Neutral Citation Number: [2024] EWCA Civ 435

Appeal No: CA-2023-001729
Case No: LM-2022-00206

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
Clare Ambrose (sitting as a Judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between :

BELLINI (N/E) LTD TRADING AS BELLINI
Claimant/Appellant

- and -

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

Jeffrey Gruder KC and Neil Fawcett (instructed by **Barings LLP**) for the **Claimant/Appellant**

Gavin Kealey KC and Harry Wright (instructed by **DLA Piper LLP**) for the **Defendant/Respondent**

Hearing date : 17 April 2024

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JUDGMENT

This judgment was handed down remotely at 10:00am on 30 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS :

Introduction

1. This appeal concerns the proper interpretation of a single clause in a licensed premises insurance policy (the policy) written by Brit UW Limited (the insurer) for Bellini (N/E) Limited (the insured). Clause 8.2 of the policy purported to provide "Business interruption – Cover extensions", but Ms Clare Ambrose, sitting as a deputy judge of the High Court, (the judge), concluded at a preliminary issue trial, that the relevant sub-clause 8.2.6 of the policy (clause 8.2.6) provided no cover in the absence of damage, as defined in the policy. Damage was defined by clause 18.16.1 as "physical loss, physical damage and physical destruction".

2. The insured was the proprietor of a restaurant in Sunderland and claimed under the policy in respect of loss incurred from business interruption caused by the COVID-19 pandemic.

3. Clause 8.2.6 was headed "Murder, suicide or disease" and provided as follows:

> **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 [AIDS] 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 [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 [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 [5%] of the **sum insured** by this **section** or £50,000 whichever is the greater.

4. It will be observed at once that clause 8.2.6 uses terms that are shown in bold. Clause 1.2 of the policy explains that such words have the specific meanings attached to them in clause 18. It will be seen also that clause 8.2.6 refers in two places to "**damage**". It says that the indemnity it provides is "in respect of interruption of or interference with the **business** caused by **damage**, as defined in clause 8.1, arising from [the 5 specified insured perils]". At the end of clause 8.2.6, it limits the period of the claim to 3 months "during which the results of the **business** shall be affected in consequence of the **damage**".

5. The question really is whether the words: "caused by **damage**" and "in consequence of the **damage**" mean what they say or whether, as the insured argues, they should be disregarded on the grounds that they make a nonsense of the insurance provided by clause 8.2.6. The insurer argues that the policy is of a well-known kind providing business interruption cover only where there is physical damage to property. Cover for business interruption losses where there was no physical damage was available, but the insured did not take it.

6. I have decided that the judge was right and that the references to the need for physical damage cannot be ignored. When the policy is read as a whole, it is clear that the extensions to the business interruption cover provided are limited. The policy was not, objectively viewed, providing non-damage business interruption cover, taking into account the policy in its entirety and all the relevant elements of the wider context (see [10] of Lord Hodge in *Wood v. Capita Insurance Services Limited* [2017] UKSC 24 (*Wood v. Capita*)). There was not, as the insured submitted, a clear mistake in the language used in clause 8.2.6, so the principles enunciated by Brightman LJ as to what he called the "correction of mistakes by construction" do not apply in this case (see *East v. Pantiles (Plant Hire) Ltd* (1982) 2 EGLR 111 at page 112 (*East v. Pantiles*)).

7. I shall proceed in this judgment to cover: (i) the relevant background facts and the judgment, (ii) the essential terms of the policy, (iii) the applicable authorities, (iv) the main arguments advanced by the parties, (v) the proper interpretation of clause 8.2.6, and (vi) my conclusions.

<u>The relevant background facts and the judgment</u>

8. The parties agreed the facts that they thought were relevant to the trial of the preliminary issue. That issue was "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])".

9. The parties agreed that the background to the COVID-19 pandemic and the UK Government's response to it was as set out in [10]-[52] of the Divisional Court's judgment in *Financial Conduct Authority v. Arch Insurance UK* [2020] EWHC 2448 (Comm), [2020] Lloyd's Rep IR 527 (*FCA Divisional Court*). The judge commented that these findings reflected the declaration of a pandemic and UK regulations (including government restrictions on restaurant opening) from March 2020.

