Neutral Citation Number: [2022] EWHC 3235 (Comm)

Case No: CL-2022-000528

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT KBD

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 6th December 2022

Before:

MR. JUSTICE JACOBS

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Between:

LONDON INTERNATIONAL EXHIBITION CENTRE PLC — **Claimant**

- and -

(1) ROYAL & SUN ALLIANCE INSURANCE PLC
(2) ALLIANZ INSURANCE PLC
(3) CNA INSURANCE COMPANY LIMITED
(4) AVIVA INSURANCE LIMITED
(5) ZURICH INSURANCE PLC
(6) CHUBB INSURANCE COMPANY OF EUROPE SE — **Defendants**

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MR. ADAM KRAMER KC and MR. WILLIAM DAY (instructed by **Stewarts Law LLP**) for the **Claimant**

MR. NEIL HEXT KC (instructed by **Keoghs LLP**) for the **First Defendant Insurers**

MR. KEIR HOWIE (instructed by **Clyde & Co LLP**) for the **Second to Sixth Defendant Insurers**

Other Parties and Representatives attending the CMC

MR. NEIL FAWCETT (instructed by **Fletcher Day**) for **Mayfair Banqueting Ltd v AXA Insurance UK Plc, Claimant Insured**

MR. MICHAEL DAVIE KC and MR. MARTYN NAYLOR (instructed by **DAC Beachcroft LLP**) for **Mayfair Banqueting Ltd v AXA Insurance UK Plc, Defendant Insurer**

MR. JEFFREY GRUDER KC (instructed by **Barings Ltd**) for **Hairlab Ltd & Ors v Ageas Insurance Ltd, Claimant Insureds**

MR. AIDAN CHRISTIE KC (instructed by **Keoghs LLP**) for **Hairlab Ltd & Ors v Ageas Insurance Ltd, Defendant Insurer**

MR. JEFFREY GRUDER KC (instructed by **Barings Ltd**) for **Kaizen Cuizine Ltd & Ors v HDI Global SE & Anr, Claimant Insureds**

MR. KEIR HOWIE (instructed by **Clyde & Co LLP**) for **Kaizen Cuizine Ltd & Ors v HDI Global SE & Anr, Defendant Insurers**

MR. TOM WEITZMAN KC and MR. PETER RATCLIFFE (instructed by **Dechert LLP**) for **Pizza Express Group Ltd & Ors v Liberty Mutual Insurance Europe SE & Anr, Claimant Insureds**

MR. DAVID SCOREY KC and MS. SUSHMA ANANDA (instructed by **DAC Beachcroft LLP**) for **Pizza Express Group Ltd & Ors v Liberty Mutual Insurance Europe SE & Anr, Defendant Insurers**

MR. DAVID HOFFMAN (instructed by **Hugh James**) for **Claire Watson (trading as Cabello) v Ageas Insurance Ltd, Claimant Insured**

MR. AIDAN CHRISTIE KC (instructed by **Keoghs LLP**) for **Claire Watson (trading as Cabello) v Ageas Insurance Ltd, Defendant Insurer**

MR. DAVID HOFFMAN (instructed by **Hugh James**) for **Why Not Bar and Lounge Ltd v Zenith Insurance plc & Ors, Claimant Insured**

MR. NEIL FAWCETT (instructed by **RLK Solicitors Ltd**) for **NAE 2018 Limited t/a New Inn v DTW 1991 Underwriting Limited, Claimant Insured**

MR. AIDAN CHRISTIE KC (instructed by **Keoghs LLP**) for **NAE 2018 Limited t/a New Inn v DTW 1991 Underwriting Limited, Defendant Insurer**

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JUDGMENT

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Transcript of the Stenograph Notes
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MR. JUSTICE JACOBS:

1. A very important market issue arises in relation to numerous claims advanced under policies of insurance which potentially cover losses for business interruption consequent upon events resulting from the Covid-19 pandemic in 2020. That issue has can conveniently be described as the "ATP/ causation" issue. ATP is shorthand for "at the premises": these words, or similar expressions, appear in a number of policies. The present CMC is taking place in what I will call the "London Exhibition" case, involving the well-known Excel centre in London. It follows an earlier application by the claimant, London International Exhibition Centre PLC, for the determination of the following preliminary issue, which encapsulates the central ATP/causation issue:

> In order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of COVID-19 at the premises covered by the clause, is it sufficient to prove that the interruption was a result of Government action taken or continued in response to cases of COVID-19, which included at least one case of COVID-19 at the premises covered by the clause and which had occurred by the date of such Government action?

