Neutral Citation Number: [2024] EWCA Civ 1281

Case Nos: CA-2024-000518 & CA-2024-000508

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
Mr Justice Jacobs
[2024] EWHC 124 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2024

Before:

LADY JUSTICE MACUR
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

1) INTERNATIONAL ENTERTAINMENT HOLDINGS LIMITED **2) ATG LONDON LIMITED** **3) AYLESBURY WATERSIDE THEATRE LIMITED** **4) GLASGOW THEATRES LIMITED** **5) MILTON KEYNES THEATRE LIMITED** **6) PLAYHOUSE THEATRE LIMITED** **7) RICHMOND THEATRE LIMITED** **8) SAVOY THEATRE LIMITED** **9) STOKE-ON-TRENT THEATRES LIMITED** **10) THE AMBASSADOR THEATRE GROUP (VENUES) LIMITED** **11) THE DUKE OF YORK'S THEATRE LIMITED** **12) THE NEW WIMBLEDON THEATRE LIMITED** **13) THEATRE MANAGEMENT LIMITED** **14) THEATRE ROYAL BRIGHTON LIMITED** **15) WOKING TURNSTYLE LIMITED**	**Claimants/ Appellants and Cross-Respondents**
- and -	
ALLIANZ INSURANCE PLC	**Defendant/ Respondent and Cross-**

Appellant

- -
- -

Josephine Higgs KC (instructed by **Fenchurch Law (UK) Ltd**) for the **Appellants**
Charles Dougherty KC & Timothy Killen (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing dates: 15 & 16 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. The issues in these appeals concern the interpretation of a 'Non-Damage Denial of Access' (or 'NDDA') clause in an insurance policy providing business interruption cover. The claims arise as a result of the closure of entertainment venues (and other places where people gather) by Regulations made by the Secretary of State for Health and Social Care in exercise of powers conferred on him by the Public Health (Control of Disease) Act 1984 in response to the Covid-19 pandemic.[1]

2. The policyholders' claim is brought pursuant to a clause in the policy which provided as follows:

> '**S/30/1 Endanger Life or Property**
>
> Denial of Access Endanger Life or Property
>
> Any claim resulting from interruption of or interference with the Business as a direct result of an incident likely to endanger human life or property within 1 mile radius of the premises in consequence of which access to or use of the premises is prevented or hindered by any policing authority, but excluding any occurrence where the duration of such prevention or hindrance of us [*sic*.] is less than 4 hours, shall be understood to be loss resulting from damage to property used by the Insured at the premises provided that
>
> i) The Maximum Indemnity Period is limited to 3 months, and
>
> ii) The liability of the Insurer for any one claim in the aggregate during any one Period of Insurance shall not exceed £500,000.'

3. The way in which this clause works is that it extends cover provided elsewhere in the policy for business interruption losses occurring as a result of physical damage to insured property by treating losses occurring without such damage as if they were the result of physical damage.

4. The issues under the policy with which we are concerned were tried as preliminary issues by Mr Justice Jacobs together with numerous other issues affecting different parties with variously expressed NDDA clauses (see *Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm)). Other appeals from his judgment are due to be heard by this court in early 2025. However, the present appeals raise distinct issues which only affect the parties to them.

5. Those issues, together with the judge's answers, are:

   (1) Does the presence of a case of Covid-19 amount, without more, to an 'incident likely to endanger human life' within the meaning of the clause?

   Answer: No.

[1] Those Regulations applied only to England. Although some of the claimants owned or operated theatres in Scotland, it was not suggested that the analysis of the issues with which we are concerned would be materially different under the equivalent Scottish regulations, to which we were not taken.

(2) If so, must the case of Covid-19 (i.e. the 'incident') occur within the one-mile radius or can the case occur outside the radius, provided that it is likely to endanger human life or property within the radius?

Answer: A case must occur within the one-mile radius.

(3) What do the words 'by any policing authority' refer to?

Answer: The words refer to the police or other bodies whose function is to ensure that the law is obeyed and enforced. They do not extend to central government or the Secretary of State for Health and Social Care.

(4) Does the 'Limit' of £500,000 apply separately to each insured premises or does it apply separately to each insured claimant?

Answer: Insofar as they are insureds pursuant to the policy, the claimants are entitled to a separate limit of indemnity per premises rather than a separate limit of indemnity per insured claimant.

(5) Is there in any event an aggregate limit of £500,000?

Answer: No.

