Neutral Citation Number: [2021] EWHC 412 (Comm)

Case No: CC-2020-NCL-000011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
NEWCASTLE CIRCUIT COMMERCIAL COURT
FINANCIAL LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

ROCKLIFFE HALL LIMITED	**Claimant/ Respondent**
- and -	
TRAVELERS INSURANCE COMPANY LIMITED	**Defendant/ Applicant**

- -
- -

David Berkley QC and Neil Fawcett (instructed by **The Gibson O'Neill Company Limited**) for the **Claimant**
Ben Lynch QC (instructed by **DWF (London)**) for the **Defendant**

Hearing dates: 11 February 2021

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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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THE HONOURABLE MRS JUSTICE COCKERILL DBE

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 25 February 2021 at 10:00AM.

Mrs Justice Cockerill :

Introduction

1. This is the hearing of the application made by the Defendant (Travelers) for an order that the case of the Claimant, Rockliffe Hall, be struck out pursuant to CPR 3.4, or alternatively that summary judgment be entered against the Claimant pursuant to CPR 24.2 ("the Application").

2. The question raised is one which is very much of this moment in time. Rockliffe Hall, which is a golf course and hotel, has found its business devastated by the current Covid-19 pandemic. It has made a claim on its business interruption insurance with Travelers. Travelers say that the claim is doomed to fail because the terms of its policy are clear and do not cover such losses.

3. In essence Travelers says that while the Policy provided various forms of cover, including for business interruption losses resulting from outbreaks of "infectious disease" in various circumstances, the phrase "Infectious disease" is expressly defined in the Policy as meaning the diseases on a closed list of 34 such diseases and Covid-19 does not appear on that list.

4. This is not a case which is covered by direct authority. Some similar issues were considered in the recent business interruption test case litigation ("the FCA Test Case"). In that case the FCA acting on behalf of numerous insured selected a range of policy wording issues for determination by the court. The first instance case was heard in summer 2020 and judgment handed down on 15 September 2020: *Financial Conduct Authority v Arch Insurance (UK) Limited & ors* [2020] EWHC 2448 (Comm) ("the FCA High Court Judgment"). The Supreme Court judgment was handed down on 15 January 2021: *Financial Conduct Authority v Arch Insurance (UK) Limited & ors* [2021] UKSC 1 ("the FCA Supreme Court Judgment"). The issue and Policy wording before the Court in this case are not an issue or type of policy wording that was considered in the FCA Test Case.

5. It is this circumstance which brings me the pleasure of sitting in this matter in the Newcastle Circuit Commercial Court. This case has rightly been brought in the Circuit Commercial Court nearest to the insured. But because of the broad implications of issues concerning business interruption insurance the Commercial Court is maintaining a "Covid-19 business interruption" list, to enable suitable cases to be heard by a High Court Judge. Accordingly HHJ Kramer has invited me to hear this application, and I have been delighted to accept that invitation. I only regret that circumstances have meant that the hearing has had to be remote.

6. This is not a full trial. Travelers has brought a strike out and reverse summary judgment application. It says that the point is a simple one of construction, which can be determined on the very limited written evidence before me, and that I should determine the case here and now.

The Legal Principles

7. The principles which apply to applications for strike out and/or summary judgment are not contentious. I repeat them only because it is possible that given the nature of this case those unfamiliar with the process may have cause to read this judgment.

8. In respect of the Court's power to strike out, CPR 3.4 provides that:

> "(2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; …"

9. CPR 24 provides a power in the Court to give summary judgment without a full trial. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10. Quite what this means in real life was explained by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15], thus:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8] …
>
> vii)… it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material

> in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Factual Background

11. The Claimant runs a five-star 61-bedroom hotel and resort called Rockliffe Hall in the countryside of County Durham. The resort includes a restaurant, spa and golf course and caters for conferences and weddings.

12. The Defendant is an insurance company and it provided insurance, including Business Interruption cover, to the Claimant with the Period of Insurance from 1 July 2019 (before Covid-19 had been heard of) until 30 June 2020 and Policy Number UC CMK 3971834 ("the Policy"). The Policy covers a number of types of risk under different sections of the Policy. They include Property Damage, Goods in Transit, Employers Liability – and critically for current purposes: Business Interruption ("BI"). The premium for BI cover was just over £20,000. The sum insured was £30,150,000 over an indemnity period of 36 months.