2. At a hearing in October 2021, I declined to order a preliminary issue at that stage: see [2022] EWHC 2712 (Comm). However, I gave directions which have resulted in today's CMC in the London Exhibition case and attendance by parties in a number of other cases where the ATP/ causation issue arises. I therefore have to resolve the question of how to case manage the London Exhibition case, bearing in mind that there are a large number of other cases which raise a very similar issue. There are some variations on and additions to the central ATP/ causation issue set out above, but it is not necessary to describe them for present purposes.

3. Having considered a large number of written submissions prepared for today's hearing, I gave an indication at the start of today's hearing as to my provisional views as to how matters should proceed. The parties' oral submissions have therefore been focused on those provisional views. Many of the policyholder claimants supported my approach, although Mr Weitzman KC for Pizza Express sought to persuade me to go further. My approach was also supported, at least to a large extent, by one of the insurers, HDI. Other insurers suggested a different approach, although some had no objection as long as they were not required to participate in the hearing that I had in mind.

4. There is obviously, in a case like this, no perfect solution in terms of case management. But I do think that there should be, as I indicated at the start of today's hearing, a series of hearings in a two-week window beginning in April 2023, at which appropriately formulated preliminary issues concerning the ATP/causation issue can be determined. I will hear submissions as to the detail of what those issues are in due course. Some parties have reached agreement as to what the issues should be and how they can be defined. But there are other cases, in particular Mayfair, where that has not yet happened, although I do not believe that it would be a very difficult thing to do.

5. I consider that the lead case should be the London Exhibition case. This will, in practice, not mean a huge amount. It will, however, mean that London Exhibition will be the first of the hearings within the window, and also that the burden of producing and agreeing relevant agreed or assumed facts -- which, it is to be hoped, can largely be adopted for the purposes of the other cases -- will fall on the parties in that case.

6. A window of the two weeks beginning on 24th April 2023 will, leaving aside Fridays, allow seven days, because there is a Bank Holiday on the second Monday. If necessary, I will try to make arrangements to sit on a Friday. What I have in mind, as I indicated in the course of argument, is that the various cases will be listed sequentially in a manner which suits the parties within that window, but I think logically starting with the London Exhibition case. Even there, there may be some flexibility and if it turns out that availability issues can be accommodated with a particular case starting on a Monday rather than a Wednesday or vice versa, then the parties will have flexibility to arrange the case within that window accordingly.

7. Since the hearing will be hybrid, and therefore accessible remotely, the parties' legal teams are not required to attend in court during the hearing of the cases in which they are not instructed. Of course they can do so if they wish. However, I anticipate that people will follow the hearing in their offices remotely, or by receiving transcripts.

8. In reaching my conclusion that this is the appropriate way forward as a matter of case management, I have been guided by the fact that there is a very important market issue and also by the fact that the Commercial Court has had to manage, and is presently managing, a very large number of cases in which common points are being raised. A number of case management hearings have already taken places in various cases, and it is sensible now to see what can be done across the board.

9. The other matters which guide my approach are as follows. It is important -- and experience has shown this from previous cases -- to have a range of different wordings for the court to consider. This is not only so that different wordings, albeit with some similarities, can be analysed, but also so that there is a range of arguments and the court can see the bigger picture. I also think it is important, in a case management decision of this kind, to have a sufficiently large volume of cases (albeit not an excessive number), not least because experience has shown that cases may settle. The ATP/ causation issue has in fact been raised in previous cases where hearings had been fixed, but where the cases have now all settled. Accordingly, the point has not yet been addressed. It is perfectly possible that other cases will settle between now and next April. It is desirable to have a sufficiently large number of cases so that drop-outs are not going to affect the determination of important issues of principle. Equally, I wish to avoid duplication. It does not seem to me there is any advantage in having two sets of cases which raise the same, or virtually the same, policy analysis issues. There is also an advantage, in selecting the cases to be decided, in having parties who are well resourced and have instructed experienced King's Counsel, as they have in many of the cases now before me. The court will then have the benefit of a wide range of arguments from different perspectives.

