Interpreting Insurance Contracts

The Rt. Hon. Lord Justice Stephen Males*

1. It is exactly half a century since I first went up to St John's College in Cambridge to study law, with Malcolm Clarke as my Director of Studies. I had met him briefly before, at an interview of which my only memory is leaning back in my chair, only to hear an unpleasant cracking sound and feel the chair give way behind me. Despite that, or perhaps because Malcolm was impressed with the ramrod straight back which I maintained for the rest of the interview, I was accepted for a place. In my first term in college, Malcolm was on sabbatical and we were taught the law of contract by a young barrister by the name of Richard Aikens. I wonder what happened to him. But after Christmas, Malcolm returned and guided us through the rest of the contract law syllabus, before we progressed to the wonders of other subjects with him in later years.

2. So for me it is a great honour and a real pleasure to have been asked to deliver this lecture in his memory, among so many friends and colleagues from the world of academia and of insurance, fields in which Malcolm's friendship and scholarship have meant so much, and it is an honour too that Eva and son Tim are here to celebrate his achievements.

3. The supervisions in Malcolm's room were both demanding and stimulating. They were always fun. You came out feeling confident that you understood the subject, whatever it was, much better than when you had gone in. You certainly had to be prepared, and to know the authority for whatever proposition you ventured to advance. I must say, however, that having listened with pleasure and profit to many of Malcolm's lectures, part of me is relieved that he is not here to listen to this one – though we all wish he were.

4. Those were the days, the mid-1970s, when Lord Denning bestrode the legal world like a Colossus, in the law of contract as in other fields, and many of the cases we studied, about which Malcolm questioned us so rigorously, were his judgments. Nowadays it is rather rare for any case of Lord Denning to be cited in court. We might conclude from this that, even for the greatest of us, the waters close very rapidly over our heads once we are gone. But I prefer to think that a great judge like Lord Denning lays the foundations of our law, and that when the building is standing firm above ground, you do not need to keep digging up the foundations.

5. So also it is with a great scholar and teacher like Malcolm. The contribution which he made as a teacher to the lives of those he taught is immeasurable, and so too is the affection which we all had for him, as evidenced by the presence of so many of us here today. Indeed, although this is by no means the only or even the most important measure, it is notable that there are as many as three current members of the Court of Appeal among his students. We have not yet all sat together in a single constitution, but I am hoping for

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the day – and of course I am hoping that we will have an insurance case. I am confident also that the contribution which Malcolm made in his chosen fields of academic study, including in particular insurance law which brings us here today, will undoubtedly live on.

The importance of interpretation

6. I have chosen as my title for today's lecture 'Interpreting Insurance Contracts'. When I studied law, we learned how you make a contract -- offer and acceptance, consideration and so forth. We learned how you break a contract -- repudiation, fundamental breach (do you remember that? it seemed so important at the time). (If I may digress for a moment, I was delighted when cycling along a canal tow path outside Bath, cycling of course being one of Malcolm's great loves, to come across a sign saying that this was the site of the *Harbutt's Plasticine* factory which had burned down in a fire in the 1960s.[1] But back to the contract law syllabus.) We learned how you invalidate a contract -- misrepresentation, mistake and illegality. Or what the remedies might be.

7. But we learned very little, under the syllabus as it was then, about how you interpret a contract. In practice, in contrast, most of the contract cases which come before the courts are about interpreting the contract. There is usually no doubt that a contract has been made, and the issue is what the clause in question means. That is as true of insurance cases as other kinds of contract case.

The challenge of the pandemic

8. The Covid pandemic caused enormous challenges to the whole nation, as people were confined to their homes – and businesses, particularly in the hospitality and entertainment sectors, were required to close while a terrible and barely understood fatal disease was raging through the country. It was one of the greatest peacetime crises that we have faced. Many people are still living with long Covid.

9. The pandemic has also caused challenges, albeit on a slightly lesser scale, for the insurance sector and the Commercial Court, as there have been literally hundreds, perhaps even thousands, of cases involving claims under business interruption insurance contracts. Businesses up and down the country have taken out their policies and tried to work out whether they have cover for the losses suffered as a result of having to close while the pandemic took its course. These involve many different wordings and have given rise to numerous issues about what these contracts mean and how they apply in unprecedented circumstances which were never foreseen. Although in a way, of course, that is what insurance is for.