13. The main section of the Policy says:

> "…the Company will provide the insurance indicated in the Policy Sections during the Period of Insurance stated in the Master Schedule or during any subsequent Period of Insurance for which the Company may accept payment subject to the terms conditions and exclusions contained herein or endorsed hereon…
>
> unless otherwise stated any word or expression to which a particular meaning has been given in the general definitions or specific Section definitions in this Policy shall bear the same meaning wherever it appears in the Policy or specific Section respectively and unless the context requires otherwise"

14. Extension 10 of the Business Interruption Section of the Policy is headed "Infectious Diseases etc". It provides, in part, as follows:

> "The insurance provided by this Business Interruption Section extends to cover loss directly resulting from interruption to or interference with the Business in consequence of
>
> 1. Infectious Disease manifested by any person whilst at the Business Premises which results in closure of the whole or part

> of the Business Premises by the order of an appropriate competent authority
>
> 2. An outbreak of an Infectious Disease within 10 miles of the Business Premises…"

15. It then goes on to deal with other causes of closure, including legionella, and then such things as murder causing the closure of the premises or an outbreak of food poisoning.

16. Immediately after this clause is a heading Extension Definitions which says "*In this extension the following terms shall have the following meanings ….Infectious Disease*". Following from that is a list to which I shall come in a moment.

17. The limit of indemnity for infectious diseases is £250,000. Rockliffe Hall claims an indemnity of this amount under the Policy in these proceedings. It alleges that:

    17.1 It was forced to close its premises by the effects of the Covid-19 pandemic;

    17.2 The outbreak of the disease manifested across England, and therefore within a 10-mile radius of Rockliffe Hall;

    17.3 Those facts triggered the cover under Extension 10 of the Business Interruption section of the Policy ("the Disease Clause"), in particular sub-paragraphs 10(1) and 10(2) of Extension 10; and Travelers is therefore in breach of its obligation to indemnify Rockliffe Hall against losses resulting from the closure.

18. I pause here to note that the Particulars of Claim does not plead any relevant factual matrix evidence – that is any specific background facts which are said to be relevant to the question of the meaning of the Policy.

19. The Claim is denied in full, as set out in the Defence. The plea of being forced to close and the losses claimed are in issue. But for present purposes I do not need to deal with these points. They only become relevant if this matter proceeds to trial.

20. Thus, bearing in mind the absence of pleaded factual matrix evidence, the case does certainly have the appearance of one which is susceptible of determination at this stage on a summary basis.

21. What matters for present purposes is that Travelers says that the Infectious Disease Clause does not, on its proper construction, cover losses resulting from Covid-19. It points to the definition of Infectious Diseases to which I have just referred. That list says this:

> "Infectious Disease
> Infectious Disease means
> (i) Food or Drink poisoning
>
> (ii) Cholera
> Plague
> Relapsing fever
> Smallpox
> Typhus

(iii) Acute encephalitis
Acute poliomyelitis
Anthrax
Chicken Pox
Diphtheria
Dysentery (amoebic or bacillary)
Haemolytic Uraemic Syndrome (HUS)
Infectious bloody diarrhoea
Invasive Group A streptococcal disease (GAS)
Leprosy
Leptospirosis
Malaria
Measles"
Meningitis
Meningococcal septicaemia (without meningitis)
Mumps
Ophthalmia neonatorum
Paratyphoid fever
Rabies
Rubella
Scarlet fever
Tetanus
Tuberculosis
Typhoid fever
Viral haemorrhagic fever
Viral hepatitis
Whooping cough
Yellow fever

22. As is obvious, many diseases have not been included on the list. SARS, for example, does not appear, and nor does HIV/AIDS, Influenza or a huge number of other diseases. And of course, Covid-19 is not on the list.

23. It will also strike any reader both that this is a strange-looking list and that there is a structure to the list. It appears likely that the structure derives as follows:

    23.1 Food poisoning appears by itself because it is a slight "outlier", not being properly an infectious disease;

    23.2 Section (ii) reflects the diseases which were included in the definition of "notifiable disease" in the Health Services and Public Health Act 1968;

    23.3 Section (iii) is an edited (with additions and subtractions) version of the list of "notifiable diseases" in Schedule 1 to the The Health Protection (Notification) Regulations 2010.

    I shall revert to the relevance of this and related evidence to the question for decision in due course.

The Submissions

24. In very brief outline the parties' respective cases were as follows:

25. Travelers submits that the cover provided by the Disease Clause extends only to loss resulting from one of the diseases specified in the Policy wording, and that list is closed and exhaustive. Covid-19 is not present on that list. The Policy could have included 'catch-all' wording, but it did not. It submits that this construction is manifest without reference to factual matrix evidence, but contends that the derivation of the list is relevant factual matrix evidence and puts the matter beyond any possible question. It

also contends that the certainty which it sees as attending its construction offers powerful support in the form of commercial purpose.