10. On behalf of Pizza Express, Mr. Weitzman has submitted that other issues, beyond the ATP/causation issue, should be decided. I have come to the view that I should not depart too much from that ATP/causation issue. Therefore although I will include Pizza Express Issue 1, which is an ATP/causation issue, I will not include the other

issues in relation to the other extension clause, concerning emergency/closure of premises, and aggregation. It seems to me that those Pizza Express issues are not sufficiently common across the board, in the context of the other cases that I now considering, and I am not persuaded that those issues, important as they are to the parties, should be expedited into the April hearing.

11. I also consider that if one were to expand the issues beyond the ATP/causation issue, there is a danger that many other parties, who are not here today, might well come along and say that they wish to be heard because their points are now similar to the Pizza Express points which have been added in, whether on aggregation or on the emergency/closure of premises wording. This would potentially result in more and more cases and issues being incrementally added, to the detriment of the swift determination of the important ATP/ causation issue.

12. In terms of the cases which will form part of this sequential hearing during that two-week window, as I have said, London Exhibition should be the lead case. Pizza Express should be in it, only in relation to its ATP issue. The Hairlab series of cases and Kaizen Cuizine should also form part of it, and Mayfair as well. I will give some reasons for this in due course, and will also address in that context various specific arguments advanced by the insurers against the approach which I have decided to take.

13. I am willing to consider adding in the Why Not Bar case, but I do not think it appropriate to do so at the present stage because the defendant's solicitors, DWF, have told me that they did not get notice of the claimant's intention to ask for that to happen. I am presently inclined to think that it would be beneficial to have Why Not Bar within the hearing, because their wording is materially identical to the Altrincham Football Club wording which would have been considered next February, had the Altrincham case not recently settled.

14. My approach to Why Not Bar is that the solicitors for the parties should discuss the matter in the light of the ruling which I am giving. If there is a dispute as to whether or not it should form part of the April hearing, I will resolve that dispute either in writing if the parties are happy for me to do that, or by way of a short hearing one morning by Microsoft Teams or whatever platform is convenient.

15. So that is my decision. I will now pick up some of the points which were raised, which I have considered in reaching my decision which is broadly speaking what I said to the parties at the start of today's hearing. I will address briefly the principal points raised, so that the parties know why I have come to the view which I have. I say this in no particular order.

16. As far as the London Exhibition case is concerned, I accept the submission made to me, on behalf of the insurers, that there will be other issues to be resolved in that case, in particular issues relating to whether there was in fact a closure of the premises. Nevertheless, the core issue of ATP/causation is still there. The fact that there will remain other issues to be resolved is not, in my view, a reason to exclude from the process the London Exhibition case, where a substantial claim is being advanced and where the ATP/ causation issue does arise.

17. I accept Mr Hext KC's submission that RSA (the first defendant in the London Exhibition case) is not interested, at least to quite the same extent in the ATP/causation issue, although they are interested in related issues. It seems to me that their particular position can be sufficiently catered for by the fact that they are not required to attend the entire hearing, but their representatives can follow it on the live stream. I appreciate that this will result in some additional cost to RSA, who are not taking the same point on the ATP wording as the following market on the London Exhibition policy. However, RSA is a very substantial insurer. If there are some additional costs which they are incurring, because the court is considering important issues which do affect their liabilities and book of business, that is something which they will have to bear.

18. Mr. Scorey KC, on behalf of the insurers of Pizza Express, argued that the court should be careful not to divorce the interpretation of the ATP wording in the relevant policy from the interpretation of the emergency/closure of premises wording which, on the basis of my decision, I am not going to include within the scope of the April hearing.

19. I accept that, in relation to the argument that will develop on the ATP wording in the Pizza Express policy, there may well be arguments as to how it interrelates and is to be construed in the light of the emergency/closure of premises wording. However, similar arguments – as to how the ATP wording should be construed in the light of the overall terms of the policy which contains that wording – may well be raised by other parties in the context of their policies. Even though those other policies do not contain emergency/ closure of premises wording such as that contained in the Pizza Express policy, there may be other contractual terms which may need to be considered in the context of the ATP wording. It is always open to a party to argue that a particular clause should not be seen in isolation but needs to be seen in the context of the policy as a whole or in the light of other particular clauses.