10. To give some examples, there are disease clauses, which can themselves be divided into at least two categories, 'radius' clauses where cover depends on proving that there was a case of Covid within a specified radius from the insured premises, and 'at the premises' clauses, where the case of disease has to be at the insured premises themselves. The different wordings adopted by different insurers have given rise to

[1] *Harbutt's 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447.

numerous issues of interpretation, both as to the nature of the insured event and the proper approach to questions of causation. There are denial of access clauses, where cover varies according to the entity which is denying access. Sometimes it has to be a statutory authority, which is reasonably straightforward. But sometimes the clause refers to denial of access by a body such as a policing authority, when there is no such thing as a policing authority in our society.[2] Another clause says that the closure needs to be on advice from a Medical Officer of Health, an official who has not existed for half a century.[3] Indeed, these officials were abolished at about the same time as I began to study law under Malcolm, so it is a bit surprising to see them still turning up in insurance policies issued in 2020. It is almost as if the insurance industry is determined to keep the lawyers busy.

11. This flood of cases posed challenges of case management for the court. The objective was to find a way of giving maximum guidance to the market at an early stage, so that policyholders and insurers would know where they stood and settlements could be concluded with a high degree of confidence, without overwhelming the court or unduly prejudicing other litigants also clamouring to have their cases heard. A number of steps were taken to that end. I would like to think that the courts have risen to the challenge.

12. The first step was a test case, *FCA v Arch*[4], brought by the Financial Conduct Authority against eight leading providers of business interruption insurance under the Financial Markets Test Case Scheme. This is a relatively new scheme which enables a claim raising issues of general importance to financial markets to be determined in a test case without the need for a specific dispute between the parties where immediately relevant and authoritative English law guidance is needed.[5] The aim was to achieve the maximum clarity possible for the maximum number of policyholders and their insurers, consistent with the need for expedition and proportionality, and the case was tried on the basis of agreed and assumed facts. It was estimated that, in addition to the particular policies chosen for the test case, some 700 types of policies across over 60 different insurers and 370,000 policyholders could potentially be affected by the outcome of this litigation.

13. Lord Justice Flaux and Mr Justice Butcher sat as a Divisional Court to determine a whole range of issues of policy coverage and the approach to causation under a variety of clauses in common use. There was an appeal from their decision directly to the Supreme Court, leapfrogging the Court of Appeal, and the proceedings were concluded from start to finish, from issue of proceedings to judgment in the Supreme Court, in only seven months and six days.

14. However, if the expectation was that the test case would settle all the points of law which might arise, that expectation was disappointed. Although the test case dealt comprehensively with issues of coverage and causation under radius clauses, that left parties free to argue that the other kinds of clause in their contracts

[2] *International Entertainments Holding Ltd v Allianz Insurance Plc* [2024] EWCA Civ 1281.
[3] *London & International Exhibition Centre Plc v Allianz Insurance Plc* [2024] EWCA Civ 1026.
[4] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649.
[5] CPR 63AA PD, paras 6.1 to 6.5.

were materially different; and there were other questions, concerning for example aggregation of losses[6] and whether policyholders should give credit for payments received under the government's furlough scheme[7], which were not touched on in the test case. There remained, therefore, well over a hundred cases in the system, which called for active case management in the Commercial Court, initially by Mr Justice Butcher, and more recently by Mr Justice Jacobs.

15. That process has involved identifying cases which raise common issues of wide importance to the insurance market and to the hundreds of businesses, mostly small and medium sized enterprises up and down the country, and trying a series of preliminary issues designed to give guidance to the market generally. So far there have been at least four major judgments in the Commercial Court, some of which have led to settlements. Two of them have reached the Court of Appeal, while there have also been several further appeals on discrete issues, and a further substantial appeal is due to be heard early in 2025. It is to be hoped that once these cases have worked their way through the system, most of the legal issues will have been resolved.

16. It is not only the courts which have wrestled with these questions. Many insurance contracts provide for arbitration, so some of the important disputes have been resolved by arbitrators in private. But fortunately the parties have agreed that some of the awards should be made public, and so we have the benefit, for example, of Lord Mance's award in the *China Taiping* arbitration[8], and Sir Richard Aikens' award in the *Salon Gold* arbitration[9], both of which are frequently cited in court to keep the judges on their toes.