6. The judge's conclusion that the Secretary of State was not a 'policing authority' was sufficient for the policyholders' claims to be dismissed regardless of the other issues. On appeal, the policyholders challenge the judge's conclusion on that issue, together with his answers to the first and second issues. By a cross-appeal, the insurers challenge the judge's answers to the fourth and fifth issues.

7. The judge also decided that if a case of Covid-19 did amount to an 'incident likely to endanger human life', it was unnecessary for the policing authority to have known about it before the making of the Regulations. Initially the insurers challenged the judge's decision on this issue, but this ground of the cross-appeal was abandoned shortly before the hearing.

8. I have concluded, in agreement with the judge, that the Secretary of State was not a 'policing authority' within the meaning of the clause. That means that the claimants' claims must be dismissed. However, I shall address briefly the other issues arising.

The policyholders

9. The first claimant, International Entertainment Holdings Ltd, is a holding company and the remaining claimants are said to be its subsidiaries. They are engaged in the ownership, operation and management of theatre, cinema, concert hall and restaurant businesses as well as related design, communications, full-service digital media and marketing agencies. Most of the claimant companies owned or operated a single theatre or venue. For example, the 8th claimant, Savoy Theatre Ltd, owned only the Savoy Theatre in London. Other claimants, however, owned multiple venues. For example, the 10th claimant, The Ambassador Theatre Group (Venues) Ltd, owned and operated 13 theatres in different locations in England and Scotland.

The policy

10. The cover was provided by Allianz under a 'Commercial Select' policy for the period from 30th April 2019 to 30th April 2020. It was a composite policy, insuring each policyholder's interest separately.

11. I would note that the policy contained a Disease clause, providing cover against business interruption losses caused by specified diseases. However, Covid-19 was not one of the specified diseases. Accordingly any claim needs to be brought within the language of the NDDA clause.

The facts

12. The circumstances leading to the making of the Regulations are well known and have been described in several previous cases (e.g. *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649 ('*FCA v Arch SC*')). There is no need to repeat that account here. The parties agreed that at all material times the claimants complied with restrictions imposed on the use of their premises, including their ability to open in whole or in part, by advice given by the government and legislation imposed by it, including the Regulations dated 21st March 2020 (the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 2020/327) and the subsequent regulations dated 26th March 2020 (the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350)) (together, the 'Regulations'). It was therefore unnecessary for the police or any other entity empowered to enforce compliance with these Regulations to take any action against any of the claimants to enforce such compliance, and no such action was taken.

13. Each of the claimants suffered interruption and/or interference as a result of the total closure of their premises required by the Regulations. The closure continued for a period longer than the Maximum Indemnity Period of three months specified in clause S/30/1.

14. Theatres, cinemas, concert halls and restaurants were permitted to re-open on 4th July 2020 when the Regulations of 26th March were revoked and replaced by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020. However, we are not concerned in these appeals with these later events, as by then the policy had expired.

Principles of interpretation

15. 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: *FCA v Arch SC* at [47]. Referring specifically to business interruption policies of the kind with which we are concerned, the Supreme Court said at [77] that in the case of such an insurance policy, sold principally to small and medium-sized enterprises, 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, but an ordinary policyholder

who, on entering into the contract, is taken to have read through it conscientiously in order to understand what cover they were getting.

16. It is, I think, fair to say that ordinary policyholders reading conscientiously through this policy would not understand the NDDA clause to be concerned, at any rate primarily, with losses caused by their premises having to be closed as a result of disease. They would expect that risk to be dealt with in the Disease clause, which draws a line between specified diseases, where there is cover, and other diseases, where there is not. That is not to say that such losses may not be recoverable under the NDDA clause, but there is no justification for stretching the language of the clause in order to achieve this result.

17. It is relevant also to have in mind that this policy adopts the 'pick and mix' approach[2] described by Sir Geoffrey Vos MR in *Bellini N/E Ltd v Brit UW Ltd* [2024] EWCA Civ 435:

> '34. … 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.'

18. Where a contract shows signs of having been drafted as a coherent whole, it must be construed accordingly, and it is often a reasonable inference that terminology has been used consistently as between the various clauses. But it is commonly the case that insurance policies are not drafted in this way. Rather, as in the present case, they appear to include a selection of different clauses adopted from other contracts, with no attempt to ensure that language is used consistently throughout the policy. This 'pick and mix' approach means that the inference of consistent usage has little or no force, and that reference to the same or similar language in other clauses of the policy may shed little light on the meaning of the term in question. As Mr Charles Dougherty KC for the insurer recognised, there is an obvious danger in trying to find coherence between clauses which have been stitched together with no attempt to ensure such coherence.