26. Rockliffe Hall contends that:

    i) There is a real prospect of the Claimant establishing at trial that Covid-19 was included within the scope of the specific diseases listed in the Disease Clause;

    ii) The definition of Infectious Disease contains diseases attributable to specific causes or pathogens (such as 'Rabies', 'Malaria' and 'Anthrax' which it calls 'Specific Diseases'), but also contains diseases which are not so attributable such as 'Plague', 'Food and Drink poisoning', 'Acute encephalitis', and 'Meningitis' (which it calls 'General Diseases').

    iii) 'Plague' should therefore be read as a general term for an infectious disease with a high mortality rate, epidemic or pandemic rather than relating to any of the specific diseases caused by the bacterium *Yersinia pestis* (i.e. bubonic, pneumonic or septicaemic plague). This would include Covid-19.

    iv) Further, 'Food and Drink poisoning', 'Acute encephalitis', 'Viral Hepatitis', 'Meningitis' are capable of or likely to be caused by the novel Coronavirus SARS-CoV-2, with the result that these listed diseases include Covid-19.

    v) In the case of genuine ambiguity, the Policy is to be construed *contra proferentem* against the Defendant;

    vi) Finally, that the mixture of General and Specific Diseases undermines the definition's claim to exhaustiveness, that the definition is ambiguous, and that it should be read to include any disease bearing a reasonable similarity to the General or Specific Diseases on the list. It is said that Covid-19 bears such a similarity.

27. Rockliffe Hall also contends that the court would be assisted by expert evidence on the pathology of SARS-CoV-2, which would only be available at trial. It also states that this is one of a number of policies with this wording, and so should proceed to trial given its wider importance.

The proper construction of the Policy

Principles of construction

28. The relevant principles to be applied by the Court when construing the Policy are not contentious. I was referred to the usual suite of authorities: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, *Minera Las Bambas SA v Glencore Queensland Ltd* [2019] EWCA Civ 972; [2019] S.T.C. 1642 and of course the FCA Test Case judgments (*The Financial Conduct Authority v Arch Insurance (UK) Ltd. and ors* [2020] EWHC 2448 (Comm) (Divisional Court) and [2021] UKSC 1 (Supreme Court)) where the principles were

carefully considered both by the Divisional Court and the Supreme Court in the context of construing a number of BI policies.

29. The relevant portions of those cases have been read and considered and need not be reproduced here. In the briefest of summaries (included essentially for those readers who are not familiar with them, bearing in mind the number of insureds who may be interested in this case), they tell us that:

    i) The job of the court in working out what a document means is not to work out what either party itself thought it meant, but what a reasonable person would have understood the contracting parties to have meant by the language used.

    ii) That reasonable person is taken to be someone who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. So, to the uninitiated, it might be supposed that ascertaining the meaning of a contract merely requires the court to look at the words, but the result of repeated careful consideration of the question has been that in fact this exercise involves looking at the words used in the context of the contract overall, and bearing in mind any factual background. The exercise also involves looking at the result which rival interpretations yield, in terms of whether they make business sense.

30. I should just add one point. One might well ask what sort of reasonable person the court must assume itself to be in doing this. The answer to this was given in the FCA Supreme Court Judgment at [77], as follows:

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

Discussion

31. I shall deal first with the question of the factual matrix evidence upon which Travelers sought to rely. As I indicated in the course of argument, there seem to me to be grave difficulties with the proposition that this is material which I should count as being reasonably available to the parties – particularly for the purposes of the summary judgment application.

32. Those doubts appear to me to be supported by the decision of Hildyard J in *Lehman Bros International (Europe) (in administration) v Exotix Partners LLP* [2019] EWHC 2380 (Ch) [2020] Bus. L.R. 67 at [110]–[114], where he reviews this slightly controversial area. In particular I note the following passages:

> "…As was emphasised by Briggs LJ (as he then was) in *Gladman Commercial Properties v Fisher Hargreaves Proctor*

> [2013] EWCA Civ 1466, and also in my own decision in *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [277] (cited in Lewison, *The Interpretation of Contracts* (6th ed) at 3.17(d)), the test of 'reasonable availability' is not always easy to apply and requires restraint in its application: and all the more so given the almost unlimited information and knowledge now available through the internet…. it also includes knowledge which it is to be inferred, from the nature of the actions they have in fact undertaken, that they had or must have had;
>
> (3) however, it does not include information that a reasonable observer would think that the parties merely might have known: that would open the gate too far to subjective or idiosyncratic speculation;
>
> (4) the fact that material is readily available or notorious may support an inference as to what the parties actually knew;
>
> (5) but (subject to (6) below) where it is demonstrated that one or more of the parties did not in fact have knowledge of the matter in question such knowledge is not to be imputed; nor is the test what reasonable diligence would or might have revealed: in either case that would be inappropriately to introduce impermissible concepts of constructive notice or a duty (actionable or otherwise) to make inquiries or investigations;…
>
> …in my view, the Court needs to be wary of assuming that the general availability of information is sufficient to make it "reasonably available" in the requisite sense: almost anything is available on the internet in the general sense. In my view, …, that phrase envisages and requires to be made an objective judgment as to whether a reasonable man, had he known the other party to have that information, would have supposed it to be necessary in order to make sure of a proper understanding of the contract, and if so, whether he would have been likely to encounter any real difficulty in obtaining it."