10. The following facts were those that the parties agreed as relating to the time that the policy was concluded, which was on 20 October 2019:

> Clause 8.2.6 was automatically included in the Policy as standard. No additional premium was paid for it.
>
> 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 [*FCA Divisional Court* at] [204] (QBE), [246] (Hiscox) and [285] (RSA).

> The Premises, for the purposes of the Policy [were] “The Dene, Dovedale Road, Sunderland, SR6 8LS” from which [the insured ran] a restaurant business.
>
> [The insured] 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).
>
> [The insured’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.

11. The judge recorded at [8] that it was common ground that there had been no physical loss of or damage to the insured’s premises or property used by it at those premises. She also recorded at [10] that she was assuming for the purposes of the preliminary issue that the insured could 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, the premises were closed by reason of government intervention, this intervention amounted to “interruption or interference” within the meaning of clause 8.2.6, and the insured suffered financial loss as a result.

12. The judge delivered her judgment on 26 June 2023 after a one-day hearing on 13 June 2023. She explained her conclusions concisely at [23]-[33]: “[o]n the ordinary meaning of clause 8.2.6, it provided no cover in the absence of such physical loss, damage or destruction. There was no inconsistency or ambiguity in the wording of clause 8.2.6 and there was no inconsistency between different parts of the policy. She reasoned as follows at [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 [insured] obtained cover through an expert intermediary and accordingly had access to advice on available cover before concluding the Policy.

13. *FCA Divisional Court* and the Supreme Court’s decision in *The Financial Conduct Authority v. Arch Insurance (UK) Ltd* [2021] UKSC 1 (*FCA UKSC*) had, according to the judge, been dealing with non-damage disease clauses (see *FCA Divisional Court* at [80] and *FCA UKSC* at [48]-[50]).

14. The judge said at [29] that the insured had submitted that "damage" in clause 8.2.6 meant "the effect of the perils". That was asking the court to read the clause as if the words "caused by damage" and "in consequence of the damage" had not been agreed. It would entail re-writing the policy contrary to the parties' express agreement and the established approach to contractual construction. The argument that clause 8.2.6's plain meaning "would render it illusory or pointless was also of limited weight", because "arguments of redundancy are given limited weight in construing insurance contracts, in which repetition is common". Clause 8.2.6 did provide some cover beyond the basic cover laid down under clause 8.1, such as the example of a closure due to rats damaging electric wires. The fact that a notifiable disease off the premises was less likely to cause physical damage did not justify giving the word "damage" a different meaning.

Essential terms of the policy

15. To be properly understood, the policy needs to be read as a whole. It comprises 20 main clauses and 11 coverage sections dealing with contents, all risks, buildings, computer breakdown, business interruption, terrorism, goods in transit, loss of licence, employer's liability, public and products liability, and legal expenses. The insured paid £2,270.60 for all the covers offered apart from all risks to specified business equipment and terrorism.

16. I have already mentioned clauses 1.2 (related to terms in bold), 8.2.6, and 18.16.1 (defining damage). It is helpful, however, bearing in mind the way the insured put its argument before us, to look at clause 8 as a whole. I am, therefore, setting it out in full in the schedule to this judgment.

The applicable authorities

17. The applicable principles of contractual interpretation are very well-known and were not really disputed before us. Nonetheless, as will appear in the next section of this judgment, the insured tried to push the boundaries of the principle I have already enunciated in *East v. Pantiles*. It is, therefore, worth taking a little time to set out the most pertinent passages from the applicable authorities, even though they are so well-known and well understood. Indeed, I recently set them out and applied them in *Britvic plc v. Britvic Pensions Limited* [2021] EWCA Civ 867 at [16]-[24], which was a case in the field of pensions, where an unsuccessful attempt was also made to apply the principles from *East v. Pantiles*.

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]:

> 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."
>
> 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.
>
> 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".

20. In *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, Lord Clarke explained the normal principles of contractual interpretation at [21]-[23] as follows:

> 21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.
>
> 22. This conclusion appears to me to be supported by Lord Reid's approach in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 quoted by Sir Simon Tuckey and set out above. …
>
> 23. Where the parties have used unambiguous language, the court must apply it.

