRADING AS BELLINI

Claimant

-and-

BRIT UW LIMITED (THE CORPORATE CAPITAL PROVIDER OF LLOYD'S SYNDICATE 2987 FOR THE 2019 YEAR OF ACCOUNT)

Defendant

Neil Fawcett for the **Claimant** (Instructed by **Barings**)
Harry Wright for the **Defendant** (Instructed by **DLA Piper LLP**)

Hearing date: 13 June 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 26th June 2023.

Ms Clare Ambrose:

1. The Claimant is a business that runs a restaurant in Sunderland called Bellini. It makes a claim against its insurer, the Defendant, under a policy of insurance ("the Policy") seeking to recover for loss incurred by reason of business interruption caused by the COVID-19 pandemic.

2. The Claimant's case is that these losses are covered while the Defendant denies liability because it says that such coverage under the relevant term of the Policy (clause 8.2.6) is dependent upon physical damage to the premises or property, which has not occurred.

3. This is the trial of a preliminary issue ordered by HHJ Pelling KC on 17 January 2023 as to whether on a true construction of clause 8.2.6 of the Policy there can be cover in the absence of damage as defined in the Policy.

The Schedule and Policy wording

4. The Policy was evidenced by a 7-page schedule of insurance identifying, *inter alia,* the business, the premises, the premium, sections of cover, sums insured and excesses applicable for different sections. For the Business Interruption Section E, the total sum insured consisted of two heads, namely estimated gross revenue for £340,000 and book debts for £10,000.

5. The Policy wording was also contained in an 80-page document entitled "Licensed Premises Insurance Policy". This document was arranged in a number of sections setting out terms for buildings and contents insurance and also other forms of insurance including business interruption, legal expenses, public and employer's liability, and also other sections for matters such as the claim procedure, general definitions and complaints. The Policy provided as follows with the bold wording following the original.

"**1.2 Words in bold**

Words in bold typeface used in this **policy** document, other than in the headings, have specific meanings attached to them as set out in the General definitions and interpretation.

…

8 Section E - Business interruption

8.1 Business interruption coverage

8.1.1 If there is **damage** to property used by **you** at the **premises** during the **period of insurance** and in consequence the **business** carried on by **you** at the **premises** is interrupted or interfered with, then **we** will pay in respect of each item of business interruption insurance stated in the schedule the amount of loss resulting from such interruption or interference provided that:

a) at the time the **damage** occurs there is in force either

i) cover under the **sections** Buildings or Contents, or

ii) an insurance policy covering the interest of **you** in the property at the **premises** against such **damage** and such property is of a type and kind not excluded by this **section**;

b) at the time the **damage** occurs **you** have claimed under the policy referred to in a) above and the relevant insurer has paid such claim in full or admitted liability for such claim or would have done so but for the operation of a proviso in such insurance policy excluding liability for losses below a specified amount; and

c) our liability under this **section** shall not exceed the **sum insured(s)** or any applicable sub limit.

…

8.1.4 Gross revenue/ estimated gross revenue

Our liability in respect of **gross revenue/ estimated gross revenue** is limited to loss of **gross revenue/ estimated gross revenue** and **increase in cost of working. Our** liability under this **section** in respect of **gross revenue/ estimated gross revenue** will be

a) in respect of the reduction in **gross revenue**: the amount by which the **gross revenue** during the **indemnity period** will, in consequence of the **damage,** fall short of the **standard gross revenue….**

…

8.2 Business interruption - Cover extensions

…

8.2.6 Murder, suicide or disease

We shall indemnify **you** in respect of interruption of or interference with the business caused by **damage**, as defined in clause 8.1, arising from:

a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;

b) murder or suicide in the **premises**;

c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the **premises**;

d) vermin or pests in the **premises**;

e) the closing of the whole or part of the **premises** by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the **premises.**

> The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the business shall be affected in consequence of the **damage**.
>
> Provided that **our** liability under this clause shall not exceed (five) 5% of the **sum insured** by this **section** or £50,000 whichever is the greater.

18 General definitions and interpretation

> The following words will have the same meaning attached each time they appear in this **policy** in **bold type face, whether with a capital first letter or not…**
>
> …All headings are included for convenience only and will not form part of the **policy.**
>
> **…**

18.16.1 Damage

> Damage means
>
> 18.16.1 physical loss, physical damage, physical destruction
>
> 18.6.2 in respect of sections I and J loss of use of tangible property that has been lost destroyed or damaged."

