Neutral Citation Number: [2023] EWHC [342] (Comm)

Case No: CL-2019-000434

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 February 2023

Before :

MR ADRIAN BELTRAMI K.C.

- -

Between :

(1) ERS SYNDICATE 218 AT LLOYDS	**Claimant**
- and -	
(1) MOTORSHIFTER LIMITED (in liquidation)	**Defendants**
AND (2) ALLIANZ INSURANCE PLC	

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- -

Patrick Blakesley KC (instructed by **Kennedys Law LLP**) for the **Claimant**
Patrick Vincent KC (instructed by **DAC Beachcroft Claims Ltd**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing dates: 14 and 15 February 2023

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JUDGMENT

MR ADRIAN BELTRAMI K.C:

INTRODUCTION

1. This is a dispute between two motor insurers about which of them is liable to satisfy claims for damages arising out of a serious car accident caused by an employee of the First Defendant (**Motorshifter**).

2. The business of Motorshifter was the transportation of vehicles on behalf of its customers. The company was owned and managed by Mr Oliver Jones (**Mr Jones**), who employed teams of drivers, all based in or around Stoke-on-Trent. On Friday, 15 September 2017, one such employee, Mr Anthony Wright (**Mr Wright**) collected an Audi A5 vehicle, registration HF65 JUA (**the vehicle**), from a location in Newcastle upon Tyne, which vehicle was due to be delivered by Motorshifter on Monday, 18 September 2017. On Saturday, 16 September 2017, at around 10.30 pm, the vehicle collided with a Seat Leon on Hempstalls Lane, Newcastle under Lyme (**the Accident**). The driver of that vehicle was badly injured. Her daughter, who was a rear seat passenger, suffered a below knee amputation.

3. The police estimated that the vehicle was travelling at 78 mph, in a 30 mph zone. On 3 July 2018, Mr Wright was convicted on various charges at Stoke-on-Trent Crown Court and was sentenced to 44 months in prison plus a driving disqualification. The victims of the Accident have very substantial claims against Mr Wright and/or Motorshifter. Motorshifter has since been placed in liquidation and has played no part in these proceedings.

4. Motorshifter had a vehicle insurance policy with the Claimant (**ERS** and **the ERS Policy**). The ERS Policy, No. 50066767, ran from 17 February 2017 until 16 February 2018. It was a comprehensive policy, covering Motorshifter and its employees. By these proceedings, ERS originally sought:

    a. A declaration and order that, on the true construction of the ERS Policy, ERS is not liable to indemnify Mr Wright and/or Motorshifter in respect of any liability either or both may have for injury loss and damage arising out of the Accident.

    b. Alternatively, a declaration that the Certificate of Motor Insurance for the ERS Policy be rectified, together with a further declaration and order that by reason of such rectification ERS is not liable to indemnify Mr Wright and/or Motorshifter in respect of any liability either or both may have for injury loss and damage arising out of the Accident.

5. At the beginning of the second day of the trial, after the evidence had been heard, ERS abandoned its claim for rectification. Hence the only matter remaining for determination is a dispute over the construction of the ERS policy. That dispute is itself of a narrow compass.

6. The claim was commenced solely against Motorshifter, by then already in liquidation. By Order of Henshaw J dated 11 February 2020, the Second Defendant (**Allianz**) was joined as a party. Allianz provided motor insurance to Saint Gobain Ltd (**SGL**) under a fleet policy (**the Allianz Policy**). The vehicle was owned or at least operated by SGL, which had contracted with CD Auction Group Ltd (**CDA**) for its transportation. CDA had sub-contracted to Motorshifter.

7. It is common ground that, if ERS succeeds in its claim, Allianz will be the responsible insurer in respect of the Accident, by reason of the operation of s. 151 of the Road Traffic Act 1988 (**RTA**).

THE EVIDENCE

8. I received oral evidence from the following witnesses:

    a. PC Brian Lovatt. Mr Lovatt is a Police Constable employed by Staffordshire Police. He has been qualified as a Forensic Collision Investigator since September 2015. In that capacity, he was requested to attend the scene of the Accident, arriving at around 23.30. He subsequently produced two Collision Reports, dated respectively 22 October 2017 and 22 November 2017. PC Lovatt's evidence was given by video-link.

    b. Chris Wilson. Mr Wilson is an employee of ERS. He joined as a Senior Underwriter in March 2014 and became Head of Fleet Underwriting in July 2017. He was not the underwriter who underwrote the ERS Policy. His evidence accordingly concerned ERS's standard procedures and practices.

    c. Edward Moore. Mr Moore is also an employee of ERS, also joining as a Senior Underwriter in 2014. He was the underwriter originally presented with the Motorshifter risk in February 2017, in circumstances I explain in more detail below. Unsurprisingly, he had no specific recollection of the transaction itself but explained the process he would have followed by reference to certain documents exhibited to his statement.

