Neutral Citation Number: [2023] EWHC 245 (Comm)

Case No: CL-2022-000227

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2023

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

- -

Between :

(1) DC BARS LIMITED **(2) TUTTON'S BRASSERIE LIMITED**	**Claimants**
- and -	
QIC EUROPE LTD	**Defendant**

- -
- -

Neil Hext KC (instructed by **Edwin Coe LLP**) for the **Claimants**
Daniel Shapiro KC and James Sharpe (instructed by **DWF Law**) for the **Defendant**

Hearing date: 18 January 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 09 February 2023 at 10:00am.

Sir Nigel Teare :

1. This is an application to stay a claim arising under a Business Interruption ("BI") Policy in connection with COVID upon the grounds that the parties have agreed that the claim shall be determined by arbitration.

2. The Claimants own and operate restaurants and bars, mainly in London but also in Manchester, Cardiff, Birmingham and Leeds.

3. The policy period was 31 December 2019 to 30 December 2020.

4. The scope of the BI cover provided by the Policy is set out in section 2 of the Policy Wording. In particular, the "*Infectious Diseases Extension*", with which the claim is concerned, provides:

> "*vii. Infectious Diseases*
> *We shall indemnify You in respect of interruption of or interference with the Business during the Indemnity Period following:*
> *a) Any:*
> *…….*
> *iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises. …*"

5. The extension further provides

> "*4. We shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident Maximum Indemnity Period shall mean 3 months.*"

6. In March 2020 the Claimants notified a claim for BI losses suffered as a result of the occurrence of Covid and the first lockdown on 26 March 2020. The Claimants' claim in respect of Covid-BI Losses was initially submitted in the amount of £3,104,110 on the basis of a maximum 3-month indemnity period from the date of the first occurrence of Covid-19 within 25 miles of insured premises.

7. The Defendant deferred a final decision on coverage under the Policy until after judgment was handed down by the Supreme Court in a case concerning a number of issues relating to BI cover and Covid. However, the Defendant sought to avoid delaying the resolution of the claim and therefore agreed to adjust the claim on a without prejudice basis pending the decision of the Supreme Court.

8. Following the Judgment of the Supreme Court the Defendant accepted that it was liable to meet the claim, the quantum of the claim was agreed applying the 3-month Maximum Indemnity Period and the Defendant paid the sum of £2,168,870.

9. Then on 30 March 2021 the Claimants claimed an additional £4,030,250 under the Infectious Disease extension to the Policy in reliance on certain dicta of the Supreme Court. These further losses were related to losses caused by further government intervention, which imposed reduced opening hours and the second lockdown. The Claimants asserted that there is a fresh cause of action (i.e. claim) under the Policy for every separate occurrence of Covid-19 within 25 miles of each of their premises.

10. The further losses were made in three periods as follows:

    10.1 A second claim under the Policy for losses suffered as a result of the Government's decision that all hospitality businesses must close their doors from 10pmon 24 September 2020 until further notice.

    10.2 A third claim under the Policy for losses suffered as a result of the Government's decision to impose a national lockdown from 5 November 2020.

    10.3 A fourth claim under the Policy for losses arising out of the Government's decision that all hospitality businesses must close their doors from 16 December 2020 until further notice.

11. The Defendant disputes that the Claimants are entitled to any further indemnity under the Policy, the Maximum Indemnity Period of 3 months applicable following the occurrence of Covid having expired (and that limit continuing to apply for the remainder of the Policy period).

12. The Policy contains the following arbitration clause (clause 10.4) which both parties agreed is of a type commonly found in property policies, providing for certain disputes under the policy, but not others, to be referred to a sole arbitrator:

> "*If any difference shall arise as to the amounts to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator who will be jointly appointed in accordance with statutory provisions*"

13. The issue between the parties is whether the present dispute falls within the terms of clause 10.4. That depends upon whether the dispute between the parties is "as to the amounts to be paid under this Policy (liability being otherwise admitted)."

14. Although the Claimants have pleaded their claim there has been no defence because, of course, a stay of the proceedings has been sought. It was therefore unclear precisely what was "otherwise admitted" by the Defendant. Counsel endeavoured to explain orally during the hearing what was admitted. The discussion which ensued suggested that there might be an underlying dispute as to whether the factual circumstances giving rise to the further claims were admitted, in which case it would not be possible to say that liability was otherwise admitted. In order to ensure that there was no uncertainty as to what was "otherwise admitted" I asked the Defendant to make clear in writing what was admitted. Accordingly, shortly after the hearing, a document entitled Schedule of Admissions was provided.

15. The Schedule provided a summary of the Defendant's admissions and the dispute in these terms:

> "[The Defendant] admits that from 17 March 2020 through to 31 December 2020 (the end of the Policy Period) there were on each and every day occurrences of Covid within a radius of 25 miles of each of the Premises and that such occurrences proximately caused interruption of or interference with [the Claimants'] business (in an amount to be determined).