17. All of these cases have raised issues of interpretation.

The general principle

18. In the years since I studied law a whole series of cases in the House of Lords and the Supreme Court has taught us how to interpret contracts. We have travelled from the heady days of Lord Hoffmann with his unlimited quantity of red ink in *Investors Compensation*[10] and *Chartbrook*[11] to the more prosaic sounding single iterative process of *Rainy Sky*[12], *Arnold v Britton*[13] and *Wood v Capita*[14]. In 1989 Mr Kim Lewison, now Lord Justice Lewison, wrote a slim volume on *The Interpretation of Contracts*, and earlier this year, its eighth edition was published, running to over a thousand pages.

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[6] *Various Eateries Trading Ltd v Allianz Insurance Plc* [2023] EWCA Civ 10, [2024] 2 All ER (Comm) 414.
[7] *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm); *Gatwick Investment Ltd v Liberty Mutual Insurance SE* [2024] EWHC 124 (Comm).
[8] Award dated 10th September 2021.
[9] Award dated 31st January 2024.
[10] *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896.
[11] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.
[12] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.
[13] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.
[14] *Wood v Capita insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

19. Others have debated whether the case law has represented a pendulum swinging between the extremes of textual analysis and commercial background or a consistent approach with only minor differences of emphasis. I do not propose to enter into that debate. Nor could I hope to cover the entire ground set out in a book such as *Lewison*. In the time available, my more modest objective is to look at a few of the issues which have arisen in recent cases, particularly cases to do with the pandemic.

20. In short, the approach which we are now required to take is set out authoritatively in the *FCA* test case itself. 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 contract to mean.[15]

21. Dealing with business interruption policies such as those in the *FCA* test case, the Supreme Court developed this further as follows:

> '77. … 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 … 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.'

22. Let us explore this a little.

Minute textual analysis and the ordinary policyholder

23. We can all agree that a contract should not be interpreted according to the standards of a pedantic lawyer. Indeed, it should not be interpreted in any spirit of pedantry, whether the pedant in question is a lawyer or anything else. But not all lawyers are pedantic, and it goes without saying that no judges are, even though they used to be lawyers and their training and professional life was as lawyers. So although it is clear enough that interpretation should not take the form of a minute textual analysis, and tempting as it may be to say, with Shakespeare, 'Let's kill all the lawyers', it remains the case that lawyers and legal principles have an important role to play in the interpretation of insurance policies. Interpretation of a contract is after all a question of law, and it is important that this should be so in order to promote consistency and certainty which are important commercial objectives.

24. Next, I doubt whether the Supreme Court was suggesting that a clause may mean something different according to whether the policyholder is an SME or a large multinational. Indeed, in the *London International Exhibition Centre* case[16], in which a number of cases were grouped together, we had policyholders at both ends of the spectrum. At one end was the owner and operator of the ExCel Centre in

[15] *FCA v Arch* at [47].
[16] *London International Exhibition Centre Plc v Allianz Insurance Plc* [2024] EWCA Civ 1026.

east London, a significant business visited by thousands of people, while at the other end we had a hairdresser in Basingstoke and a nightclub in Aberystwyth. But nobody suggested that the same or essentially the same language meant something different because of the status of the policyholder.

25. While a small business which takes out a policy of insurance may not be expected to be familiar in detail with the content of such valuable books as *The Law of Insurance Contracts* by Professor Malcolm Clarke, it can fairly be taken to know that there are principles of law which apply to insurance, and to the interpretation of contracts, and to expect that those principles will be applied to the policies which it takes out.

26. So what is the significance of identifying the kind of client to which the particular kind of insurance is generally sold?

27. Perhaps the key point being made by the Supreme Court is the rejection of what is described as subjecting the entire policy document to a minute textual analysis. I would like to examine what that means by reference to a few recent cases.

