WHEN IS A PLAGUE NOT A PLAGUE?

Insurance Matters

The Supreme Court decision on Covid-19 business interruption claims has provided a lot of clarity on how disease extensions to property damage policies are to be construed. The anecdotal evidence is that most insurers are now paying out on claims made under these extensions where they were refusing to do so before the court's decision. One point which remained open to argument, however was whether use of the phrase "plague" in a list of diseases covered by a disease extension clause would cover Covid-19. It has after all been described as a modern plague and there are few who would disagree with that description.

This was the issue which had to be decided by Mrs Justice Cockerill DBE in *Rockliffe Hall Limited* v *Travellers Insurance Company Limited* [2021] EWHC 412 (Comm). The claimant, a golf course and hotel in the north

east of England, had an insurance policy with the defendant which contained a disease extension which provided cover for business interruption losses arising from any of 34 listed "infectious diseases" none of which, inevitably, was Covid-19 (not least because the policy started on 1 July 2019, long before anyone had heard of Covid-19 if indeed it existed then). This was not a type of policy wording considered in the Supreme Court case. The policy provided cover for the consequences of an outbreak of an infectious disease within 10 miles of the hotel. If the hotel could therefore show that Covid-19 was included within the definition of infectious disease (and that there had been at least one instance of Covid-19 within that 10 mile radius) it would, following the Supreme Court decision on 15 January 2021, be entitled to a pay-out by the insurers for the business interruption losses it had suffered subject to the policy limit (for that type of loss) of £250,000 (although the extent of the hotel's losses was in dispute).

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The matter came before the judge on a summary judgment application by the insurer so the only issue the judge had to consider was whether Covid-19 fell within the policy definition of infectious disease. "Infectious disease" was defined in the policy as one of the 34 types of disease set out in the policy. The different types of disease were set out in 3 sections the first of which consisted only of food or drink poisoning. The second group of diseases was:

- Cholera
- Plague
- Relapsing fever
- Smallpox
- Typhus

The third list was far more extensive and consisted of 28 separate diseases of which Rabies, Malaria and Anthrax are relevant.

Travelers argued that the list was closed and exhaustive.

The hotel argued that diseases such as rabies, malaria and anthrax were specific diseases and that others, such as plague, food and drink poisoning and meningitis were general diseases. Thus, it argued that "plague" was a general term for an infectious disease with a high mortality rate, epidemic or pandemic rather than a specific disease caused by the bacterium *Yersina pestis* (bubonic, pneumonic or septicaemic plague). It further contended that the definition was ambiguous and therefore had to be read *contra proferentem* against the insurer. The hotel supported its contention by reference to the Oxford English Dictionary definition of "plague" as "*Any infectious disease which spreads rapidly and has a high mortality rate; an epidemic of such a disease*."

The judge preferred the insurer's argument. In particular, she held that the hotel's definition focused on the consequences of the disease rather than the identification of the disease. She also pointed out that plague is listed in the policy with cholera, smallpox and typhus all of which are very specific diseases which suggested that the list also only referred to the bubonic, pneumonic or septicaemic versions of plague. She felt that her view may have been different if it had been listed with famine, war and pestilence!

She also briefly dealt with the hotel's contention that the policy should be read *contra proferentem*. She dismissed this argument in very short order finding that the policy was not ambiguous and that therefore the point did not arise for consideration.

The claim was therefore struck out summarily.

The judge was at pains to emphasise that the construction of the policy was to be done through the eyes of the reasonable person and that that was not a lawyer. It might have been thought that, in the eyes of a layman, the use of the word "plague" could have the more general meaning contended for by the hotel. Her analysis and treatment of the policy wording however is exemplary and it is difficult to see that any appeal by the hotel will get anywhere.

About Peter Fitzpatrick

Peter was a partner with specialist risk and insurance firm BLM for more than 20 years. He has advised on all aspects of insurance law both for insureds and insurers and of commercial litigation generally.

He has experience of litigation and arbitration both in England & Wales and overseas. He has handled claims ranging in value from tens of thousands to millions of pounds. He has advised both companies and individuals on contractual claims, company disputes, partnership disputes, property claims (including boundary disputes and rights of way claims), and claims against professionals including solicitors, architects, surveyors etc., and shareholders disputes.

He has acted for and against insurers in policy coverage disputes and represented insurers in both recovery and liability disputes. He has also handled complaints to the Financial Ombudsman Service for both insureds and insurers and advised on the application of the ICOBS rules.

Peter has considerable experience of conducting mediations and alternative dispute resolution generally.