> It is admitted that under Extension vii.a)iii. of the Policy [the Claimants] are entitled to an indemnity from [the Defendant] in respect of such business interruption or interference, subject always to the quantification of the loss, including the application of the Maximum Indemnity Period.
>
> [The Defendant] admits that [the Claimants] are entitled to indemnity under Extension vii.a)iii. for the Maximum Indemnity Period of 3 months from 17 March 2020, which indemnity has been agreed in the sum of £2,168,870 and which sum has been paid by [the Defendant] to [the Claimants].
>
> The dispute is:
>
> > Whether there is, upon the occurrence of Covid causing business interruption or interference:
> >
> > > One three month Maximum Indemnity Period, as [the Defendant] contends; or
> > >
> > > Multiple three month Maximum Indemnity Periods, commencing upon each occurrence of Covid, as [the Claimants] contended by paragraph 4.6 of the letter dated 30 March 2021 from Edwin Coe LLP; or
> > >
> > > Four separate periods of up to three months as contended in the POC.
>
> If contrary to [the Defendant's] case there is a or there are any further indemnity period(s) beyond the three month Maximum Indemnity Period, what is the amount of the loss?"

16. The Schedule of Admissions then went through the Particulars of Claim making clear what was and what was not admitted. It is unnecessary to set out that part of the document in this judgment. It is now clear that the underlying factual matters giving rise to the further claims are admitted.

17. In support of the application for a stay counsel for the Defendant made the following submission:

> The arbitration clause consists of two requirements:
>
> First, there must be a "*difference as to the amounts to be paid under* [the Policy]";
>
> Secondly, liability must "*otherwise be admitted*", (i.e. otherwise save as to the dispute over the amount payable).
>
> The first requirement is plainly satisfied. The Claimants claim an additional £4,030,250 under the Infectious Disease extension to the Policy whereas the Defendant's stance is that it has paid the sum of £2,168,870 applying the 3-month Maximum Indemnity Period.
>
> The second requirement is also plainly satisfied: the dispute is not as to whether there is or would be liability under Extension vii.a)iii. for BI loss arising out of an occurrence of Covid in, say, September 2020, per se but whether such loss

> falls outside the 3-month Maximum Indemnity Period. That does not contain a dispute as to liability.

18. For these reasons it was submitted that the difference between the parties must be referred to arbitration pursuant to their agreement.

19. Counsel for the Claimant submitted that there are separate and independent causes of action under the policy in respect of each of the four periods of loss for which a claim has been made, each flowing from an independent occurrence (or group of occurrences) of disease within the relevant areas.

20. Counsel further submitted that the arbitration clause refers to arbitration differences where the only matter in dispute between insurer and insured is quantum. If there are other matters in issue, such as whether or not the right to indemnity is triggered, whether exclusions apply, whether the application of other conditions obviate the claim, or whether certain types of loss fall within the scope of the cover, there is no right to refer to arbitration. In such a case, liability is not "*otherwise admitted*." And that is so even if there are also matters of quantum to be determined.

21. Counsel said that the Defendant denied liability under the policy for a new 3-month indemnity period on the happening of each occurrence of disease. Counsel said that the Defendant maintained that there is only one 3 month indemnity period under the policy, which flows from the date of the first occurrence of Covid-19 within the relevant 25 mile radius.

22. It therefore follows, submitted counsel for the Claimant, that the difference between the parties is not as to the amounts to be paid under this Policy (liability being otherwise admitted). Rather, there is a difference as to liability for the second, third and fourth periods in respect of which an indemnity is sought. It cannot be said that there is only a difference as to the amounts to be paid under this Policy (liability being otherwise admitted).

23. The nature of a claim under an insurance policy is not in doubt. In *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] LRLR 94 Mance J (as he then was) held:

> "Condition 11 dealing with arbitration, again in the same wording in each policy, requires arbitration of any difference arising 'as to the amount to be paid under this policy (liability being otherwise admitted)'. In circumstances where it applies, it provides that 'the making of an award shall be a condition precedent to any right of action' against insurers. As a matter of general legal principle, unless the contract otherwise provides, insurance contracts (whether liability or property insurance) are treated in law as contracts to hold the insured harmless against the liability or loss insured against. Insurers are therefore, in the absence of contrary provision, in breach of contract as soon as the insured liability or loss occurs. A claim under an insurance contract is thus commonly for damages for the failure to hold the insured harmless against the relevant liability or loss."

24. Thus, when a subsequent outbreak of Covid caused a BI loss to the Claimant the Defendant was in breach of its promise to hold the Claimant harmless from the loss insured against. On the facts pleaded by the Claimant the Defendant was in breach of

its promise on at least 4 occasions. The response of the Defendant is that by reason of clause 4 of the Infectious Diseases Extension it cannot be liable for BI losses occurring for longer than 3 months. The question for the Court to determine on this application is not the correctness of the Defendant's response (that will be determined later either in arbitration or in court depending on the result of this application) but whether the difference between the parties is "as to the amounts to be paid under this Policy (liability being otherwise admitted)."