9. I am satisfied that each of witnesses was seeking to assist the Court, to the best of his recollection. That said, such assistance had limited potential, especially after the abandonment of the rectification claim.

10. I should mention two other aspects of the evidence.

11. First, the trial bundle contains four statements or records of evidence of Mr Jones:

    a. A signed witness statement given to the Police and dated 19 September 2017. The statement is said to be given pursuant to Criminal Procedure Rules r. 27.2, Criminal Justice Act 1967, s. 9 and Magistrates Court Act 1980, s. 5B. Mr Jones has signed underneath the declaration that "*This statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false, or do not believe to be true."*

    b. A further signed witness statement given to the Police, under the same provisions and with the same declaration, dated 22 January 2018.

    c. An unsigned document described as a witness summary of evidence that Mr Jones will give at trial, which Allianz was granted permission, pursuant to an order of Butcher J dated 29 October 2020, to rely upon as a witness summary under CPR 32.9.

    d. An unsigned document described as a witness statement of Oliver Jones, which ERS was granted permission, pursuant to an order of Butcher J dated 8 December 2020, to rely upon as a witness summary under CPR 32.9.

12. Albeit that there is some measure of common ground, the two witness summaries record divergent evidence, or more accurately potential evidence, from Mr Jones. It appears that he spoke at different points to representatives of ERS and of Allianz and, at its lowest, their perception of what he said differed. At any rate, he did not sign either summary and neither party called him as witness.

13. Mr Blakesley KC, on behalf of ERS, sought to admit the witness summary for which it had been granted permission, as a hearsay statement, and accepted that the same would apply to the summary for which Allianz had been granted permission. Mr Vincent KC, on behalf of Allianz, initially opposed the admission of either summary into evidence and this led to a debate in opening, in particular as to the effect of CPR 32PD 27.2, which renders admissible all documents contained in the agreed bundle as evidence of their contents, unless the court orders otherwise or a party gives written notice of objection to the admissibility of particular documents. I was shown various authorities which touched on this issue: *Charnock v Rowan* [2012] EWCA Civ 2, [2012] CP Rep

18, *First Subsea Ltd v Balltec Ltd* [2013] EWHC 1033 (Pat) and *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB), [2020] 4 WLR 42.

14. Ultimately, the debate was cut short when I indicated that I was prepared to treat the two witness summaries as admissible evidence, though with very little weight to be attached to them. Insofar as the documents are put forward as evidence of the truth of what Mr Jones says, they constitute secondary hearsay (ie as hearsay statements of hearsay evidence) and which are internally inconsistent. Evidence of such a nature is not likely to assist the Court on any disputed question of fact. Mr Vincent was ultimately content for me to proceed on that basis. In the event, neither party invited me to make a finding of fact on any part of Mr Jones' evidence and I do not do so.

15. The second aspect of the evidence is more difficult to calibrate. In describing the normal sequence of events, the ERS witnesses explained the evidential trail which leads to the conclusion of an insurance policy. It is apparent that the documentary record is now incomplete. One central document, namely the offer of insurance made by ERS, to Motorshifter's broker, has not been located by ERS. Another document, which I describe below as the Closing document, was not disclosed by ERS but appeared, apparently for the first time in the action, as part of the exhibit to Mr Moore's witness statement. Mr Moore was unable to explain how it had been obtained (and, in particular whether it had been belatedly found by ERS in its own records or had been requested from the broker, each of which possibilities might legitimately raise different follow-on questions). There is also the possibility that the original presentation documents would have contained a cover sheet with central information on it, although Mr Moore could not confirm whether such a document did exist in this case.