21. In *Arnold v. Britton* [2015] UKSC 36 at [14]-[22] (*Arnold v. Britton*), Lord Neuberger summarised the previous 45 years of jurisprudence from *Prenn v. Simmonds* [1971] 1 WLR 1381 to *Rainy Sky*. He said this at [15]-[19]:

> 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 …
>
> 16. For present purposes, I think it is important to emphasise seven factors.
>
> 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 …
>
> 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. …

> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. …

22. At [21] in *Britvic*, I summarised the effect of *Wood v. Capita* as follows:

> In *Wood v. Capita*, Lord Hodge at [8]-[15] rejected the suggestion that there had been any change in the approach to contractual interpretation. There was no need to reformulate the guidance in *Rainy Sky* and *Arnold v. Britton*, and the latter had not recalibrated the former. The recent history was one of continuity rather than change. At [13], he said that "[t]extualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation". Rather, they were "tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement", and "[t]he extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements". Lord Hodge drew a distinction between agreements that could "be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals" on the one hand and where the "correct interpretation [might] may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance". The representative member relied on Lord Hodge's statement that "[t]here may often … be provisions in a detailed professionally drawn contract which lack clarity and the … judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type".

23. The parties before us referred to Carnwath LJ at [80] and Rix LJ at [110] in *ING Bank SA v. Ros Roca* [2011] EWCA 353, [2012] 1 WLR 472. I confess that I do not think those helpful passages take the applicable principles I have already described any further.

24. Finally, though, I should mention [47] of *FCA UKSC* where Lords Hamblen and Leggatt summarised the principles of contractual interpretation as follows:

> 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*] in the judgment of Lord Hodge … 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.

<u>The main arguments advanced by the parties</u>

25. It was suggested by the insurer that the insured's main argument before us had not been addressed to the judge. That was because before us the insured explained precisely, in answer to questions from the court, how it said that the words "caused by **damage**, as defined by clause 8.1" and "in consequence of the **damage**" in clause 8.2.6 should be

understood. The insured submitted that clause 8.2.6 should be understood as if the words "caused by **damage**, as defined by clause 8.1" were deleted, and as if the words "in consequence of the damage" read "in consequence of the insured perils set out above at paragraphs (a)-(e) above". Those amendments, together perhaps with some similar linguistic changes to other parts of clause 8.2 were, it was said, the "only way to make sense of the policy". That was, the insured submitted, how the Divisional Court had interpreted the trends clause in *FCA Divisional Court* at [119]-[120], and how the approach of the Supreme Court in *FCA UKSC* at [77] should be applied:

> In any event, the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf *Jumbo King Ltd v. Faithful Properties Ltd* (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.

26. The insured submitted that it was obvious that clause 8.2.6 was an absurdity, because the words "**damage**, as defined in clause 8.1" made no sense. Damage was not defined in clause 8.1. Clause 8.1 simply provided for business interruption coverage subject to certain defined provisos as to damage. When Mr Jeffrey Gruder KC, leading counsel for the insured, was asked whether it was clear that his interpretation was the only way to cure the mistake in the language, as required by the second part of the test in *East v. Pantiles*, he said that, even if there were other possible ways, the court should choose to rewrite the policy in the most sensible way that accorded with the obvious intention of the parties. In this case, that was, in effect, so that 8.2.6 provided non-damage rather than damage cover.

27. In answer to these arguments, the insurer said that such an approach was impermissible. The insurer took the court through the entirety of the policy and through the detail of clauses 8.1 and 8.2 (set out in the schedule) to show us that clause 8.2 was all about cover extensions arising from physical damage. The only exception was at the end of clause 8.2.9 where non-damage cover was expressly and clearly provided for "interruption of or interference with the **business** caused by accidental failure of" electricity or gas supplies. A proper application of the authorities and of *East v. Pantiles* required the court to reject the insured's submissions. It did not matter that clause 8.2.6 provided only very limited extensions of cover for disease, nor that it was hard to imagine how liability could ever arise under clause 8.2.6(a) on the insurer's interpretation. The parties were to be held to their bargain.