The Brian Leighton case

28. *Brian Leighton (Garages) Ltd v Allianz*[17] was a business interruption case , but it had nothing to do with Covid. The policyholder ran a garage business in Goole, East Yorkshire, trading and repairing vehicles and operating a 24-hour petrol filling station. So it was another case where the policyholder was a small business. It had a motor trade policy covering various risks under 15 sections. In the usual way, there was a schedule identifying which sections of the policy applied. So, for example, in this particular case there was cover under section 1 (material damage) and section 8 (business interruption), but not under sections 2 and 3 which provided cover for third party liability for self drive rental vehicles and insured vehicles respectively. There was a leak of fuel oil which resulted in the garage being shut down for health and safety reasons, and the policyholder brought a claim for material damage and business interruption losses. The leak was caused by the pressure of an object such as a sharp stone on a section of pipe connecting one of the underground fuel tanks to the forecourt pumps. The stone moved a bit under the weight of the forecourt's concrete slab and punctured the fuel pipe. From that initial puncture, there was extensive contamination, with a risk of fire or explosion, and the business had to be closed.

29. The issue was whether the damage was 'caused by pollution or contamination' so as to be excluded from cover under an exclusion in the policy. The judge held that the damage was so caused, so the exclusion applied and the claim failed. In the Court of Appeal the majority held that although pollution or contamination was *a* cause of the damage, the *proximate* cause was the movement of the stone, and the exclusion was to be read as referring only to damage proximately caused by pollution or contamination. So the appeal was allowed and the claim succeeded.

[17] [2023] EWCA Civ 8.

30. For present purposes, I would draw attention to two points. First, the issue was one of interpreting apparently straightforward language: was the 'damage caused by pollution or contamination'? The lay person, or the owner of a filling station in Yorkshire, might well say that it was. But the answer to the question of interpretation depended on the principle of insurance law that a reference to a cause will generally be taken as referring to the proximate cause, and that what insurance people mean when they talk about the proximate cause is not the cause which is nearest in time, but the cause which is proximate in efficiency, sometimes called the dominant, effective or efficient cause.[18] That principle, reflected in section 55 of the Marine Insurance Act 1906 but also applicable in non-marine insurance, applies 'unless the policy otherwise provides'. So it is a general principle of interpretation in insurance law, but based on the presumed intention of the contracting parties and capable of being displaced. Everyone agreed, at least in the Court of Appeal, that this was the general principle which applied in this case.

31. The issue in the *Brian Leighton* case was whether the general principle had been displaced by the particular language of the policy. The majority held that it had not, which is why the appeal succeeded. The dissenting member of the court, that was me I'm afraid, thought that it had and would have dismissed the appeal.

32. I am not here to argue that the majority got it wrong. There is no point in fighting old battles and, anyway, I thought the case was finely balanced and the majority's reasoning is compelling. I simply use the case to illustrate that, although the policy was of a kind generally marketed to small businesses, and the policyholder in question was such a small business, the answer to the question of interpretation of an apparently straightforward phrase depended on a fairly sophisticated concept of insurance law, that a cause generally refers to the proximate cause, which I rather doubt that the owner and operator of a small business would have had at his fingertips. On this occasion they worked in his favour, but in another case they might work against him – if, for example, the reference to damage caused by contamination or pollution had not been part of the exclusion, but part of the scope of the cover. The principle that reference to a cause generally mean the proximate cause is familiar to insurance lawyers and those in the market, although not necessarily familiar to small business policyholders. It does not depend on what the Supreme Court called minute textual analysis. But to decide whether that principle had been excluded inevitably did depend on fairly close examination of the particular language used in the policy. There is no real getting away from that.

33. The second point about the *Brian Leighton* case to which I would draw attention is a point about the way in which an SME policyholder would be understood to read the policy. Usually it is a principle of contractual interpretation that language will be used consistently throughout the contract. So if a term or a phrase is used in one part of the contract, it is generally a reasonable inference that the same term or phrase used in another part of the contract has the same meaning, although the strength of that inference will vary according to such matters as the perceived quality of the drafting. Counsel for the policyholder wanted to rely on the use of the term 'directly or indirectly caused by pollution or contamination' in Sections 2 and 3

[18] E.g. *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350.

of the policy, concerned with third party liability cover, and to contrast the use of the words 'directly or indirectly' in those sections with their absence from Section 1, concerned with material damage. The argument was that words such as 'directly or indirectly caused' are often used to indicate that the proximate cause principle is not intended to apply, that the drafter of the policy was familiar with that usage, and that because the relevant exclusion referred simply to 'damage caused by pollution or contamination' and not to 'damage directly or indirectly caused by pollution or contamination', the drafter intended the exclusion to apply only when damage or pollution was the proximate cause of the damage.