16. On any view, therefore, there are gaps in the evidence and so I must determine what to do about that. As for how it may have occurred, the ERS witnesses explained that, at least at the time, "*box*" insurance work at Lloyd's was generally conducted by hard copy and at face-to-face meetings. Documents would then need to be scanned before they formed part of ERS's electronic record. Given the volume of business being conducted, this would involve large piles of material, and it is not impossible that individual documents, no matter how important with hindsight, would be missed. Mr Vincent, properly, did not suggest that I should find that there was anything mischievous in the evidential gaps, and in such circumstances there is no scope for an adverse inference. In undertaking the exercise of construction, I must do the best I can with the documents available, whilst at the same time recognising that they do not form a complete set.

THE ERS POLICY

17. ERS provided a number of documents in connection with the ERS Policy:

    a. A Policy Booklet (**the Policy Booklet**). This is a 30 page document setting out the general terms of what is described as an Equity Insurance policy. It is signed by Mr Mark Bacon as "*Active Underwriter*".

    b. A Policy Schedule (**the Schedule**). This is a single page document, recording the insurance premium of £38,830, together with specific policy, vehicle and other details.

    c. A Schedule of Endorsements.

    d. A Certificate of Motor Insurance (**the Certificate**). This is the Certificate required under section 147 RTA. It is signed by Mr Bacon as "*Active Underwriter*". It describes, or at least purports to describe, various details of the ERS Policy and concludes with the declaration: "*I hereby certify that the policy to which this certificate of insurance relates satisfies the requirements of the relevant law applicable in Great Britain, Northern Ireland and the Islands of Guernsey, Jersey and Alderney."*

18. The Policy Booklet describes the policy in the following terms:

    "*Your policy document*

    "Welcome to your ERS policy document. To know exactly what your insurance covers with us, please make sure to read this document carefully. You should read it alongside any schedule, endorsement or certificate you've received from ERS…

    "This policy document, Certificate of motor insurance, schedule, any schedule of endorsements and the information you or your representative have supplied form the contract of insurance between you (the insured) and us (ERS).

    You should read all parts of the contract as one document…"

19. The following are then included in a Definitions section:

    "***Certificate of motor insurance** – a document which is legal evidence of your insurance and which forms part of this document and which you must read with this document…*

    *"**Schedule, Policy schedule** – the document showing the vehicle we are insuring and the cover which applies. To be read in conjunction with schedule of endorsements.*

*"**Schedule of endorsements** – the document showing endorsements that apply. To be read in conjunction with the policy schedule…*

*"**Your vehicle, the insured vehicle** – any vehicle shown on the schedule or described on the current certificate of motor insurance…"*

20. The Schedule records the Policy number and Broker agency number. After setting out certain details of the policy and the premium, it then provides as follows:

Vehicle details

Vehicle type	Numbers	Registration number	CC	GVW	No. of seats	Cover	Class of use	Annual rate per vehicle (excl.IPT)
Trade plate	20	ALL				Comprehensive	Business use of the Insured	£1,765.00

Permitted drivers

Vehicle type	Registration number	CC	GVW	No. of seats	Driver restrictions
Trade Plate	ALL				Any Driver – Excluding Drivers under 21

Vehicle excess details

An excess is the amount you must pay in the event of any claim, regardless of who is to blame for an incident. However, there may be additional excess terms applied highlighted below in Additional excesses for young or inexperienced drivers, or shown in the attached Schedule of Endorsements.

Vehicle type	Registration number	CC	GVW	No. of seats	Excesses

Trade Plate	ALL				Accidental damage	Fire & theft	Windscreen
					£1000	£1000	£1000

21. Moving on to the Certificate, this was, as I have mentioned, the document required under s. 147 RTA, subsection (1) of which is in the following terms:

"*An insurer issuing a policy of insurance for the purposes of this Part of this Act must deliver to the person by whom the policy is effected a certificate (in this part of this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and any other matters as may be prescribed."*

22. The RTA also contains further provisions relating to the certificate of insurance. For example, by s. 165, a driver of a motor vehicle must produce the certificate if required to do so by a constable.

23. The Certificate includes the following provisions, in addition to the declaration I have set out above:

"***1. Description of vehicle(s)***

Any private car or commercial vehicle the property of the policyholder or in their custody or control including any motor vehicle bearing a trade plate number owned by the policyholder…

*"**5. Persons or classes of persons entitled to drive***

Any person who is driving on the order or with the permission of the policyholder.

Provided that the person driving has a licence to drive the vehicle or has held and is not disqualified from or prohibited by law from holding or obtaining such a licence.