<u>The proper interpretation of clause 8.2.6</u>

28. In my judgment, the court should apply the authorities that I have tried to summarise at [17]-[24] above. As the insured's argument acknowledged, it was only permissible to rewrite clause 8.2.6 if something has indeed gone wrong with the language used. If not, then the clause would have to be given its natural meaning, if, as was effectively acknowledged also, it was not ambiguous on its face, even if it did provide only limited additional cover beyond the other cover provided in clause 8.1.

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.

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.

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.

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.

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.

35. In these circumstances, it is not necessary to consider whether the second limb of Brightman LJ's test in *East v. Pantiles* could anyway be satisfied in this case. The insurer argued persuasively that it was not clear what correction ought to be made in order to cure the mistake, even assuming there was one. Its point was rather reinforced by the fact that the insured argued below (see [31] of the judge's judgment) that "**damage**" in clause 8.2.6 meant "the effect of the perils", whereas in this court it said that clause 8.2.6 should be understood as if the words "caused by **damage**, as defined by clause 8.1" were deleted, and as if the words "in consequence of the damage" read "in consequence of the insured perils set out above at paragraphs (a)-(e) above" (see [25] above). I do not think we need to decide the second limb question, since it does not arise. I can certainly see some force in the argument that, **if** it were clear that something had gone badly wrong with the language the parties had used, and **if** it were obvious that non-damage cover was intended by the parties to be provided, it would be harsh to deprive the insured of that intended cover because there was more than one way to give it effect. I would prefer to leave that question for a case in which it actually arises. It is, as I have said, clear to me that clause 8.2.6 was not, on its face and in its proper context, reading the policy as a whole, intended to provide non-damage cover. Nothing has gone wrong with the language the parties used.

Conclusion

36. For the reasons I have given, I would dismiss this appeal.

LORD JUSTICE MALES:

37. I agree.

LORD JUSTICE BIRSS:

38. I also agree.

Schedule to the judgment

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.

8.1.2 **Gross profit/estimated gross profit**

Our liability in respect of **gross profit/estimated gross profit** is limited to loss of **gross profit/estimated gross profit** caused by a reduction in **turnover** or an **increase in cost of working. Our** liability under this **section** in respect of **gross profit/estimated gross profit** will be:

a) in respect of reduction in **gross profit:** the sum produced by applying the **rate of gross profit** to the amount by which the **turnover** during the **indemnity period** will, in consequence of the **damage,** fall short of the **standard turnover;**
b) in respect of **increased cost of working:** the additional expenditure (subject to the provisions of the Specified working expenses clause) necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **turnover** which but for that expenditure would have taken place during the **indemnity period** in consequence of the **damage,** but not exceeding the sum produced by applying the **rate of gross profit** to the amount of the reduction thereby avoided;
c) minus, regardless of whether the calculation is based on the reduction of **turnover** or **increased cost of working ,** any sum saved during the **indemnity period** in respect of such of the charges and expenses of the **business** payable out of **gross profit** as may cease or be reduced in consequence of the **damage;**

except that, in either case, if the **sum insured** in respect of **gross profit** is less than the sum produced by applying the **rate of gross profit** to the **annual turnover** (or to a proportionately increased multiple thereof where the **maximum indemnity period** exceeds twelve months), **our** liability will be

proportionately reduced.

8.1.3 **Gross fees/estimated gross fees**

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

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

b) in respect of **increased cost of working:** the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **gross fees** which but for that expenditure would have taken place during the **indemnity period** in consequence of the **damage,** but not exceeding the amount of the reduction thereby avoided;

c) minus, regardless of whether the calculation is based on, the reduction in **gross fees** or the **increased cost of working** any sum saved during the **indemnity period** in respect of such of the charges and expenses of the **business** payable out of **gross fees** as may cease or be reduced in consequence of the **damage;**

except that, in either case, if the **sum insured** in respect of **gross fees** is less than the **annual gross fees** (or a proportionately increased multiple thereof where the **maximum indemnity period** exceeds twelve months), **our** liability will be proportionately reduced.