34. The problem with that argument was that Sections 2 and 3 were not part of the cover selected by the policyholder in this case. So would the reasonable policyholder have bothered to read those sections at all? I said no:

> 'The reasonable policyholder who has selected cover under Section 1 but not Sections 2 or 3, and who is seeking to understand the cover which he has purchased, could not be expected to scrutinise Sections 2 or 3 in search of contrasting wording which might or might not throw light on the meaning of clauses contained in Section 1.'

35. Lord Justice Nugee agreed with that particular point, so it may be said that, although mine was a dissenting judgment, this reasoning commanded the agreement of a majority of the court. But in the end, the point did not much matter on the facts of this particular case, as the 'directly or indirectly caused' language could also be found elsewhere in Section 1, which the reasonable policyholder might have been expected to read.

36. There is, I suppose, some irony in the fact that counsel make submissions, and judges make decisions, about the way in which an insurance policy would be read by the owner of a small or medium sized business, when none of us (or at least hardly any of us) have ever run such a business. But in the end I doubt whether the position would have been any different if the policyholder had been a more substantial business. If you do not want, and do not take out, third party liability insurance, why should you engage in detailed textual analysis of sections of the policy, which do not form part of your agreement with the insurer, in order to ascertain the meaning of the sections of the policy which do apply? Life is too short for that.

37. But perhaps we can take the point a little further. After all, if a policy is designed so that the policyholder has a choice of which sections will apply, some policyholders who want material damage cover under section 1 and business interruption cover under section 8 will also want to take out third party liability cover under sections 2 and 3 while others, like the policyholder in the *Brian Leighton* case, will not. But the meaning of a term in section 8 such as 'caused by pollution or contamination' cannot depend on whether the policyholder has chosen to take out third party liability cover in sections 2 and 3. It must mean the same for all policyholders, those who take out third party liability cover and those who do not. On that basis, therefore, it may be unhelpful to attempt to discern the meaning of terms in one section of the policy by reference to the use of language in other optional sections of the policy, regardless of whether those optional sections have been included in the particular case in issue.

Pick and mix

38. Insurance policies are sometimes described as having a pick and mix quality, evoking fond memories of the Woolworth's sweet counter. That description was used by the Master of the Rolls in *Bellini*[19], another Covid case earlier this year. As he put it:

> '34. … Insurance policies are, as the judge said at [31], often somewhat repetitive. They are also sometimes clumsily drafted.'

39. I pause to say that I would never dream of saying such a thing, certainly not before this audience or in this place. He continued:

> '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.'

40. That point was followed up in a Covid business interruption case decided only last week, *International Entertainment v Allianz*[20]. One of the issues was whether a case of Covid, which the Supreme Court has told us amounts to an occurrence or an event, could be regarded without more as an 'incident'. The point arose under an NDDA clause which provided cover for a restriction of access to the insured premises as a result of an incident endangering human life or property. There would have been no problem if the clause had referred to an occurrence, but the argument was that an incident required something more and if so, what exactly? So we were treated, among other things, to dictionary definitions, some of which suggested that the words 'event', 'occurrence' and 'incident' could be used interchangeably, and some of which suggested that while every incident is an event or occurrence, 'something which happens at a particular time, at a particular place, in a particular way'[21] in Lord Mustill's famous definition, not every event or occurrence is an incident. But reference was also made to other clauses in the policy, even within the business interruption section, where the word 'incident' had been used, the submission being that this usage illuminated the meaning of the word 'incident' in the clause in question. That might have been a helpful submission if the policy had shown signs of having been drafted as a coherent whole, but it was apparent that it had essentially been stitched together adopting clauses from a variety of sources, without attempting overall consistency of language. In those circumstances we held that analysis of the meaning of the word 'incident' in other clauses risked falling into the kind of 'minute textual analysis' of the policy, deprecated by the Supreme Court, which the reasonable policyholder was unlikely to have undertaken.