19. In my judgment that is the position here. For that reason I shall not set out or refer to other terms of the policy to which counsel referred, for example where terms such as 'incident' were used elsewhere in the policy, the submission being that this usage illuminated the meaning of the word 'incident' in clause S/30/1. Although these submissions were made moderately and attractively, that kind of submission risks falling into the 'minute textual analysis' of the policy, deprecated by the Supreme Court, which the reasonable policyholder is unlikely to have undertaken.

20. I shall refer to separate principles, concerned with the correction of obvious mistakes, when I deal with the fifth issue identified above.

Was the Secretary of State for Health and Social Care a policing authority?

The judgment

[2] A term which will evoke fond memories of the Woolworths sweet counter for those of a certain age.

21. The judge accepted that the term 'policing authority' was not limited to the police, but extended to other similar bodies that carry out policing functions. He considered that no reasonable policyholder would consider that central government or a government minister was a body similar to a police force. Rather, the term referred to the police or similar bodies whose function was to ensure that the law was obeyed and enforced.

Submissions

22. Ms Josephine Higgs KC for the policyholders submitted that the term 'any policing authority' has no established meaning. There is in fact no body which is called a 'policing authority': although there used to be such things as 'police authorities', responsible for the supervision of police forces, those police authorities did not themselves perform policing functions. Accordingly, because clause S/30/1 is concerned with prevention or restriction of access to premises, the term 'policing authority' should be interpreted as referring to *any* body with the authority to prevent or restrict (i.e. to police) access to premises.

23. Ms Higgs referred to various common law or statutory powers which the police have to prevent or restrict such access. She pointed out, however, that the exercise of such powers by the police is (in many cases) not for the purpose of enforcing existing laws, but to protect public safety by imposing restrictions where none existed before. She pointed out also that other bodies, such as the fire and rescue services, also have powers to restrict access to premises or to close roads, not for the purpose of enforcing existing laws, but to protect public safety: see, for example, section 44 of the Fire and Rescue Services Act 2004. An obvious example was a gas leak giving rise to a danger of fire or explosion, which might be regarded as a paradigm situation with which clause S/30/1 was concerned. Faced with such a leak, either a police officer or the fire and rescue services would have power to restrict access to the premises concerned and the surrounding area. However, the exercise of that power would not be for the purpose of enforcing an existing law, but to protect the public.

24. Ms Higgs submitted, therefore, that the judge was wrong to regard the enforcement of the law as the critical function which characterises a 'policing authority'. Rather, the critical function for the purpose of clause S/30/1 was the protection of public safety – which was precisely the function which the Secretary of State was performing when he made the Regulations. The powers contained in section 45C of the 1984 Act, pursuant to which the Regulations were made, were conferred 'for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales'. Accordingly, in clause S/30/1 at any rate, the term 'any policing authority' extended to any body restricting access for the purpose of protecting public safety, including central government when legislating for that purpose.

Decision

25. I have no doubt that a reasonable policyholder would not regard the term 'any policing authority' as extending to the Secretary of State or any other embodiment of central government when enacting secondary legislation. That would be an unnatural meaning of the term, contrary to the ordinary use of language. The essential logic of Ms Higgs' submission, that because the police and some other bodies have power to restrict access for the purpose of protecting public safety, therefore any body

exercising a power to restrict access for that purpose is a policing authority, would not in my judgment be a process of reasoning which a reasonable policyholder would adopt. It seems to me to be a *non sequitur*.

26. Moreover, the submission that 'any policing authority' extends to *any* body which has authority to prevent or restrict access to premises deprives the word 'policing' of any content. If that were intended, the clause might as well read 'any authority'. But it does not.

27. Accordingly the word 'policing' must be intended to qualify the word 'authority', by narrowing the scope of the clause to those authorities which carry out policing functions. Sometimes the police may need to prevent access to premises for the purpose of law enforcement, such as the investigation of crime if the premises in question are a crime scene. I would accept, however, that there are other situations, of which the gas leak is one obvious example, when a restriction may need to be imposed for the purpose of protecting public safety which does not involve the investigation of crime, the enforcement of any existing law or the maintenance of public order. But the police powers to impose such restrictions are generally conferred (or exist at common law) to enable the police to respond to specific local circumstances in an operational situation.