33. On this basis I propose to deal with the application on the basis that the legislative history which apparently underpins the list of infectious diseases is not relevant factual matrix evidence.

34. Bearing in mind the authorities, and the absence of relevant factual matrix evidence, the starting point is a careful reading of the relevant parts of the policy in context, bearing well in mind the point from the FCA Supreme Court Judgment that the reasonable person is not a lawyer. On that basis the immediate provisional indication would seem to be that the claim is not covered. On the plain wording of the Policy cover is for Infectious Diseases, they appear to be specifically defined by means of a list, and Covid-19 (or SARS) is not on the list.

35. There would be nothing contrary to principle in such an approach. There is some law on the use of definitions by list; unsurprisingly because parties not infrequently choose

to evade (or try to evade) future arguments as to the meaning of a term by such a form of definition. The leading text on the process of contractual construction, Lewison on *The Interpretation of Contracts* says "*… the court will uphold the definitions so agreed, even where the meaning attributed to the defined term by the definition is not its ordinary meaning*" (7th ed, paragraph 5.91).

36. The appearance of the list itself also suggests that the list of diseases in the definition is exhaustive. That is because it begins with the words "*Infectious Disease means…*". That reading is supported by authority. Arden LJ held in *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542; [2012] 2 Costs L.O. 132 at [19]:

> "Definitions in statutes and deeds can be exhaustive or non-exhaustive. Non-exhaustive definitions are usually prefaced by the word "include". More often however, a definition is intended to be exhaustive and it will then generally begin with the word "mean" or "means". It is difficult to read a definition which begins with the word "means" as other than exhaustive."

37. The starting point therefore is that there is good reason to posit that only the diseases on the list count as "Infectious Diseases", as defined.

38. As I have noted, there is no case here that one needs to reconsider this reading through the lens of relevant factual matrix. Nor is this a case where the result that is arrived at is attacked as being contrary to business common sense. The approach of Rockliffe Hall is one of pure iterative construction of the words of the clause. Essentially, it says that on a further and better reading its construction is to be preferred. The iterative process referred to in the authorities is therefore here one of re-running the initial indication against the arguments put forward by Rockliffe Hall.

39. In performing this exercise Rockliffe Hall does not offer one alternative, it offers at least two. In and of itself that is not a reason to reject that construction. There are examples of cases where the correct construction is only arrived at by such a process. One example is *Towergate Financial Group v Hopkinson* [2020] EWHC 984 (Comm) [2020] 2 B.C.L.C. 649 where the correct construction was only arrived at on the second go, after a visit to the Court of Appeal.

Plague

40. The first (and main) argument Rockcliffe Hall raises as to construction is that Covid-19 is covered by the word Plague. It does so by pointing out that "Plague" has more than one meaning. One refers to the illness caused by *Yersinia pestis* (the most infamous form of which is bubonic plague). I shall call this Meaning 1. Another, also reflected in the OED, is "*Any infectious disease which spreads rapidly and has a high mortality rate; an epidemic of such a disease*.". I shall call this Meaning 2.

41. Rockliffe Hall points to the fact that Black's Medical Dictionary defines "Plague" primarily as a disease caused by the bacterium *Yersinia pestis*, but refers specifically to its definition as an epidemic, pandemic, or notifiable disease by reference to the cross-reference notation: "*(See also EPIDEMIC; PANDEMIC; NOTIFIABLE DISEASES)*".

42. I was also referred to the Oxford Colour Medical Dictionary which takes the Meaning 2 "*epidemic with high death rate*" as the first definition; with the *Yersinia pestis* Meaning 1 version as the second.

43. Against that background the basic submission is that the Court cannot be sufficiently sure that the second meaning is not intended to meet the test for summary judgment. This is an argument with a number of strands.

Preliminary points

44. Its first point is that as yet, there has been no disclosure of the broker file and no evidence adduced by either side as to what negotiation took place between the parties and the basis upon which the list of diseases was agreed upon. On that basis alone, it is submitted that summary judgment/strike-out is not the appropriate.

45. I am not attracted by this argument. There is no pleaded case that this was a bespoke clause. Nor is there any evidence to this effect. While this is not a full trial, it is well established that a party in Rockcliffe's position cannot simply say "*Oh well, who knows what will turn up*". Negotiations are generally inadmissible. They will usually only be relevant and admissible if there is a so-called "private dictionary" meaning – that is, a meaning which is not the natural meaning but which is agreed between the parties. If there were a private dictionary meaning agreed between the parties, that is something which would be within the knowledge of Rockcliffe and its agents. It would need to be pleaded, particularly if there was to be a rectification claim. It would certainly have to be dealt with in the evidence. It is not.

46. To recycle a classic dictum of Megarry V-C in *Lady Anne Tennant v. Associated Newspapers Group Ltd* [1979] FSR 298:

> "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."