41. Actually, that contrasted with the position in *Bellini*, where there was a consistent pattern. The issue there was whether a Disease clause in a business interruption cover extension applied when there was no damage to the insured property. The clause was a radius clause, applying to any human contagious disease manifested by a person within a 25 mile radius. The problem for the policyholder was that there had to be 'damage', and 'damage' was a defined term, which was defined as meaning 'physical loss, physical damage and physical destruction'. The argument was that this definition could not have been intended to apply to business interruption, as it would make a nonsense of the cover. There would never be physical damage to

[19] *Bellini N/E Ltd v Brit UW Ltd* [2024] EWCA Civ 435.
[20] *International Entertainment Holdings Ltd v Allianz Insurance Plc* [2024] EWCA Civ 1281.
[21] *Axa Reinsurance (UK) plc v Field* [1996] 2 Lloyd's Rep 233 at p.239.

the premises as a result of a case of disease 25 miles away. So to apply the definition would mean that the cover was illusory. At first instance the judge was unmoved by this argument. The definition of 'damage' was clear, and the word 'damage' in the clause was in bold, showing that it was being used in its defined meaning. If that meant that the cover was illusory, that was tough. The Court of Appeal was equally unmoved. But it also pointed out that the clause in question was part of a section of the policy which was all about business interruption caused by physical damage to property. In counsel's vivid phrase, it was part of a 'damage sandwich', and would be so understood by any reasonable policyholder.

42. So there we have it. Sometimes, as in *International Entertainment v Allianz*, other clauses of the policy will not help to illuminate the meaning of the particular clause in issue. At other times, as in *Bellini*, they will be crucial. All the lawyers have to do is to decide how the reasonable policyholder would understand the policy. Simples – as my granddaughter might say.

A matter of impression

43. Sometimes it is possible to analyse the language of a clause and thereby to discern its true meaning. That is, generally speaking, what interpretation is and what we try to do. But sometimes there is not much to go on and the meaning of the clause is said to be largely a matter of impression. That was the position in the *Al Mana Lifestyle* case.[22] The claims in this case were also for business interruption losses arising out of the Covid-19 pandemic, but the issue was whether the English court had jurisdiction. The clause in question was headed 'Applicable Law and Jurisdiction', and in its relevant part provided:

> 'Applicable law and jurisdiction
> In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued.
> Otherwise England and Wales UK Jurisdiction shall be applied.'

44. The insurer said that this meant that the country in which the policies were issued had jurisdiction, with a fallback for English or Welsh jurisdiction if for any reason the local court did not have or would not accept jurisdiction. So the English court did not have jurisdiction because the policyholder could sue in the Middle East and Gulf countries where the policies had been issued. The policyholders, on the other hand, who were part of a group carrying on business in the Middle East, said that the clause gave whichever party wanted to bring a claim a free choice of suing either in England or in the jurisdiction where the policy in question had been issued. The judge agreed with that.

45. On appeal, it was submitted (among other things) that the construction of the clause was as much a matter of impression as of analytical interpretation. As counsel put it, 'impressions (and first impressions and intuition and judgment) may be as powerful a tool as intricate linguistic and conceptual analyses' when seeking to discern the true meaning of a contract, particularly in a clause like this one where the language

[22] *Al Mana Lifestyle Trading v United Fidelity Insurance* [2023] EWCA Civ 61.

was rather terse. The court accepted that submission, albeit noting that while impression was very often the starting point, it was necessary at least to attempt some further analysis.

46. But the problem with this approach is that impressions may differ. I said in my judgment:

> '2. My strong impression when I first saw this clause was that the first sentence contains the primary jurisdiction selected by the parties, with a fallback for English or Welsh jurisdiction in the second sentence. That impression has been confirmed rather than dispelled by the more analytical approach adopted in the parties' submissions.'