28. For example, police officers have statutory powers to issue closure notices to prevent anti-social behaviour (sections 76 and 77 of the Anti-social Behaviour, Crime and Policing Act 2014) or the unauthorised sale of alcohol (section 19 of the Criminal Justice and Police Act 2001), and have power at common law to cordon off an area, among other things, to protect public safety, prevent an actual or anticipated breach of the peace and protect a crime scene.

29. All of these, however, are far removed from the enactment of legislation, even when that legislation is enacted for the purpose of protecting public safety.

30. I would accept that the term 'any policing authority' extends more widely than the police themselves. Thus restrictions imposed by a similar body performing policing functions in circumstances likely to endanger human life or property will also be within the scope of clause S/30/1. However, it is unnecessary in this appeal to decide how much more widely the clause may extend. It is sufficient to say that the term does not extend to the Secretary of State. To adapt Lord Justice Scrutton's famous remark about the elephant (*Merchants Marine Insurance Co Ltd v North of England Protection & Indemnity Association* (1926) 26 Ll LR 201, 203), the reasonable policyholder might not be able to define a 'policing authority', but he would know that the Secretary of State was not one.

31. I would therefore substitute for the declaration made by the judge a declaration that the Secretary of State for Health and Social Care is not a policing authority within the meaning of clause S/30/1 of the policy.

Does the presence of a case of Covid-19 amount, without more, to an 'incident likely to endanger human life' within the meaning of the clause?

The judgment

32. The judge accepted that a case of Covid-19 was likely to endanger human life, but considered that such a case, in and of itself, could not be regarded as an 'incident' as a matter of the ordinary use of language. For example, there would not be an incident if neither the person in question nor anybody else knew that he was suffering from the disease. In the judge's view, an 'incident' connoted a happening which was apparent at the time, often to very many people. It would be unusual to use the word 'incident' to describe something which no-one perceived at the time.

33. The judge considered that this view was supported by the decision of the Divisional Court in *FCA v Arch* [2020] EWHC 2448 (Comm) ('*FCA v Arch DC*') at [404] and [405].

Submissions

34. For the policyholders Ms Higgs submitted that 'incident' is a neutral term which in itself is neither good nor bad, but is coloured by its context or its description (for example, an amusing incident, an embarrassing incident, a curious or unpleasant or tragic incident). She submitted that in ordinary speech, when not qualified by such adjectives, it has the same meaning as 'occurrence' or 'event', referring to Lord Mustill's well known statement in *Axa Reinsurance (UK) plc v Field* [1996] 2 Lloyd's Rep 233 at p.239:

> 'In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way.'

35. She pointed to dictionary definitions which show that the three terms, 'occurrence', 'event' and 'incident', can be used interchangeably. She pointed out also that the Supreme Court held in *FCA v Arch SC* that a case of Covid-19, without more, amounted to an occurrence or event for the purpose of the radius clauses considered in that case:

> '104. As in other policy wordings, we consider that the word "occurrence" should be given its ordinary meaning of something which happens at a particular time, at a particular place and in a particular way. As discussed, each individual case of disease is in our view properly regarded as an occurrence. Accordingly, where there are multiple cases of disease, each is an "occurrence" within the meaning of the clause.'

36. So here, Ms Higgs submitted, in the context of an insurance policy providing cover against something which endangers human life or property, the word 'incident' means no more than something which happens at a particular time, at a particular place, and in a particular way, and which endangers human life or property. She referred also to the use of the word 'occurrence' in clause S/30/1 ('excluding any occurrence where the duration of such prevention or hindrance of us [*sic*.] is less than 4 hours'), which

demonstrated that the terms 'incident' and 'occurrence' were being used interchangeably.

37. Ms Higgs submitted, therefore, that the judge was wrong to say that the incident had to be apparent to people at the time when it occurred.

38. Mr Dougherty for the insurer accepted that the word 'incident' can sometimes be used as a synonym for 'event' or 'occurrence', but submitted that something more than an event or an occurrence is needed if, as a matter of ordinary usage, the event or occurrence is properly described as an incident. Thus, while every incident is an event, every event is not an incident. He submitted that in normal usage, 'incident' is not a neutral term and that an incident (when the word is used without some qualifying adjective) denotes something unpleasant or dangerous. It was clear that the term 'incident' was used in that sense in clause S/30/1 because the incident had to be likely to endanger human life or property: therefore it would not be enough to say that the event was unusual.