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;**

b) in respect of **increased cost of working:** the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **gross revenue** which but for that expenditure would have taken place during the **indemnity period** in consequence of the **damage,** but not exceeding the amount of the reduction thereby avoided;

c) minus, regardless of whether the calculation is based on, the reduction in **gross revenue** or the **increased cost of working** any sum saved during the **indemnity period** in respect of such of the charges and expenses of the **business** payable out of **gross revenue** as may cease or be reduced in consequence of the **damage;**

except that, in either case, if the **sum insured** in respect of **gross revenue** is less than the **annual gross revenue** (or a proportionately increased multiple thereof where the **maximum indemnity period** exceeds twelve months), the **insurer's** liability will be proportionately reduced.

8.1.5 **Increased cost of working**

Our liability under this **section** is limited to the **increased cost of working.**

8.1.6 **Rent receivable**

Our liability in respect of rent receivable is limited to loss of **rent receivable** and additional expenditure and the amount payable under this **section** will be:

a) in respect of loss of **rent receivable:** the amount by which, in consequence of the damage, the **rent receivable** during the **indemnity period** falls short of the **standard rent receivable;**
b) in respect of additional expenditure: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of **rent receivable** which but for that expenditure would have taken place during the **indemnity period** in consequence of the **damage,** but not exceeding the amount of the reduction in **rent receivable** thereby avoided;
c) minus any sum saved during the **indemnity period** in respect of such of the expenses and charges payable out of **rent receivable** as may cease or be reduced in consequence of the **damage;**
d) except that if the **sum insured** in respect of **rent receivable** is less than the **annual rent receivable** (or a proportionately increased multiple thereof where the **maximum indemnity period** exceeds twelve (12) months), **our** liability will be proportionately reduced

8.1.7 **Book debts**

In the event of any of **your** books of account or other business books or records at the **premises** up to a sum insured stated in the schedule being **damaged** by:

a) insured peril under Clause 3.2 or 5.2;
b) glass breakage;

so as to render it impossible for **you** to obtain from **customers** all the sums due to them and outstanding at the date of the **damage** and for which payment shall have been made or liability admitted by an insurer under any insurance covering **your** interest in the property **damaged** then;
we shall indemnify **you** in respect of loss of **book debts** by paying:

c) the difference solely due to the **damage** between the amount of the **book debts** at the date of the **damage** and the total amount received in payment of them during the twelve (12) months after the **damage;**
d) any reasonable expenditure incurred in avoiding or diminishing the loss of **book debts** but not more than the loss avoided.

The indemnity provided under this clause shall be void if the **business** be wound up or carried on by a liquidator or receiver or permanently discontinued without **our** consent.

No claim shall be payable unless **you:**

a) take all action which may be reasonably practicable to minimise or check any interruption or interference with the **business** or to avoid or diminish the loss;
b) at **your** own expense deliver to **us** in writing a statement setting forth

particulars of your claim.

8.2 Business interruption – Cover extensions

8.2.1 **Additional increased cost of working**

We shall indemnify **you** in respect of additional increased cost of working with the amount limited to the additional expenditure necessarily and reasonably incurred in consequence of the **damage** for the sole purpose of preventing or minimising a reduction in **turnover** or resuming or maintaining normal **business** operations for an amount not exceeding

a) the **sum insured** stated on the schedule by this item; or

b) £50,000

whichever is the greater.

8.2.2 **Alternative trading clause**

If during the **indemnity period goods** are sold or services rendered elsewhere than at the **premises** for the benefit of the **business,** either by **you** or by others on **your** behalf, the money paid or payable in respect of such sales or services will be brought into account in calculating the **turnover** during the **indemnity period.**

8.2.3 **Automatic reinstatement of sum insured**

In the event of a loss the **sum insured** hereby shall not be reduced by the amount of such loss provided that **you** shall:

a) pay the extra premium on the amount of loss from the date thereof to the date of expiry of the **period of insurance;**

b) if the loss results from theft give effect to any additional protective devices which **we** may require for the further security of the property insured.

8.2.4 **Contract sites and transit**

We shall indemnify **you** in respect of interruption of or interference with the **business** caused by **damage,** as defined in clause 8.1, to contents and **goods** belonging to or held in trust by **you** whilst temporarily at **premises** not occupied by **you** or whilst in transit by road, rail or inland waterway anywhere within the **United Kingdom** provided that **our** liability under this clause shall not exceed ten (10%) percent of the **sum insured** by this **section** or £100,000 whichever is the greater.