Common ground and agreed facts

6. The parties helpfully agreed common ground as to some aspects of the factual matrix and also conditions of the pandemic under which the claim arose.

7. The parties agree the background to the COVID-19 pandemic and the UK Government's response to it as set out in paragraphs 10 to 52 of the judgment of the Divisional Court *in Financial Conduct Authority v Arch Insurance UK and others* [2020] EWHC 2448 (Comm) (the FCA Test Case). These findings reflect the declaration of a pandemic and UK regulations (including government restrictions on restaurant opening) from March 2020.

8. For the purposes of this claim it was common ground that there has been no physical loss of or damage to the Claimant's premises or property used by it at those premises.

9. It was agreed that when the Policy was concluded the following facts applied.

   a) The Premises referred to in the Policy were run as a restaurant.

   b) In obtaining insurance the Claimant was represented by an insurance broker, Bernard Saxon General Insurance Services Limited, and in particular by Mr Scott Kinnaird and Ms Mandy Armstrong (the Brokers).

c) The Claimant's insurance broker placed the Policy through a Lloyd's Managing Agent, Generation Underwriting Management Ltd. That managing agent accepted business only through professional intermediaries (i.e. insurance brokers), and not directly from members of the public. Accordingly, any business placed through Generation necessarily involved an expert intermediary.

d) Clause 8.2.6 was automatically included in the Policy as standard. No additional premium was paid for it.

e) In general terms, and without reference to the policy in question, standard business interruption cover was contingent on the occurrence of physical loss or damage to the insured premises or other property. Non-damage business interruption ("BI") insurance was also available as an extension to standard business interruption. Such non-damage BI insurance was provided in various forms, one of which was in the form of an extension on similar terms to clause 8.2.6, but which did not expressly require physical damage. Examples of such cover were seen in the FCA Test Case: see the judgment of the Divisional Court ([2020] EWHC 2448 (Comm)) at paragraphs [204] (QBE), [246] (Hiscox) and [285] (RSA).

10. I assume for the purpose of the preliminary issue that the Claimant can establish its pleaded case that COVID-19 was manifested at the premises or within the 25 mile radius referred to in clause 8.2.6, and that the premises were closed by reason of government intervention and that this intervention amounted to "interruption or interference" within the meaning of clause 8.2.6, and the Claimant suffered financial loss as a result.

The Claimant's position

11. The Claimant emphasised that the purpose of clause 8.2.6 was to provide cover for infectious human diseases, and in particular notifiable diseases that manifested in a broad area of a 25 mile radius, rather than being localised only at the premises.

12. The overall contractual scheme was for basic cover tied to physical damage and then extensions of cover for matters that would not ordinarily be expected to give rise to physical damage. Clause 8.2.6 had a specific purpose in extending the basic interruption cover that applied at clause 8.1 and going beyond mere physical damage to the premises or property used there. The Claimant suggested that this was reinforced by the Supreme Court's approach to a similarly worded disease clause in *FCA v Arch* which also responded where an infectious disease manifested within a 25 mile radius of the premises.

13. The Claimant asked the court to conclude that the reasonable intention of the parties when using the language "caused by damage, as defined in clause 8.1" in the extension under clause 8.6.2, was to make reference to the contractual machinery in clause 8.1 for the standard cover as a whole, and not specifically limiting the extension to physical damage. When using the emboldened word "damage" the parties were not seeking to negate the cover which was being specifically provided within the clause, but to extend the meaning of that term in the cases specifically provided by the clause.

14. The Claimant submitted that it was significant that clause 8.2.6 did not refer to the definition of damage in clause 18.6.1, but instead referred to damage as defined by clause 8.1, in circumstances where clause 8.1 did not define damage as physical damage.

Indeed clause 8.1 was not concerned with defining the word damage but was more widely providing the machinery for the standard type of business interruption cover, including the method of calculating the amount of cover. When the extensions under clause 8.2 (include clause 8.2.6) refer back to clause 8.1, they are not referring back to whether the damage is physical in nature, they are instead referring back to damage in its entirety in the context of clause 8.1. The extensions were thereby re-stating the machinery of the standard cover and then extending it to things not already covered under the standard cover.

15. The Claimant argued that if clause 8.2.6(a) only responded to physical damage then this would render any cover it provided illusory, and negate the purpose of the clause in providing cover for a notifiable disease that could manifest itself miles away. The Defendant's construction would render the clause pointless, and mean that there would have been no need to take the trouble to set out various types of other perils. On that construction it was not possible to identify any cover arising under clause 8.2.6(a). Even for the other heads of cover under paragraphs (b) to (e) the Defendant's construction only gave rise to potential cover in wholly limited examples such as a rodent eating through a wire.