47. So far so good. But unfortunately, Lady Justice Andrews had the precisely opposite first impression, and hers was equally strong. So that did not get us very far and neither of us budged. That left the third member of the court, Lord Justice Nugee, with the casting vote. He explained what we mean when we talk about a matter of impression, saying that:

> '… it is not always easy to articulate with precision why one reading of a disputed provision seems more natural and ordinary than another, as the way in which language strikes a reader is an accumulation of experience of how language is ordinarily used. And, as the present case illustrates, the same words may strike different readers differently …'

48. He went on to describe the process by which a reader would determine the meaning of a not very well drafted clause. He would start with the heading, 'Applicable Law and Jurisdiction', which would tell him what the clause was about. He would then read the first sentence, which would tell him that these things were to be in accordance with the jurisdiction, local laws and practices of the place of issue of the policy. Pausing there, the natural meaning was that law and jurisdiction were agreed to be 'in accordance with' the law and jurisdiction of the place of issue. So far, there is no element of choice about that. So if the sentence stood alone, its meaning would be clear. The reader would then come to the second sentence, beginning with the word 'Otherwise', which clearly qualifies the first sentence in some way, but would not be expected to negate it altogether. So what did the word 'Otherwise' mean? In some contexts it might mean 'Alternatively', so as to give the claimant a choice of jurisdiction, although not of governing law, but that was not the natural meaning in this clause. Or it might mean, and did in this case mean, 'If not'. But if not what? The clause did not spell out the circumstances in which that sentence would apply. Did it mean, 'If you choose not to sue in the local court', or did it mean 'If the provision for the local court to have jurisdiction is ineffective'? On this occasion Lord Justice Nugee agreed with me that the latter was the more natural way to understand the clause. So you could say that in the end the case depended on what was meant by a single word, 'Otherwise'.

49. Once again, I am not concerned to discuss whether the result reached by the majority was correct. But I think the case is of some interest in exposing the process by which judges reach a conclusion about how a reader would approach the interpretation of a clause and thus what it means. For all of us, the way that language strikes us, and thus what we consider to be its natural meaning, is the result of an accumulation of our own experience. That is not always easy to explain, although judges have to do their best.

50. The case also raises the question, in a case which turned on the meaning of a single word, where does legitimate legal reasoning end and where does minute textual analysis, deprecated by the Supreme Court, begin. Perhaps it is one of those irregular verbs which viewers of 'Yes Minister' will remember: 'I interpret the natural meaning of the clause, you engage in minute textual analysis, he is a bit of a pedant'. I remember arguing an insurance case as counsel in the Court of Appeal when the then Lord Chief Justice said that he was full of admiration for commercial lawyers, who could argue for hours about the meaning of five words. Doing my best to keep a straight face, I pointed out that actually the clause had seven words. But of course, he had the last word and I lost the case.

Causation

51. So far I have been considering interpretation as a process of discovering the meaning of language. But it may also have a somewhat different role to play, for example in ascertaining the nature of the causal link that is required between the insured peril and the damage suffered in order for there to be cover under the policy. That, perhaps, has been the principal issue which has arisen in the Covid business interruption cases.

52. We can see that in the *FCA v Arch* case in the Supreme Court. The first issue concerned the identification of the insured peril. The Supreme Court held that the pandemic itself could not be regarded as an occurrence for the purpose of the clauses in issue, because it failed the Mustill test. That is to say, it was not something which had happened at a particular time, at a particular place, in a particular way. But each individual case of Covid was a separate occurrence of a notifiable disease. Because there were thousands of known cases of Covid, and it was known that there were many other cases which had not been reported, the known unknowns, it could be shown by statistical modelling that there was Covid almost everywhere in the country. That meant that, with a few exceptions, almost any insured restaurant would be likely to be able to prove that there was a case of Covid, and thus the occurrence of an insured peril, within a 25 mile radius of its premises. It was found as a fact that the government restrictions introduced in March 2020 requiring premises to close were introduced as a response to information about all of the cases in the country at the time, not just those which had been reported.

53. The problem for policyholders was that on these facts, none of them would be able to satisfy the traditional 'but for' test of causation. None of them could say that their premises would have stayed open and the damage would not have been suffered but for the case or cases of Covid which had occurred within 25 miles of their premises. Such an occurrence was not a necessary condition for the government's closure of the premises -- they would have been closed anyway as a result of all the other cases in the country. Did that mean, applying a conventional test of causation, that the claims had to fail? That was what the insurers were saying and, as the Supreme Court explained, usually as a minimum the 'but for' test must be satisfied if one event is to be treated in law as the cause of another. If the loss would have occurred anyway, the law does not generally regard causation as being established.