47. A similar point is made at 15(vii) of *EasyAir*. Therefore the argument on construction must stand or fall now.

48. Taking another point which can be dealt with fairly swiftly, Rockcliffe Hall also draws my attention to the fact that some other policies specifically refer to bubonic plague, arguing that if this was what Travelers meant they would surely have said so; or at least that it is not at all obvious that "Plague" only refers to the bubonic, pneumonic and septicaemic forms of the disease, which are caused by *Yersinia pestis*.

49. While the courts generally deprecate the practice of construing one policy by reference to another, I agree with Rockcliffe Hall to an extent: it is certainly correct that Travelers could have said "bubonic plague". However this point does not really advance matters. As the dictionary definitions make clear, "plague" is an accepted usage for the *Yersina pestis*-caused disease. That begs the question of which it does mean – as it must mean one of them. And indeed Rockcliffe Hall does not suggest more than this ("not obvious that it does" does not equate to "suggests it does not").

50. I also note that the point made by Travelers that the definition of plague advocated would make nearly all of the diseases listed in any of these definitions redundant, appears to be sound. This also provides a small further indication that this is not what would be intended – because of the presumption against surplusage, which though a weak presumption, may have more force when such an extensive list would be rendered redundant.

Construction and plague

51. Passing on to the substance of the argument, Rockcliffe Hall then says that the term sits very well with Meaning 2. Indeed, it positively asserts that this is the natural reading to the hypothetical reasonable person. It says that a consideration of the other diseases on the list gives an indication as to the purpose of the list and therefore why "plague" is defined generally, as opposed to specifically as the disease caused by *Yersinia pestis*. It says that the inclusion of a number of diseases, not just with arguably different causes, but a particularly wide range of alternative causes, is consistent with what it says is the purpose of the clause as a whole: to provide an indicative or non-exhaustive list of the diseases or types of diseases for which the Policy provides cover.

52. In particular it points to the inclusion in the list of states of affairs or conditions such as "Food and Drink Poisoning", "Acute encephalitis", and "Meningitis", all of which are capable of having more than a single cause. Most obviously, it says, "Food and Drink Poisoning" is sufficiently generic and loose to encompass many different and multiple causes. It contends that it follows that what is insured against is not the pathogens or specific poisons but rather the state of affairs or condition which arises from a variety of causes.

53. It also points to the definition of encephalitis in the OED, for example, which refers to inflammation of the brain caused by any viral disease and meningitis, which is defined by the OED in wide terms so as to include any inflammation of the meninges caused by a bacterial or viral or other type of infection.

54. This argument is in my very clear view, a clever lawyer's construct and not a credible suggestion.

55. The first point is that I disagree that the meaning favoured by Rockliffe Hall is the one which would naturally present itself to the mind of the reader. Reading the word plague in context (as I must on the authorities) I find it fanciful in the extreme to suppose that any reasonable reader would consider the meaning to be Meaning 2. Even if the reader had no mental association with *Yersinia pestis*, she would consider that reference was being made to a specific infectious disease called "plague".

56. As for the argument by reference to the breadth of the other conditions, this argument essentially elides causes and conditions and thereby posits a straw man. It assumes that if there is more than one cause there is somehow a lack of clarity. However, the fact that some diseases have more than one possible cause does not mean the named disease lacks specificity. The list of 34 named infectious diseases are coherent in that they are all the outcome of some pathological process, and they are all (including food poisoning and encephalitis) things – generally diseases, but at worst conditions – with which an individual might be diagnosed. It does not matter to the definition how that "disease" is brought about; it is the "disease" itself that is the key to cover under the Policy.

57. Pausing here one can also see how Rockliffe Hall's argument fails the approach prescribed in the authorities as to construction. Is the exercise it asks the reader to perform one which the reasonable (non-lawyer) would do? Obviously it is not. It is an approach which only comes about through minute, blinkered and reductive focus on the individual components of the clause; an approach repeatedly deprecated in the authorities.

58. Further the argument does not help because "plague", as defined by Rockliffe Hall, is not a disease or even a condition of any sort. It is actually a description of the macro effects of more than one possible disease; it is a usage of the word plague that is essentially descriptive: "a plague", rather than "plague". Against the background of what this list is, in practical terms, there to do in the context of the Policy, the reasonable person/SME owner faced with the list and Rockliffe Hall's definition of plague in it would have no difficulty identifying it as the "odd one out"; whereas under the Meaning 1 definition it is cohesive with the list.

59. This takes me naturally to further problems. One is that at both the above stages of the argument Rockcliffe Hall ignores two key facts. The first is that its preferred purpose, which underpins the definition it advocates, actually sits very ill with the way the clause is drafted. If the purpose were, as it argues, to provide an indicative or non-exhaustive list this would be (frankly) a bizarre way of going about it, even in a world where it is well known that policies are sometimes imperfectly drafted.