16. The Claimant's case was that the proper meaning of the word damage in clause 8.6.2 would be the "effects of the perils" defined in 8.2.6 and would not be limited to physical property damage. This gives effect to the parties' reasonable intentions taking account of what a small and medium-sized enterprise ("SME") would have understood by the wording.

17. The Claimant argued that any inconsistency in the contractual language should be resolved to reflect the reasonable intentions of an SME contracting for insurance. The court should follow the approach of the Supreme Court in the *FCA v Arch* case when it rejected an argument that an exclusion for epidemics on the last page of the policy would override the business interruption cover expressly providing for disease. Further, while acknowledging that the principle of *contra proferentem* was one of last resort, it suggested that if the court can identify a genuine ambiguity as to whether clause 8.2.6 was limited to physical property damage then it should resolve that ambiguity in its favour.

THE LAW

18. The principles of contractual construction to be applied in construing clause 8.2.6 were not controversial. The Claimant referred me to *Wood v Capita* [2017] UKSC 24 and *The Financial Conduct Authority and ors v Arch Insurance (UK) Ltd and ors* [2021] UKSC 1:

"Principles of contractual interpretation
47. There is no doubt or dispute about the principles of English law that apply in interpreting the policies. They were most recently authoritatively discussed by this court in Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 in the judgment of Lord Hodge and are set out in the judgment of the court below at paras 62-66. The core principle is that an insurance policy, like any other contract, must be

interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task."

19. Business interruption cover has been heavily litigated in recent years due to the pandemic. The Supreme Court and Divisional Court in *FCA v Arch* provided guidance as to the types of cover available for business interruption although acknowledged that such clauses come in many forms. The Divisional Court at paragraph 80 made a clear distinction between what they described as "standard" business interruption cover that is consequent on physical damage (which was not in issue) and "non-damage extensions" which were under consideration.

20. The disease clauses that the Supreme Court ruled on did not require physical damage. They explained some distinctions between different types of cover as follows.

"V Disease clauses
48. We consider first the disease clauses. The general nature of these clauses is that they provide insurance cover for business interruption loss caused by occurrence of a notifiable disease at or within a specified distance of the policyholder's business premises. The following policy wordings contain clauses of this kind: Argenta; MSA 1 and MSA 2; QBE 1, QBE 2 and QBE 3; and RSA 3. There are some variations among these wordings, though for reasons we will give none of the differences in our view materially alters the correct interpretation of the clauses.
The RSA 3 policy wording
49. We will take as an exemplar RSA 3, as this was the wording which the court below thought it most convenient to consider first. RSA 3 is a form of Commercial Combined policy which covers a variety of risks and was taken out by the owners of various different businesses, including building contractors, landscape gardeners and manufacturers and wholesalers of electronics, fabrics and metal goods. The policy has nine sections which provide different types of insurance cover. Section 2 provides cover for business interruption.
50. As is typical, the basic cover provided by this section is for business interruption which is a consequence of physical loss or destruction of or damage to property insured under the property damage section of the policy (section 1). However, section 2 also contains a series of "extensions" which provide cover for business interruption that is not consequent on physical damage to property. The critical extension for present purposes is Extension vii headed "Infectious Diseases". This states:…
" We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:
a. any
i. occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises;
ii. discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;
iii occurrence of a Notifiable Disease within a radius of 25 miles of the Premises".

21. This explanation is consistent with the parties' agreed facts, namely that at the time of contracting the standard cover provided by business interruption insurance required physical damage but "non-damage" business interruption insurance was also available as an extension to the standard cover, and such cover does not expressly require physical damage.

22. The Claimant also highlighted recent authorities (*FCA v Arch* and *Corbin & King v Axa Insurance UK* [2022] EWHC 409 (Comm)) showing that the court must decide what the parties' objective intentions were from the perspective of a reasonable SME owner (advised by his broker) looking at the wording and avoid approaching it with the minute textual analysis of a pedantic lawyer.

CONCLUSIONS

23. The question of construction can be answered shortly. Clause 8.2.6 expressly provided that the insurer would only indemnify for business interruption caused by damage. Damage was in bold terms and under the express terms of the Policy (clause 1.2, 18, and 18.16) it was given a defined meaning, namely physical loss, damage or destruction. On the ordinary meaning of clause 8.2.6, it provided no cover in the absence of such physical loss, damage or destruction.