*"**6. Limitations as to use***

Use for social, domestic and pleasure purposes and for the business of the policyholder.

***Unless specified under section 6 of this certificate of insurance, this policy does not cover**: use for hiring, the letting on hire, the carriage of passengers and goods for hire or reward, racing, pacemaking, use in any contest, reliability or speed trial or the use for any purpose in connection with the motor trade."*

24. As will be seen from the above, a number of the documents within the ERS Policy refer to "*Trade Plates*". The use of Trade Plates within the motor trade is permitted and regulated by the Vehicle Excise Registration Act 1994 and the Road Vehicles (Registration and Licensing) Regulations 2002. The detail of these provisions does not matter for present purposes, and my bundle contained only a summary by way of Guidance Notes issued by the DVLA. So far as relevant, a motor trader may apply for a trade licence or a series of trade licences for the purpose of its business, including the movement of vehicles, and so be able to operate such vehicles without paying separate vehicle excise duty. In such case, the driver must display the trade plate applicable to the licence. However, the trade licence may only be used for the particular business purposes for which it is issued and it is an offence to use the vehicle for a purpose other than that specified.

THE CONCLUSION OF THE ERS POLICY

25. Prior to the ERS Policy, Motorshifter obtained its insurance cover elsewhere. There was in the bundle evidence of the terms of an insurance policy for the year 2014/15. Mr Blakesley suggested that I should draw adverse inferences from the fact that Allianz had not disclosed the terms on which it had, in another year, itself provided insurance to Motorshifter. However, there was no suggestion that the terms of such earlier policies were known to ERS and on that basis I do not see them as relevant, or indeed admissible, on the issues of construction which I have to determine. I do not, accordingly, draw any adverse inference.

26. As explained by the ERS witnesses, and by reference to the available documentation, ERS first received a presentation by Bishopsgate Insurance Brokers as agent for Finch Commercial Insurance Brokers who were acting on behalf of Motorshifter. This included a Quick Quote Sheet, reflecting a telephone call between the broker and Motorshifter, in which the broker obtained information about the insurance which Motorshifter was looking to acquire. There is only limited information on this document. Under the heading "*Own vehicles/trade Plates*", there is a reference to a Mercedes Vito 7 seater minibus, valued at £24,000, as well as to the number of 25 Trade Plates. It is not clear from the document itself whether the contemplation at that stage was for insurance for both the 25 Trade Plates and the minibus, or whether it was just for the Trade Plates. Mr Blakesley suggested that the reference to the minibus was just for information purposes only but, as I say, this is not clear from the document and I do not feel able to make that finding. Of more significance, the subsequent documents contain no further reference to the minibus.

27. The presentation also included the following documents:

a. A "*Trade Plate Fact Finder*" prepared by Century Insurance, the insurer for 2015/16. This contained commercial information on Motorshifter's business, including the number of drivers it employed and the number of Trade Plates it used in preceding years.

b. A "*Motor Trade Claims Experience*" prepared by Allianz, as insurer for 2016/17.

c. A "*Motor Trade Claims Experience*" prepared by QBE, as insurer for 2014/15.

28. Mr Moore explained that each of these documents would have been relevant to him in his assessment of risk. However, they are historical documents in respect of experiences under earlier policies and it was accepted that they do not address the scope of cover which was being sought from ERS.

29. As I mentioned above, the Quick Quote may have had a cover sheet with central details recorded on it. Following the receipt of the presentation, there may have been a verbal conversation between the broker and Mr Moore to clarify any outstanding points, but it is unknown whether that occurred in this case. The usual practice then would have been for ERS to send a written offer of insurance, either in hard copy or by email. If acceptable, the broker would thereafter produce and provide the Closing document. Mr Moore's evidence was that the Closing document in this case would probably not have been given to him directly, or at least would not have been reviewed by him, but would have been passed onto an assistant underwriter to produce the Policy documents.