60. If the idea were to be non-exhaustive:

    i) Indicative wording of some sort (like "including", "for example" etc.) would inevitably feature, and the bald dichotomy "*Infectious Disease means: [list]*" would not; and

    ii) There would be no sensible reason for such a long list – the more so where plague (in the sense of "*infectious disease which spreads rapidly and has a high mortality rate*") could encompass many – if not nearly all – of those on the list. As noted above, if the Meaning 2 interpretation is adopted, the list becomes redundant or next to redundant.

61. The second key fact is that (coming back again to the context of the Policy) it ignores the fact that Plague is in section (ii) of the list. Rockcliffe Hall refers instead as comparators to conditions which are in (i) (Food poisoning – which appears alone there) and (iii) (the very lengthy section). This is particularly noticeable where Rockliffe Hall also positively invites me (via a citation of *Young v Sun Alliance* [1977] 1 WLR 104) to take a first impression of the word plague, divorcing it from its context, contrary to the requirements of the authorities.

62. When one looks at the list what is immediately noticeable is that the list is apparently deliberately broken down into sections and that "Plague" is listed in section (ii) of the definition immediately after "Cholera" and before "Relapsing Fever", "Smallpox" and "Typhus". Whatever the derivation of the structure (and I assume here that the reasonable reader does not know the derivation) she would naturally look at Plague in the context of the list overall, but more particularly in the context of the obviously deliberate subdivision of the list. When put alongside Cholera, Smallpox and Typhus,

it is natural to read 'plague' as meaning specifically and only its bubonic, pneumonic or septicaemic forms. This is a point to which Rockcliffe has no real answer.

63. This also reflects the point I have made above that in reality the definition of "Plague" for which the Claimant advocates is the usage which correlates to "a plague". That is fundamentally different and completely incompatible with its location in the definitions. It therefore gives the word "Plague" a meaning which is obviously wrong when read in context.

64. It follows that even after giving careful consideration to the detailed arguments, I have no hesitation in concluding that in this context, the word "Plague" is obviously intended, on a common-sense reading and proper construction of the clause, to refer to a specific disease: i.e. "an infectious disease caused by *Yersinia pestis* bacteria".

65. I also note (though this forms no part of the reasoning in reaching the conclusion) that, as Travelers points out, this approach receives further support from the *eiusdem generis* approach to construction, by which "*where several words preceding a general word point to a confined meaning the general word shall not extend in its effect beyond subjects ejusdem generis (of the same class)*" (*Chitty on Contracts*, 33rd ed, 13-100). That is a principle which is also referred to in the FCA Divisional Court Judgment at [67]–[70]. I would not however be minded to place any weight on that principle in arriving at the result, for the reasons given by Mr Berkley QC.

66. When one looks at the list, the word "Plague" is surrounded by words which can only refer to specific diseases. It is a word which can refer to a specific disease. The alternative is a usage which would never be diagnosed in an individual case and which is out of step with its surroundings in not referring to a specific disease. It follows that Meaning 1 is clearly the meaning that was objectively intended – i.e. in this context, "Plague" means an infectious disease caused by *Yersinia pestis* bacteria. Matters might of course be different if 'plague' were in the company of 'famine', 'war' and 'pestilence'.

The encephalitis argument

67. Another related argument raised by Rockcliffe Hall is that cover for Covid-19 can be accessed via the cover for encephalitis/meningitis because there is evidence of these conditions being associated with and/or caused by Covid-19. It is said that this is persuasive that the Claimant has a real prospect of success in pursuing the point. The way this argument would work is that the Claimant intends to obtain expert evidence as to whether Covid-19 and/or SARS-CoV-causes encephalitis and/or meningitis or is associated with any other disease on the list, and that this then caused the losses.

68. The Claimant then says that issues of causation do not form any part of the Application, and therefore it cannot be properly argued at this stage that the UK Government's restrictions were imposed as a result of "Covid-19" rather than "Acute encephalitis" or "Meningitis". Even if it were so argued, such argument would have little merit given the Supreme Court's decision on the breadth of causation in the FCA Supreme Court Judgment.

69. This argument is another lawyer's construct. It is also inconsistent with the pleaded case which is explicitly that the losses were caused by Covid-19. In order for this argument

to be correct, the claim would effectively have to be made under these other heads, which it is not. The case is therefore not strictly open to the Claimant.

70. But in any event the argument could not arguably succeed.

71. There are two possible approaches to this argument, but both of them are plainly defective, essentially for the same reason: that SARS-CoV-2 may cause acute encephalitis or meningitis is not the same as saying that either are synonyms for or forms of Covid-19 (even assuming acute encephalitis or meningitis were recognised symptoms or complications of Covid-19, which remains to be shown).

