BELLINI V BRIT UW LTD.

The Court of Appeal (Vos MR, Males and Birss LJJ) handed down judgment in *Bellini (N/E) Ltd. v Brit UW Limited* [2024] EWCA Civ 435 on 30th April 2024, a case concerning the interpretation of the word "damage" in a commercial insurance contract.

Background

The Claimant ("**Bellini**") was a business that ran a restaurant in Sunderland, which was forced to close on 20th March 2020 by the UK Government when it gave mandatory guidance and passed emergency legislation during the COVID-19 pandemic.

Bellini had entered into a policy of insurance with the Defendant ("**Brit**") in November 2019, which provided business interruption insurance cover, under which Bellini sought to claim an indemnity for its losses caused by the closure.

Brit defended the claim on the basis that on a proper construction of the word "damage" within the policy, Bellini was only entitled to cover for physical damage as opposed to non-physically-caused business interruption losses.

The claim was set down by HHJ Pelling KC for a preliminary issue trial which was heard before Clare Ambrose, sitting as a Deputy High Court Judge on 13th June 2023, who ruled in favour of Brit in *Bellini (N/E) Ltd. v Brit UW Limited* [2023] EWHC 1545 (Comm). Bellini appealed.

The Policy

Like many business interruption insurance policies, the policy documents comprised a schedule and a policy wording. The policy schedule defined the parties and the standard limits of indemnity. In this case, Bellini was covered in principle for business interruption losses to gross revenue of £340,000.

The policy wording (a "Generation Underwriting Licenced Premises Insurance Policy") contained standard covers for contents, equipment, buildings etc. Section E of the policy defined the terms for business interruption coverage, which, as is usual in such policies, related to interruption caused by damage to property. Clause 8.2 defined the extensions to that standard cover, and clause 8.2.6 provided a cover extension for "Murder, suicide or disease":

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% percent of the **sum insured** by this **section** or £50,000 whichever is the greater.

The relevant clause in *Bellini* was 8.2.6(a), i.e.:

> *"**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; "*

The term "*any human infectious or human contagious disease … an outbreak of which the local authority has stipulated shall be notified to them…"* was a reference to certain "notifiable diseases" made notifiable under the provisions of the Health Protection (Notification) Regulations 2010. COVID-19 had been made a notifiable disease by the UK Government on 5th March 2020, and the Divisional Court in *FCA v Arch Insurance (UK) Ltd. and ors* [2020] EWHC 2448 (Comm) had held (para. 160) that diseases which were made notifiable would count, even if they had not existed at the outset of the policy.

Bellini therefore argued that if it were able to prove the manifestation of COVID-19 within 25 miles of its premises, it would be entitled to cover.

Brit relied on two clauses in order to deny cover. Firstly, a clause within the definitions section of the policy wording, which provided:

> ***"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."*

Secondly, clause 18.16.1:

> ***"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."*

The Preliminary Issue

The court was asked to decide "*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), or not.*", which involved deciding whether the clause provided cover only where a manifestation of COVID-19 within 25 miles of the premises had caused "*physical loss, physical damage"* or "*physical destruction".*

Bellini contended that the cover would be rendered entirely illusory by that interpretation of the clause, that the clause was an extension of cover to the standard property-damage-related business interruption cover as was usual in business interruption policies, and that it would be an absurd reading of the policy to require that the manifestation of disease caused physical property damage for cover to follow. It was Bellini's case that that was clearly not the commercial purpose behind the clause, as summarised by Clare Ambrose:

> *"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.*
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> *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."*

Brit's argument, on the other hand, was that "damage" was clearly defined by the policy and that that could not be ignored; that although it might be seen as very unlikely that the manifestation of COVID-19 within 25 miles of the premises could cause physical property damage, it was not entirely illusory cover. As it said in its opening submissions at the preliminary issue trial:

> *"…in support of its redundancy case Bellini argues that the perils listed in (a) to (e) "do not in any practical or realistic sense give rise to physical property damage", meaning the clause (on Brit's case) is redundant. This too is wrong. See the examples of the rat infestation and the murderer, above. … there is an attempt to throw down the gauntlet by asking how reasonable parties could have anticipated that physical loss, damage or destruction could ever arise from the manifestation of a disease…. This is a forensic flourish intended to obscure the obvious meaning of clause 8.2.6. But to address the point directly, suppose a customer falls suddenly (and perhaps violently) ill with a contagious disease in the middle of dinner. It is not difficult to imagine how this might involve contamination of property and/or overt physical damage, which could well result in a temporary closure for cleaning and/or to replace damaged property. There would in that case have been an interruption or interference caused by physical damage arising from an incident of contagious disease. There will be cover, because the damage trigger is satisfied. That this might be expected to be a rare or unlikely occurrence is not relevant: so too are many insured perils. Nobody expected the Titanic to sink on her maiden voyage. It does not mean one can ignore the clear meaning of the contract."*

The High Court agreed with Brit:

> *"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."*

The Court of Appeal

Vos MR gave the lead judgment, setting out the applicable legal principles to the construction of contracts, summarised by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 (himself summarising the previous 45 years of jurisprudence from *Prenn v Simmonds* [1971] 1 WLR 1381 to *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50):

> *"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean … And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …*
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> *16. For present purposes, I think it is important to emphasise seven factors.*
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> *17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual*

> *case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract …*
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> *18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. …*
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> *19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. …"*

On appeal, Bellini argued additionally that the definition of "damage" as solely physical property damage was an error which ought to be corrected by the court in accordance with the principles in *Chartbrook Limited v. Persimmon Homes Limited* [2009] 1 AC 1101, summarised by Vos MR at [18-19]:

> *"18. In Chartbrook Limited v. Persimmon Homes Limited [2009] 1 AC 1101 (Chartbrook), Lord Hoffmann explained and applied the East v. Pantiles principle as follows at [22]-[25]:*
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> > *22. In [East v Pantiles] Brightman LJ stated the conditions for what he called "correction of mistakes by construction": "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."*
> >
> > *23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this*

> *statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50): "Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."*
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> *24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.*
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> *25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied.*

19. It is useful to add a slightly expanded citation from Brightman LJ's judgment in East v. Pantiles at page 112 as follows. It explains how the principle applies to "obvious clerical blunders or grammatical mistakes":

> *It is clear on the authorities that a mistake in a written instrument can, in certain limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention. In Snell's Principles of Equity 27th ed p 611 the principle of rectification by construction is said to apply only to obvious clerical blunders or grammatical mistakes. I agree with that approach. Perhaps it might be summarised by saying that the principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, "Of course X is a mistake for Y"."*

Vos MR took the view that Brit was correct in its interpretation of the clause, and that it ought to be interpreted as providing only very limited cover for losses caused by physical damage:

> *34. Fourthly, I should deal briefly with the argument that the insurer can only produce far-fetched examples, or no real examples, of when the damage-based cover in clause 8.2.6 would actually add anything to the clause 8.1 cover, in respect of the 5 perils listed in clause 8.2.6. Diseases 25 miles away could never cause physical damage, and the idea that clause 8.2.6 was only intended to provide cover when a murder caused damage by, for example, blood stains on the carpet at the premises, was absurd. The fact that clause 8.2.6 provides limited additional business interruption cover does not make it absurd. Insurance policies are, as the judge said at [31], often somewhat repetitive. They are also sometimes clumsily drafted. Without giving evidence, I think it is fair to say that this can arise, even if it did not in this case, from*

> *the "pick and mix" approach to the insertion of various possible clauses that insurers sometimes adopt. I can see it is frustrating for the insured in this case to discover, after COVID-19 struck, that clause 8 of its policy was pretty well entirely about losses caused by physical damage. But we have to decide objectively what a reasonable reader, with all the background knowledge which would reasonably have been available to the parties when they entered into the policy, would have understood its language to mean. I have, as already explained, no doubt that that reasonable reader would have concluded at the policy's inception that clause 8.2.6 was only providing damage-based cover.*

The court also held that nothing had gone wrong with the language of the contract so as to justify the use of Lord Hoffman's pot of red ink in *Chartbrook*:

> *"29. I do not think that anything has gone wrong with the language of clause 8.2.6, whether obviously or at all. Clause 8.2 is, as Mr Gavin Kealey KC, counsel for the insurer, put it, a "damage sandwich". It is all about business interruption losses of various kinds caused by physical damage. It is not and cannot reasonably be interpreted as a non-damage cover of any kind. So far from being absurd, that is just what a fair reading of the policy to a reasonably informed small-business-owning policyholder would lead them to conclude. There are 3 reasons why I take the view that nothing has gone wrong with the language of clause 8.2.6.*
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> *30. I will take the "damage sandwich" point first. It may be noted at the outset that clause 8.1.1 clearly provides for business interruption cover where there is damage to property used by the insured at the premises. The rest of clause 8.1 is about how losses claimed under that cover are to be calculated. The sub-clauses of clause 8.2 effectively provide business interruption cover for various things caused by physical damage. Clause 8.2.6 can be seen, if one looks at clause 8.2 as a whole, to be no exception.*
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> *31. In this context, it is useful to summarise the other coverage provisions of the sub-clauses of clause 8.2 as follows. Clause 8.2.1 provides cover for*

additional increased costs of working "limited to the additional expenditure … incurred in consequence of the damage". That is plainly covering only losses caused by physical damage. Clause 8.2.4 extends cover to business interruption "caused by damage … to contents and goods belonging to or held in trust by you whilst temporarily at premises not occupied by you or whilst in transit". Again, that is demonstrably cover for losses caused by physical damage, albeit to the physical property of others or to property in transit. Clause 8.2.5 is providing cover for business interruption caused by damage "to property in the vicinity of the premises which shall prevent the use of the premises or access thereto". That is a damage-based extension covering the situation where, for example, a fire in neighbouring premises closes the restaurant. After clause 8.2.6, there is clause 8.2.8, which extends cover to business interruption caused by damage "at any premises of any of your direct suppliers". This too is clearly a damage-based extension. The first part of clause 8.2.9 is also a damage-based extension to cover business interruption losses, where damage is caused to the property of utility suppliers. Clause 8.2.10 provides business interruption cover caused by damage at the premises of the insured's customers. Clause 8.2.12 deals with additional expenditure incurred as a result of damage that interrupts the insured's research and development. Without making a too detailed analysis of the extensions to the business interruption coverage provided by clause 8.2, one can see that the clause is all about business interruptions caused by physical damage to property. That may make less sense in terms of an outbreak of COVID-19, but it must be recalled that the COVID-19 pandemic had not occurred when the policy was written.

32. The second reason why I do not think it is obvious that something has gone wrong with the language of clause 8.2.6 concerns the phrase "damage, defined in clause 8.1". The insured's entry point to its absurdity argument was that the reference to clause 8.1 was an obvious mistake. I do not think it was. The same phrase is used in most of the other extensions in clause 8.2 that I have already mentioned. Moreover, clause 8.1 does indeed define the "interruption of or interference with the business caused by damage" which are the words that immediately precede "defined in clause 8.1" in clause 8.2.6. In effect, it

> *also defines the "damage" as occurring "during the period of insurance" and "the business" as being that carried on by the insured "at the premises". The reference to clause 8.1 is not a mistake at all. It is making clear that the damage-based business interruption coverage in clause 8.1 is being extended in the indemnity clauses in clause 8.2.*
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> *33. Thirdly, as I have already intimated, the policy must be interpreted as at 20 October 2019 when it incepted. COVID-19 was pretty well unheard of in October 2019, and clause 8.2.6 cannot be interpreted through the telescope of COVID-19."*

Males and Birss LJJ agreed, dismissing Bellini's appeal.

Conclusion

The decision has had a substantial effect on hundreds of businesses with similar clauses where cover has now been refused on the basis that they are required to prove not simply that the manifestation of disease caused closure (in accordance with the new test for causation in *FCA v Arch and ors* [2021] UKSC 1 para. 212), but additionally that physical damage to property was caused by that manifestation.

12.08.2024

NEIL FAWCETT