8.2.5 **Denial of access**

We shall indemnify **you** in respect of interruption of or interference with the **business** caused by **damage,** as defined in clause 8.1, to property in the vicinity of the **premises** which shall prevent the use of the **premises** or access thereto whether the **premises** or **your** property therein shall be **damaged** or not (but excluding **damage** to property of any supply undertaking from which **you** obtain electricity, gas or water or telecommunications services

which prevents or hinders the supply of such services). Provided that **our** liability under this clause shall not exceed £50,000.

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.

8.2.7 **Professional accountants charges**

We shall indemnify **you** in respect of reasonable charges payable by **you** to **your** professional accountants for producing any particulars or details contained in **your business** books or such other proofs information or evidence as **we** may require under clause 16.2.1 e) and reporting that such particulars or details are in accordance with **your** business books or documents

8.2.8 **Suppliers**

We shall indemnify **you** in respect of Interruption of or interference with the **business** caused by **damage,** as defined in clause 8.1, at any **premises** of any of **your** direct suppliers within the **United Kingdom,** provided that **our** liability under this clause shall not exceed fifteen (15%) percent of the **sum insured** by this **section** or £250,000 whichever is the greater.

8.2.9 **Supply utilities**

We shall indemnify **you** in respect of interruption of or interference with the **business** caused by **damage,** as defined in clause 8.1, giving rise to **damage** to property at any:

a) generating station or sub-station of the public electricity supply undertaking;
b) land based **premises** of the public gas supply undertaking or of any natural

gas producer linked directly therewith;
c) water works and pumping stations of the public water supply undertaking;
d) land based **premises** of the public telecommunications undertaking;
from which **you** obtain electricity, gas, water or telecommunication services within the **United Kingdom**

In addition we will indemnify **you** in respect of interruption of or interference with the **business** caused by accidental failure of:
- i) terminal ends of the electricity supply utility service feeders;
- ii) the supply of gas at the supply utility metres;
- iii) the supply of water at the supply utility main stopcock;
- iv) the supply of telecommunication services at the incoming line terminal or receivers

provided that **our** liability under this clause shall not exceed (fifteen) 15% percent of the **sum insured** by this **section** or £250,000 whichever is the greater.

8.2.10 **Unspecified customers**
We shall indemnify **you** in respect of interruption of or interference with the **business** caused by **damage,** as defined in clause 8.1 at the premises of any of the **insured's** customers' but excluding:
a) customers specified by a more specific clause by this **policy;**
b) the premises from which the **insured** obtains electricity, gas, water or telecommunication services;
c) premises outside the **United Kingdom** or Eire:
provided that **our** liability under this clause shall not exceed fifteen (15%) percent of the **sum insured** by this **section** or £250,000 whichever is the greater.

8.2.11 **Value Added Tax**
To the extent that **you** are accountable to the tax authorities for Value Added Tax all terms in this **section** shall be exclusive of such tax.

8.2.12 **Research and development**
We will pay to **you** the additional expenditure incurred as a result of **damage** insured under **sections** Contents and Buildings to property at the **premises** that interrupts the current research and development programme of the **business** except that:
a) cover will be limited to the additional expenditure necessary to reinstate research and development projects to the stage that they were at immediately prior to the **damage;**
b) **our** liability under this clause will not exceed £25,000 for any one claim**.**

8.3 Business interruptions – Exclusions

The insurance by this **section** excludes and does not insure:

a) **damage** arising from deliberate erasure loss distortion or corruption of information on computer systems or other records programs or software;

b) **damage** directly or indirectly caused by or arising from any programming or operator error **virus or similar mechanism** or **hacking** including where this results from the actions of malicious persons other than thieves;
c) mislaying or misfiling of records and tapes;
d) the deliberate act of the supply undertaking in restricting or withholding electricity supply;
e) subject to the provisions of clause 8.2.2 – Automatic reinstatement of sum insured and clause 8.2.6 professional accountants charges, any amount in excess of the **sum insured** shown in the schedule that is the maximum amount **we** are liable to pay during any one **period of insurance.** For the avoidance of doubt professional accounts charges are payable in addition to the **sum insured.**
f) any payment beyond the **indemnity period** shown on the schedule