72. The first approach would be to contend that Covid-19 is a form of meningitis or acute encephalitis, such that a diagnosis of Covid-19 is in fact a diagnosis of encephalitis and/or meningitis. That is not a tenable construction of the words. The reasonable person in the position of the parties would not understand these diseases to refer to Covid-19, which is a new disease (discovered after the Policy incepted), with a different name and commonly associated with entirely different main symptoms, definition and categorisation. If Covid-19 results in encephalitis or meningitis it plainly only does so in a small minority of cases. It would be an Alice in Wonderland approach to call Covid-19 "encephalitis" or "meningitis".

73. The absurdity of this argument is perhaps well illustrated by the fact that alongside encephalitis and meningitis the Claimant pleads this approach applies to food and drink poisoning. This argument was wisely dropped in oral argument. But it is indicative. Plainly in no real world would the closure of the hotel and resort be said to be caused by food and drink poisoning, even though Covid-19 can, as is well known, manifest with digestive symptoms (almost certainly more often than either of the other conditions).

74. The second approach is arguing that any manifestation of Covid-19 in the form of another covered peril means that this is to be taken as the actual causative peril. This was really the essence of the case being run. But it is plainly wrong simply as a matter of logic and language. Without getting into factual questions of causation, which I accept would be for another day, it is clear that the purpose of the list is to identify the specific diseases (albeit sometimes ones which can have more than one cause) which, if there is an outbreak of them which causes loss, are covered.

75. In order for either of these diseases/conditions to have "an outbreak" within a 10-mile radius of the Business Premises, there would have to be a manifestation of actual and diagnosed cases of those diseases. There is no suggestion of any such thing; and indeed the pleaded case reflects the obvious fact that what has brought businesses across this country to a standstill is an outbreak of Covid-19. Covid-19 is what on any analysis and the pleaded case caused the closure. It is not either of the diseases/conditions relied on by Rockliffe Hall.

76. The argument advanced was that what was actually insured was not the specific conditions, but an outbreak of the causative agents which resulted in the manifestation of any of the illnesses or conditions in the list. Yet this is plainly a reading which runs directly against the wording of the whole clause (which is directed to Infectious Diseases and which contains a list of Infectious Diseases). It is also one which produces (again) Alice in Wonderland results. Thus Mr Berkley QC urged me to accept that if

there was an outbreak of Virus A which affected 5,000 people in the local area with no more than a small sniffle, but one person suffered from encephalitis as a vanishingly rare complication of Virus A, there was an outbreak of encephalitis for the purposes of the Policy.

77. Once again, testing this against the reasonable reader test it is plain that this is not a result which any remotely reasonable reader would arrive at.

78. I therefore reject this argument without hesitation.

79. That conclusion is, I note, consistent with the fact that the Divisional Court remarked in passing in the FCA High Court Judgment (at [356]) regarding a list of diseases that included "*cholera, dysentery, leprosy, malaria, measles, meningitis, mumps, plague, rabies, rubella, scarlet fever, tuberculosis, typhoid fever, viral hepatitis, and whooping cough. Obviously that list does not include COVID-19, or for that matter, SARS*". In other words while the point was not decided it obviously struck the Divisional Court that such a clause would not be triggered by Covid-19.

The "notifiable disease" analogy

80. Both parties have of course looked at the question of the notifiable disease wording considered in the FCA Test Case; a "Notifiable Disease" clause appeared in many of the policies in that case.

81. By way of example (and adopting here the terms / definitions used in the FCA Test Case) there were under consideration:

i) RSA 3, which provided that:

> "1. Notifiable Disease shall mean illness sustained by any person resulting from:
>
> i. food or drink poisoning; or
>
> ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them"

ii) RSA 4, which provided that:

> "Notifiable Diseases & Other Incidents means:
>
> i. one of the following tabulated diseases and/or illnesses:
>
> Acute encephalitis
>
> …
>
> Yellow fever

> ii. any additional diseases notifiable under the Health Protection Regulations (2010), where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak;"

82. Rockliffe Hall says that, rather than the parties intending to limit cover to a number of pre-defined diseases listed within the policy, the parties were intending, particularly in parts (ii) and (iii) of the list, to cover highly contagious or infectious diseases even if they were not specifically included on the list and were newly occurring. It contends that the rationale at [160] of FCA Divisional Court Judgment, is a broad one, is applicable to the construction of notifiable diseases in the statutory list, and supports the logic in the Particulars of Claim that a disease is included in the list if in all the circumstances it bears a reasonable similarity to the diseases listed. It was submitted that in that case the issue was that Covid-19 was included on the statutory list of notifiable diseases, but only quite some time after the entry into the contract and that in deciding that it fell within contractual definitions of "notifiable disease", the court considered the similarity of Covid-19 to the diseases on the statutory list of "notifiable diseases".