54. But in a contractual context, this all depends on the interpretation of the contract. In these cases, the Disease clauses provided cover against infectious diseases, including new diseases which were unknown at the date of the policy, which the parties would have appreciated could spread rapidly, widely and unpredictably, just like some of the existing diseases named in the clause. It was obvious, therefore, that an outbreak of such a disease might not be confined to a specific locality or area delineated by a radius of 25 miles around a policyholder's premises. So nobody would suppose, if there were such an outbreak, and if it was sufficiently serious to interrupt a policyholder's business, that all the cases would necessarily occur within the radius. Inevitably in such a case there would also be cases of disease outside the radius. But the parties cannot have intended the cover to be ineffective in such circumstances.

55. That led the Supreme Court to conclude that the parties cannot have intended the 'but for' test of causation to apply. To apply that test would be contrary to the commercial intent of the clause. Instead, each case of illness which had occurred by the date of the government action was a separate and equally effective because of that action, so that the principle of concurrent causation applied.

56. As the Supreme Court made clear, this conclusion did not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril. The analysis applied regardless of the particular terminology, such as 'following', 'arising from' or 'as a result of'. It was not a question which depended to any great extent on matters of linguistic meaning, or how the words would be understood by an ordinary member of the public, but it was, nevertheless, the result of a different kind of process of interpretation of the policies in issue.

57. In the case of radius clauses, and perhaps especially where the radius was as much as 25 miles, the conclusion which the Supreme Court reached might seem reasonably straightforward, although I suppose that everything seems straightforward once the Supreme Court tells you what the answer is. But the next case, the *London International Exhibition Centre* case, concerned 'at the premises' clauses rather than 'radius' clauses, and the issue was whether the same analysis applied. All the insurers were arguing that 'at the premises' clauses are fundamentally different from radius clauses, although they did not have a completely united front. One set of insurers were arguing for a 'but for' test, while another contended that an occurrence of disease at the premises had to be a 'distinct effective cause' of the closure, i.e. the fact that the case of disease was at the premises had to be what caused the authority to take the relevant action. In the event the Court of Appeal decided that neither of these approaches was correct.

58. Once again, the nature of the insured peril had to inform the nature of the causal link required to be satisfied, and the key point was that the Disease Clauses being considered included diseases capable of spreading rapidly and widely, potentially affecting and causing interruption to businesses over a wide area. So if the parties had applied their minds to the circumstances in which the insured premises were likely to be closed by a relevant authority as a result of an occurrence of such a disease at the premises, they would have contemplated that closure would be unlikely to be a response only to the disease at the insured premises. Rather, it would be imposed in response to the outbreak as a whole over whatever was the

relevant area. If the Disease clauses were to have meaningful content, therefore, the parties must have intended that there would be cover in such circumstances.

59. As before, I am not concerned this evening with whether that conclusion was right or wrong. I leave that to the Supreme Court to decide if the case ever goes there. The point I want to demonstrate is that the interpretation of insurance contracts extends much more widely than deciding what the words mean, important as that is, and that it is necessary to discern from the terms of the policy and the nature of the peril insured what the parties intended, objectively speaking, as to other important matters such as causation. So the interpretation of insurance contracts is a very wide topic.

Conclusion

60. If I have done nothing else, I hope I have shown you that many interesting and important insurance cases have come before the English courts in the last few years, although I would not go so far as to say that every pandemic has a silver lining. These cases illustrate what my own experience has been in the half-century since Malcolm taught me contract law, from the first Iran/Iraq war and continuing through other conflicts, a series of natural disasters, the financial crash and now the pandemic, which is that commercial lawyers – and perhaps especially insurance lawyers – tend to do very well from the natural and man-made disasters which afflict the world.

61. You will have noticed that I have spoken mainly about cases in which I have had some involvement, on the grounds that these are what I know best. I am not sure if there is anyone supervising my efforts now, but some of you, particularly if you were on the losing side, will think that the end of term report should say something like 'Must do better'. If so, I can only say that we would all do better if Malcolm's incisive analysis and penetrating commentary were still available to us as we wrestle with the fascinating issues that insurance law continues to present.

62. Thank you.