20. Ultimately, it does not seem to me that that is a problem which prevents the proper determination of the preliminary issues of construction of the relevant ATP clauses. It is a point which arises whenever there is a preliminary issue of construction which involves looking at a contract term which will inevitably be part of a set of overall contract terms.

21. The other point which Mr. Scorey raised, which is similar to a point raised by Mr. Davie KC on behalf of the Mayfair insurers, is that there is no reason for the Pizza Express insurers to participate; other people can do it. In my view, however, it is advantageous to all concerned, and in particular the court, to have well-resourced parties present in order to assist with the arguments; so that the court is in the best possible position to reach a decision on these important issues of construction/causation. I bear in mind that parties such as the Pizza Express insurers and indeed the Mayfair insurers have raised the causation/ATP point in their pleadings, and so it is a point which they are inviting the court to determine. The court can properly decide to determine that pleaded point sooner rather than later, and within the framework of the series of hearings that I consider to be appropriate.

22. It also seems to me to be important to recognise that Mr. Weitzman for Pizza Express, and Mr Fawcett for Mayfair, have expressed their clients' desire to be able to argue the point, which is an important point, rather than to let it simply be argued by others.

Given that the court is minded to order the April hearing, it is appropriate for parties who wish to make submissions on the important point to be able to do so, provided, of course, that the case does not become unwieldy or involve excessive duplication.

23. Mr Davie, on behalf of the Mayfair insurers, has submitted that Mayfair, the claimant in that case, has changed its position from the stance taken at the CMC which was dealt with Picken J. That CMC resulted in a trial being fixed for December 2023, and there was no suggestion by Mayfair that there should be a preliminary issue on the ATP/ causation issue. Mayfair knew at that time that the point had been raised in other cases which would be heard before December 2023, and was thus content for the point to be considered and decided without Mayfair's participation. Mr. Davie argued that therefore it is not appropriate for the court now to shake the case up in a different way.

24. I accept that this is a change of position, but I do have to look at the landscape of the litigation as it now is. I do not consider that there is any irreversible prejudice, or indeed any prejudice to the Mayfair insurers, by the ATP/causation point being accelerated into the April hearing. The trial date in the Mayfair case for the determination of all other issues will remain. I bear in mind, as Mr. Davie told me, that the ATP/ causation preliminary issue has not yet been precisely formulated in that case. As I said earlier, I do not think it is going to be too difficult to draft the issue. If necessary, it can be done by reference to the list of issues in that case, or indeed by utilising or adapting formulations of preliminary issues which have been drafted in the other cases.

25. Mr. Christie KC raised points on behalf of the insurers in relation to the Hairlab case, where Mr Gruder KC appears for the policyholders. Mr Christie argued that it was not necessary to consider his client's policy wording, because the wording was in practice subsumed in other wordings which will be before the court. I consider, however, that it is sensible that the wording in Hairlab should be before the court. It is desirable that what has been called a "plain *Vanilla* wording", as opposed to what have been called "hybrid wordings", should be considered, even if the view could be taken that the hybrid wordings incorporate and extend the plain *Vanilla* wording.

26. As far as Why Not Bar is concerned, I have already mentioned that I will not take any final decision on that. I can see advantages to having the wording which is in their policy (which was similar to the Altrincham wording) being included, but I have already indicated how I am going to deal with that.

27. This leaves the New Inn and the Claire Watson cases. I am not persuaded that those cases raise any issues which are not covered by everything else. I do not, at the moment, think that anything would be gained by adding in another small business party to argue essentially on the same policy terms. If the other cases are before the court, there will be a very wide range of different businesses and policies, including small businesses and restaurants. If it were to transpire that there were to be settlements in the various cases which will now form part of the April hearing, then the effect of the settlement may need to be considered. At that stage, there will be the possibility of substituting a case for a case that has settled, and these two cases may be possible substitutes.

28. The only other thing which I would say is that I would encourage, if possible, the parties to slim down the representation. I appreciate that may not be altogether easy and that different insurers may have slightly different positions. However, it may well be possible, for example, for the Why Not Bar insured to choose one of the counsel, acting in one of the other cases, to argue their position. It may be on the insurer side there could be something along those lines as well. I will not say any more than that.

(For continuation of proceedings: please see separate transcript)