39. Supporting the judge's approach, Mr Dougherty submitted also that, to qualify as an incident in the context of the clause, the event had to be manifest or apparent as opposed to something which is unobservable or undetectable. Thus the mere presence of a case of Covid-19 within the radius would not be regarded as an incident, although Mr Dougherty accepted that there might be an incident if that presence were combined with other facts (for example, if the person in question fainted in the street).

Decision

40. I accept that the word 'incident' can be used synonymously with 'event' or 'occurrence', but that in ordinary usage it generally connotes something more. What more is required must depend on the context in which the word is used. We are not concerned with the meaning of 'incident' in the abstract, but with its meaning in the context of clause S/30/1. In my judgment the colour which the clause provides is that, in order to qualify as an incident, the event must be something which endangers human life or property so as to call for a response by a policing authority. Such an event is likely to be inherently noteworthy (i.e. worthy of note) even if not actually noted by anyone present.

41. On the premise, contrary to what I have decided above, that the Secretary of State is a policing authority, a case of Covid-19 within the radius can properly be regarded as an incident. It amounts to an event or occurrence, as the Supreme Court held in *FCA v Arch SC*; it is common ground that it endangered human life because of the infectious nature of the disease; and taken together with all the other cases of Covid-19 in the country, it called for a response by the Secretary of State. Moreover, although such a case might not have been observed if the person concerned was not manifesting symptoms, we know that it would have been detectable with reasonable accuracy if a suitable test had been performed.

42. This view of the clause is confirmed, in my judgment, by the use of the word 'occurrence'. Although it may be possible to understand the words 'excluding any occurrence where the duration of such prevention or hindrance of us [*sic*.] is less than 4 hours' as referring to the prevention of access for a period of four or more hours, as Mr Dougherty submitted, I consider that the more natural reading of the clause, and

the way in which it would be understood by a reasonable policyholder, is that the words 'incident' and 'occurrence' are being used interchangeably.

43. The analysis may be different when the word 'incident' is used in other clauses. In *FCA v Arch DC*, the Divisional Court was dealing with the Hiscox NDDA clause. Much of the reasoning at [404] and [405] was addressing the FCA's primary case, rejected by the Divisional Court, that the pandemic itself was an incident. But the Divisional Court did also say at [405] that 'it is a misnomer to describe the presence of someone in the radius with the disease as "an incident" for the purposes of the clause.' Ms Higgs invited us to say that this point, which was not appealed to the Supreme Court, was wrongly decided by the Divisional Court. I would decline that invitation. I prefer to focus on the clause in issue in the present case, and to do so on the premise that the Secretary of State can be regarded as a policing authority: if that is not the case, the question whether a case of Covid-19 qualifies as an incident does not arise.

Must the case of Covid-19 (i.e. the 'incident') occur within the one-mile radius?

The judgment

44. The judge held that the incident must occur within the one-mile radius and that it is not sufficient that an incident occurring outside the radius causes human life or property within the radius to be endangered. His essential reasoning was that this results in an interpretation which can be applied in a certain and straightforward way, whereas if the incident could occur anywhere, it was difficult to see why the parties had specified a radius at all.

Submissions

45. Ms Higgs submitted that the more natural reading of the clause was that it is the endangering of human life or property within the one-mile radius which matters, not the location of the incident which causes that endangering. She acknowledged that the further away the incident occurred, the less likely it was to endanger life within the radius. She relied also on a published arbitration award (the *Salon Gold* award dated 31st January 2024) in which Sir Richard Aikens had held that a clause referring to 'an emergency likely to endanger life or property in the vicinity of the Premises' required only that life or property in the vicinity be endangered and not that the emergency had occurred there.

Decision

46. I consider that, simply as a matter of language, either interpretation of the clause is possible. However, I agree with the judge that if it is the incident which must occur within the radius, that produces certainty and a clause which is straightforward to apply, and that this is a relevant consideration (cf. *FCA v Arch SC* at [204]). The clause is less certain and straightforward in its application if the incident may occur anywhere, however remote from the policyholder's premises. For example, it may be said on one view that the introduction of a novel, highly infectious and life-threatening disease into the United Kingdom endangered human life all over the country. I conclude, therefore, that the reasonable policyholder would understand the clause to provide cover only where the incident occurs within the radius.

47. I should not be understood as casting any doubt on the correctness of the award in the *Salon Gold* arbitration. But that was an award on a rather different wording, referring to an 'emergency' rather than an 'incident' and to 'the vicinity' rather than a fixed radius as in the present case.

