MAY 2024

COURT OF APPEAL RULES OUT COVID-19 COVER WHERE POLICY REQUIRED DAMAGE

The Court has handed down judgment in *Bellini v Brit*[1]. This case joins the growing collection of decisions interpreting business interruption cover in the context of the COVID-19 pandemic and follows on from the High Court decision which held there was no cover in the absence of physical damage, on the basis of this particular wording. The Claimant appealed on the grounds that there was a clear mistake in the wording of the disease clause warranting the application of the "correction of mistakes by construction" doctrine established in *East v Pantiles (Plant Hire) Ltd*.[2] The Court of Appeal rejected the appeal, and in this article, we consider the judgment further.

Background

The insured, Bellini, owned a restaurant in Sunderland and claimed for losses incurred from business interruption caused by the COVID-19 pandemic under the "Murder, suicide or disease" extension in the policy.

The business interruption extension at Clause 8.2.6 provided:

> "***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 …. 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 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****…*"

Damage was defined in clause 18.16.1 as "*physical loss, physical damage, physical destruction…*"

Clause 8.1 provided: "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….."

High Court judgment

We previously reported on the first instance judgment here

In summary, Ms Clare Ambrose (sitting as Deputy High Court Judge) concluded that the policy wording clearly and plainly required physical damage. In the absence of such physical damage there was no business interruption cover.

---

[1] [2024] EWCA Civ 435

[2] (1982) 2 EGLR 111

Court of Appeal judgment

Parties' arguments

The Claimant argued that the cover provided by the extension was illusory, as there were no real examples of when 8.2.6 would provide any cover – diseases 25 miles away could never cause physical damage. The Claimant said that the reference in clause 8.2.6 to "*damage as defined in clause 8.1*" was a mistake, as clause 8.1 included no such definition. On that basis, the Court should correct the mistake in the policy wording in accordance with *East v Pantiles*. The insured argued that the wording of 8.2.6 should be changed as follows:

(a) clause 8.2.6 should be read as if the words "*caused by damage, as defined by clause 8.1*" were deleted; and
(b) the words *"in consequence of the damage*" should be read as "*in consequence of the insured perils set out above..."*

Therefore, in essence the claimant sought to turn this element of the cover from damage to non-damage based cover. It argued that this was how the Supreme Court had interpreted the trends clause in *FCA v Arch*, and the Supreme Court's approach, to consider how an ordinary policyholder would understand the policy wording and not a pedantic lawyer, should be followed here.

Insurers disagreed and argued that the clause was clearly intended to provide cover for physical damage only, even if this led to limited additional cover for disease in the policy.

Judgment

Master of the Rolls, Sir Geoffrey Vos, gave the unanimous judgment, and dismissed the appeal. The Court found that nothing had gone wrong with the language of clause 8.2.6. The wording in the disease clause was not, on its face and in its proper context, intended to provide non-damage cover.

To reach its conclusion the Court relied upon various authorities on contractual construction. *East v Pantiles* established two conditions for the "*correction of mistakes by construction*": i) there must be a clear mistake on the face of the instrument and ii) it must be clear what correction ought to be made in order to cure the mistake. The Court emphasised the importance of consideration of the mistake "on the face of the instrument" in the first condition, including consideration of the background and context of the policy.

The Court held that the first condition in *East v Pantiles* had not been met. There was no mistake in the extension's reference to "*damage, defined in clause 8.1*" as this confirmed that there was business interruption cover where there was damage to property. This "*damage*" wording was also replicated in the other sub-clauses of 8.2 extending similar cover, and it was clear that all of these other sub-clauses were also concerned with physical damage to property. The Court held that the reference to clause 8.1 was not a mistake, but in effect defined the "*damage*" as occurring "*during the period of insurance*" and the "*business*" as that carried on by the insured "*at the premises*". Finally, the policy had to be interpreted at the date it incepted (October 2019) and not through the telescope of COVID-19.

The judgment then found that even if the first condition had been met it would only be acceptable for it to rewrite the clause if it was clear what the mistake was. In the absence of this, the clause should be given its natural meaning, even if that lead to limited cover.

The Court noted that it would have been a harsh result if it had concluded that something had gone wrong with the wording, and it had been obvious non-damage cover was to be provided but there was no remedy because the language could be amended in more than one way, but the Judge indicated that this issue would be left for another day.

It was acknowledged that this interpretation would be "*frustrating*" for the Claimant where there may have been losses due to a notifiable disease such as the COVID-19 pandemic but where there had been no physical damage to the property. Nevertheless, a reasonable reader at the time of inception of the policy in October 2019 (before the start of the COVID-19 pandemic) would have concluded that the extension only provided cover where there was physical damage. As it was common ground between the parties that there had been no physical loss or damage to the insured's premises or property, there was no cover under the extension.

Conclusion

The decision of the Court of Appeal is perhaps unsurprising given the specific policy wording. As indicated by the Court, insurance policies can sometimes be the result of a "*pick and mix*" approach to the insertion of various clauses in the policy, and it is always important to consider the meaning of any clause within the context of the policy wording as a whole, including any definitions.

A number of other COVID-19 appeals are continuing. The next appeal hearing due to take place is in *London International Exhibition Centre* on "*at the premises*" wordings and other issues, listed in June 2024.

For more information, please contact the author(s) of this alert

JACQUELINE LEWINTON
Associate, London
T +44 (0)20 7264 8019
E jacqueline.lewinton@hfw.com

hfw.com

Americas | Europe | Middle East | Asia Pacific