83. The analogy that the Claimant attempts to make with "Notifiable Diseases" is plainly wrong. First, and as commented above, seeking to construe the Policy by reference to other insurance policy wordings is not a promising start. Second, the wording in the "Notifiable Diseases" clauses is, as is apparent even from the passage of the FCA Divisional Court Judgment cited, different. That passage, which came under the heading "Cases outside the Radius - Cover and Causation" says:

> "Critical here again is the fact that Extension 4(d) does not say "any occurrence of a NOTIFIABLE HUMAN DISEASE only within a radius of 25 miles of the PREMISES" or anything which dictates such a reading. Essential also is that what was being insured under Extension 4(d) was business interruption resulting from Notifiable Human Diseases, and that it was known at the time of the conclusion of the contracts that such diseases embraced the list to which we have already referred, including SARS and other highly contagious or infectious diseases, which were required to be notified precisely in order to permit a response from the authorities, and some of which were capable of spreading over large areas, as infected people moved around. Furthermore, the nature of the definition of Notifiable Human Diseases in the policy meant that newly occurring diseases, if made notifiable by the relevant authorities, would count, even if they had not existed or been notifiable at the outset of the policy. The potentially widespread effects of the diseases in question were recognised by the fact that the "relevant policy area" was stipulated to be a radius of 25 miles, which, as the FCA reminded us on a number of occasions is an area of about 2,000 square miles, or as we were told, an area the size of Oxfordshire, Berkshire and Buckinghamshire combined. The ways in which a disease could have such an effect must have been recognised as including via the reaction of the authorities and / or the public. The parties thus knew or must be taken to have known that what was being insured under Extension 4(d) was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance

> from a particular case, including through the reaction of the authorities; and where it might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area."

84. It is therefore clear that the Notifiable Disease clause in that case made explicit reference to an externally-maintained and dynamic list regularly updated by the UK Government. There is no such reference here. The Policy in this case takes a very different approach setting out its own static list including only a limited list of the diseases that were known to the parties at the time. That list does not include diseases that are subsequently discovered, for the simple reason that they are not on the list. There is no future-looking "catch-all" wording. Thus whilst a "catch-all" "Notifiable Disease" clause is (depending on its wording) likely to be inclusive of diseases which are added (after the time of contracting) to the statutory list of 'Notifiable Diseases', a defined list of diseases is not.

85. Further it seemed to me that the passage of the FCA case relied on provided no support for the argument in any event. In that case there was no issue as to whether the Notifiable Disease clause extended to Covid-19; the issues were rather different, and the passage relied on merely stated what was not in issue as a matter of construction there. There was no "broad" approach to construction as contended for.

Commercial Purpose

86. This is not a case where commercial purpose played a large part in the arguments. Both sides suggested that commercial purpose was cohesive with their construction. There was nothing in either side's argument which they suggested would tip the balance in favour of a construction which was not suggested by a consideration of the words in context. This consideration therefore takes matters no further.

"*Contra proferentem*"

87. Rockliffe Hall argues by way of a backup argument that if the court is not of the view that "Plague" is defined to include Covid-19, owing to its generality, and to the multiple definitions referred to, the term ought to be construed *contra proferentem* against the Claimant.

88. The short answer to this point is that there is no ambiguity, and therefore the principle cannot arise.

Some other compelling reason?

89. Finally, I should deal with the argument that even if I considered (as I do) that Rockliffe Hall's construction has no real prospects of success, I should nonetheless allow the matter to proceed to trial.

90. Four arguments were advanced. The first was that there might be material relevant to the background to the negotiations. I have dealt with that argument above.

91. The second was that there would be material relevant to whether the *contra proferentem* argument applied (in relation to who was the *proferens* of the clause). However this could only arise if the clause were ambiguous, which it is not. Had it been ambiguous

I would have been prepared to assume at this stage that it was at least strongly arguable that the doctrine would apply. But it would be wrong to allow this matter to go forward to pursue an argument which cannot arise.

92. The third was to enable expert evidence on the link between Covid-19 and encephalitis/meningitis to be obtained. But as I have made clear above, the argument to which this is relevant fails, assuming in Rockliffe Hall's favour that such evidence would be available. It would thus be pointless, and contrary to the overriding objective to allow this case to proceed.

93. The final argument raised was that the broader implications of this decision made it appropriate for the case to proceed, in that a similar issue will arise at least on a number of other Travelers' policies, and possibly also in relation to other insurers' policies. Mr Berkley QC spoke of turning the Claimant away from the judgment seat. But that is not what is happening here.

94. It would be of no assistance to permit this matter to proceed. Were I to refuse the application for strike out and/or summary judgment I would simply be condemning the Claimant to fail later, and at far greater cost. The Courts must apply the ordinary principles which apply to construction of contracts regardless of the circumstances of this pandemic. The result when one applies those principles is quite clear. There is no further evidence which could inform this key issue. This case is best and most appropriately dealt with summarily.

95. Accordingly I grant Travelers' application. The Claimant's claim is struck out and to the extent necessary I grant reverse summary judgment under CPR Part 24.2 (a) and (b).