24. There was no inconsistency or ambiguity in the wording of clause 8.2.6, in particular by reference to the "*interruption of or interference with the **business** caused by **damage**, as defined in clause 8.1"*. This part of the clause was identifying the business interruption in question and could not be construed as suggesting that cover was subject to a different type of damage. There was no inconsistency between different parts of the policy, indeed damage was used consistently throughout.

25. The fact that clause 8.2.6 was contained under a heading described as "cover extensions" was of very limited weight in supporting the Claimant's argument that damage had a different meaning under that clause. It was an agreed fact that clause 8.2.6 was automatically included in the Policy as standard and no additional premium was paid for it. As is commonly found in policies, the parties had expressly agreed that the headings were not part of the policy so the heading "extension" should not dictate the meaning of the terms.

26. A reasonable SME (advised by its broker or even acting without advice from a broker) would have read the policy wording, including the definition sections and understood the meaning of damage. The fact that clause 8.2.6 was contained within extensions or referred back to clause 8.1 did not alter the meaning of damage. It was an agreed fact that at the time of contracting non-damage cover was available in addition to standard business interruption cover which is typically contingent on damage. The Claimant obtained cover through an expert intermediary and accordingly had access to advice on available cover before concluding the Policy.

27. The Supreme Court's reference to "extensions" providing non-damage business interruption cover did not support a conclusion that clause 8.2.6 should be construed as non-damage cover. The Divisional and Supreme Court had only addressed non-damage disease clauses. It was significant that the clause they were dealing with was not expressed to cover interruption caused by damage, and had been expressly recognised as

a "non-damage" clause where cover was not contingent on damage. Clause 8.2.6 was worded in a materially different way, and it had a different meaning reflecting the use of the express term "caused by **damage**", where the bold wording had been clearly defined to mean physical damage.

28. The Defendant referred to decisions of the Financial Ombudsman Service addressing a similar question based on what appeared to be an identical wording and declining to treat it as a non-damage clause. I gave these rulings limited weight since they go to what is fair and reasonable rather than legal entitlement. They were of some reassurance in supporting the agreed factual matrix, and showing that clause 8.2.6 is not an anomalous, erroneous or outlier wording.

29. The Claimant's counsel put its case as persuasively as possible, but the arguments put forward, including that damage in clause 8.2.6 meant "the effect of the perils" were effectively asking the Court to read the clause as if the words "caused by damage" and "in consequence of the damage" had not been agreed. This would entail re-writing the Policy contrary to the parties' express agreement and the established approach to contractual construction. Indeed, the Claimant would have had to re-write not only clause 8.2.6 but also clause 8.1.4 whereby any indemnity was calculated by reference to damage defined as physical damage. The Claimant's argument that the extensions operated to extend the cover to different types of damage simply did not work unless damage was given a broader meaning (or removed) within both clauses 8.2.6 and 8.1 and there was no justification for this in the wording or context.

30. The Defendant correctly referred to authorities in *Lewison on the Interpretation of Contracts, 7th Ed,* laying down the principle that where a word is expressly defined by the contract the court will give effect to the agreed definition, and it would be highly unusual to depart from it. Here the express definition was clear and workable: there was no basis to depart from it.

31. The Claimant's argument that it would negate the cover if it was construed as only arising where interruption was caused by physical damage begged the question as to what cover had been agreed. The argument that the clause's plain meaning would render it illusory or pointless was also of limited weight. As the Defendant emphasised, arguments of redundancy are given limited weight in construing insurance contracts, in which repetition is common. While non-damage cover that was not contingent on physical damage would have been significantly wider and provided better cover against the closures caused by COVID-19, the clause was not to be construed (or re-written) with hindsight as to subsequent events.

32. On its ordinary meaning clause 8.2.6 would plainly provide some cover beyond the basic cover laid down under clause 8.1 (as was apparent from the example of a closure due to rats damaging electric wires). The manifestation of a notifiable infectious disease or a murder on the premises would clearly be capable of causing physical damage on the premises that would interfere with the business. The manifestation of a notifiable disease off the premises was less likely to cause such physical damage but its inclusion reflected the impact of a notifiable disease, and its limited application did not justify giving damage a different meaning.

33. To answer the preliminary issue on the terms ordered I conclude that on the proper construction of clause 8.2.6 of the Policy there can be no cover in the absence of damage (as defined in the policy), and such damage is physical loss, physical damage and physical destruction.