25. In one sense (looking at what counsel for the Defendant described as the substance of the dispute) the difference is as to the amount to be paid. Is the sum to be paid a substantial sum, as alleged by the Claimants, or is it nil as alleged by the Defendant? However, it can also be said that the difference is as to liability because the Defendant does not accept that it is liable to indemnify the Claimants in respect of the BI losses occurring on the pleaded second, third and fourth occasions.

26. In my judgment, when one has regard to the nature of an insurer's obligation, the correct analysis is that, although the Defendant admits that from 17 March 2020 through to 31 December 2020 (the end of the Policy Period) there were on each and every day occurrences of Covid within a radius of 25 miles of each of the Premises and that such occurrences proximately caused interruption of or interference with the Claimants' business (in an amount to be determined), the Defendant is disputing liability to hold the Claimant harmless against such BI losses in respect of the second, third and fourth periods by reason of the terms of the policy, in particular because there is only one three month Maximum Indemnity Period which has been exhausted. The difference between the parties, properly analysed, is as to the liability of the Defendant for the BI losses caused on the second, third and fourth occasions. That difference is not merely a difference as to the amounts to be paid under this Policy (liability being otherwise admitted). The difference between the parties has not therefore been agreed to be submitted to arbitration.

27. Although several cases were referred to, the researches of counsel have produced only one case dealing with the true construction of an arbitration clause in the form of clause 10.4. It is *New Hampshire Insurance Company v Strabag Bau AG* [1990] International Litigation Procedure 334. That was a case where insurers purported to avoid the policy on the grounds of non-disclosure so there can have been no surprise that the court determined that liability was not otherwise admitted. However, Potter J., having heard arguments advanced by Mr. May QC and Mr. Pickering QC had to consider and express his understanding of the true construction of the clause. The argument advanced by Mr. May QC was that the arbitration clause was restricted to disputes about quantum once the insurers had admitted liability. Mr. Pickering QC submitted that it was not possible to interpret the words in brackets as restricting or limiting the differences to be arbitrated to differences as to the amount payable because that would render the word "otherwise" surplusage. Potter J concluded as follows at p.339:

> "It seems to me that the word "otherwise" is apt to emphasise the fact that it is "mere" disputes as to quantum which are to be arbitrated, thus excluding disputes as to amount which, despite prima facie acceptance of liability, depend upon the application of particular provisions or exemptions in the policy which place limitations on categories of loss, or otherwise apply to limit the amount recoverable. Such cases would raise a question of liability in the sense and to

> the extent that they involve a point of law or construction rather than a mere dispute on quantum."

28. There was no appeal from this part of Potter J.'s decision. Lloyd LJ nevertheless described the point as "almost unarguable"; see [1991] International Litigation Practice 478 at paragraph 11.

29. This decision has stood for over 30 years. It is a clear statement of the true construction of this type of arbitration clause and must have informed those in the insurance world who have used the clause since 1990. It should therefore only be departed from if the court is convinced that Potter J.'s construction of the arbitration clause is wrong. Counsel for the Defendant accepted that Potter J. was correct with regard to exclusions but submitted that he was wrong with regard to limits. I am not persuaded that Potter J.'s understanding of the clause was wrong in any respect. Indeed, I think it was correct.

30. The aim of the clause, as is apparent from its wording, is to refer to arbitration disputes as to quantum or assessment of loss but where there is, or is also, a dispute as to the liability of the insurer based upon the terms of the policy there is no agreement to arbitrate. Disputes as to liability are to be resolved in court. In the present case there is a dispute as to quantum or assessment (see the final paragraph of the Summary of the Defendant's Admissions), but there is also a dispute as to whether the Defendant is liable for the BI losses caused by the second, third and fourth occurrences of COVID relied upon by the Claimants. Although the Defendant has stated that it "admits" that the Claimants are entitled to an indemnity in respect of such business interruption or interference that "admission" is subject to the application of the Maximum Indemnity Period. Thus in effect the Defendant says it is not liable for the further BI losses because there is "one three month maximum indemnity period" which has already been exhausted. In my judgment it cannot be said that there is a difference "as to the amounts to be paid under this Policy (liability being otherwise admitted)".

31. It may be that where there is a contractual formula describing how BI loss is to be assessed or quantified and there is a difference or dispute as to the assessment or quantification of the BI loss that difference or dispute may be referred to arbitration notwithstanding that there may be an issue as to how the contractual formula works. But in the present case there is a dispute as to liability in addition to a difference as to the amount to be paid.

Conclusion

32. For the reasons I have endeavoured to express the parties are not obliged by contract to refer to arbitration the differences between them. The application for a stay of these proceedings must therefore be dismissed.