Does the 'Limit' of £500,000 apply separately to each insured premises?

The judgment

48. The judge held that the limit of £500,000 applied separately to each claim and that each closure of premises was a separate claim. To take as an example a policyholder with a theatre in Manchester and another in Oxford, the ability to claim for the closure of the Manchester theatre would depend upon proof of a relevant incident within the one-mile radius of that theatre, while the ability to claim for the closure of the Oxford theatre would likewise depend upon proof of a relevant incident within the one-mile radius of that theatre. That would be so regardless of whether the incidents in question were different in character (for example, an outbreak of Legionnaires' disease in Manchester and a student riot in Oxford) or the same (two cases of Covid-19, one in Manchester and one in Oxford, each of which, adopting the analysis of the Supreme Court in *FCA v Arch SC*, was a separate incident). There was nothing in the clause to indicate that the limit of £500,000 was intended to operate on a per-insured basis.

Submissions

49. Mr Dougherty emphasised that the clause provided cover in respect of 'any claim resulting from interruption of or interference with the Business', and that 'Business' is a defined term meaning 'the Business Description stated in the Schedule'. He submitted that each policyholder would have its own business, which might include some centralised costs, and that it did not make sense to speak of the business of the premises as distinct from the business of the policyholder.

Decision

50. I agree with the reasoning of the judge as I have summarised it above. The insured peril is specific to each premises insured. Prevention or restriction of access to each premises gives rise to a separate claim, to which the limit applies. Mr Dougherty's reliance on the definition of the 'Business' puts more weight on that definition than it will bear.

51. Moreover, the policy draws no distinction between those policyholders in the IEH group who own or operate only one venue and those who own or operate multiple venues. At the time when it was concluded, the policy did not even identify which subsidiary of IEH owned or operated which venue. So far as the policy was concerned, therefore, it was a matter of happenstance whether any particular subsidiary owned or operated more than one venue. To interpret the policy limit as applying separately to each policyholder rather than to each premises, when there is no clear wording to show that this was intended, would therefore be somewhat capricious.

Is there in any event an aggregate limit of £500,000?

The judgment

52. The judge rejected the insurer's submission that the words 'any one claim in the aggregate' should be corrected by a process of corrective interpretation, such as described in *East v Pantiles (Plant Hire) Ltd* (1982) 2 EGLR 111 and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [22] to [25], and now summarised in *Bellini* at [18] and [19], to read 'any one claim *and* in the aggregate'. He was not persuaded that there had been a clear mistake but, if there had been, it was not clear that there was only one answer. There were at least two possibilities: (i) to ignore, and thus notionally strike out, the words 'in the aggregate during any one Period of Insurance', and (ii) to ignore, and thus notionally strike out, the words 'any one claim'. The insurer's proposal, which was to add the word 'and', would retain superfluous words in the clause, but would accomplish a switch in the words which were superfluous: under the clause as drafted, the relevant superfluous words were 'in the aggregate during any one Period of Insurance'; under the clause as redrafted, the superfluous words would be 'any one claim'.

Submissions

53. Mr Dougherty submitted that there was an obvious mistake in the clause and that the parties had clearly intended to use what he described as a classic phrase to be found in insurance policies, 'any one claim and in the aggregate'. He submitted that the insertion of the word 'and' would give meaning to both parts of the sentence. The effect would be that all claims were aggregated.

Decision

54. The applicable principles are summarised in *Bellini*:

> '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'".'

55. I would accept that something has gone wrong with the language of the clause in this case. The phrase 'during any one Period of Insurance' does not make sense in a policy where there is only one Period of Insurance. A limit cannot sensibly apply to 'any one claim' and also 'in the aggregate'.

56. However, I agree with the judge that the solution is not clear. As he said, there are two alternatives and it is not obvious which solution the parties intended. It is at least as likely that they intended the limit to apply to 'any one claim' as it is that they intended it to apply 'in the aggregate'. The solution proposed by the insurer, adding the word 'and', does not give effect to both parts of the sentence, but deprives the words 'any one claim' of any meaning. Even if the phrase 'any one claim and in the aggregate' can be found in other policies, that is not something which the reasonable policyholder could be expected to know. The judge was therefore right to reject the insurer's case of construction by correction.

LORD JUSTICE BIRSS:

57. I agree.

LADY JUSTICE MACUR:

58. I also agree.