30. The Closing document is a four page document under the heading of "*Bishopsgate*", the broker. It sets out certain (but by no means all) the terms of what would in due course become the ERS Policy. After identifying Motorshifter as the insured and describing its occupation as "*Vehicle Collection and Delivery*", it includes the following further provisions:

"*Vehicle Schedule: As per Attached Excel Risk Register*

"Rate Split: As per Attached Vehicle Schedule…

"Cover Comprehensive

Excess £1000 All Claims other than Third Party Excess

Use Social Domestic & Pleasure including the business of the Policyholder

Drivers Any Authorised, Licenced Driver, but excluding drivers under 25 years of age"

31. The Vehicle Schedule referred to in the body of the Closing document is a table comprising 20 rows, with each row describing a separate trade licence. By way of example, the information on the first row is as follows:

No.	Registration Number	Type of cover	Vehicle Make & Model	Value	GVW/CC	Annual Rate	Addition Date
1	3084	COMP	Trade Plate			GBP 1,765.00	16 Feb 2017

The remaining 19 rows contain identical content, save that there is a different trade licence registration number. The total rate for the 20 items is recorded as £35,300 which with the addition of IPT, produces a renewal premium of £38,830.

32. It was Mr Wilson's understanding, with which Mr Moore agreed, that a closing document constitutes the insured's acceptance of the insurer's offer and that, when it is presented to the underwriter, "*the contract of insurance is bound*". That may or may not be the case, either generally or with respect to this contract in particular, but it is not something I need to explore further. Both parties accepted that the relevant contractual documents which I need to construe are the ERS Policy documents which I have described above. It was also common ground that the Closing document forms part of the relevant and admissible factual matrix for the purpose of that construction exercise.

THE ACCIDENT

33. Although this had been adumbrated as one of the issues for determination, Allianz conceded shortly before trial that, at the time of the accident, Mr Wright had not been using the vehicle for business purposes, but for purposes which would fall under the description "*social domestic and pleasure*" (**SDP**). That concession removed any necessity for exploring the detail of the Accident, either in the trial or in this Judgment.

34. Only one factual issue remained in dispute, just about, throughout the trial, and that was whether the vehicle was displaying trade plates at the time of the Accident. PC Lovatt's evidence was that it was not. He was cross-examined as to whether or not it was possible that the force of the Accident had propelled the trade plates off the vehicle and that they had simply not been found. His evidence was clear that he examined the entire area in which he would expect there to be any relevant evidence, and that there were no trade

plates. I am entirely satisfied, and find, that the vehicle was not displaying trade plates at the time of the Accident.

THE REMAINING ISSUE

35. The remaining issue, as agreed between the parties, is as follows:

> Whether on its proper construction the Policy covered business use only or whether it extended to SDP use and made ERS liable to provide indemnity to Mr Wright and/or Motorshifter in respect of the Accident.

36. On behalf of ERS, Mr Blakesley developed the case using the following principal steps:

37. First, pursuant to the ERS Policy, Motorshifter obtained insurance coverage for the use of 20 Trade Plates. Given that a trade licence may only be used for business purposes, and indeed that it is an offence to use a licence for other purposes, the Policy was inherently and inevitably limited to business use only, and for such vehicles only, this in any event being confirmed by the terms of the Schedule. As it was now accepted that the Accident occurred when Mr Wright was using the vehicle for SDP, and on the finding that the vehicle was not displaying Trade Plates, this was conduct which fell outside the scope of the Policy and there is no right to an indemnity in respect of it.

38. Second, and so far as the contractual elements are concerned, he recognised that there was an inconsistency, at least on its face, between the content of the Schedule and the content of the Certificate, most significantly in the description of the insured vehicles and in the permitted uses.

39. Third, and faced with that conflict, he submitted that the Court should give priority to the terms of the Schedule and, in effect, construe away the conflicting terms of the Certificate as obvious mistakes, through the exercise described by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, at [22]-[25]. This was because:

    a. It is the Schedule which contains the operative terms of the Policy. The Certificate serves a different, statutory purpose and cannot or should not as a matter of construction be used to expand the scope of the insured risk defined in the Schedule. He referred specifically in this context to the Definitions contained in the Policy Booklet and to the decision of the Supreme Court in *R & S Pilling (trading as Phoenix Engineering) v UK Insurance Ltd* [2019] UKSC 16, [2020] AC 1025, to which I shall return.

b. More generally, he pointed out that the Schedule was a more detailed and, as he said, "*coherent*" document, this contrasting with the Certificate, which was a limited and "*generic*" document. There was evidence from the ERS witnesses that ERS had initiated a "*simplification*" process in relation to Certificates, with the inference being that this had led to errors.

c. He sought to rely on various matters which he described as "*commercial context*", of which I mention two. The first was his submission that the statutory background concerning trade licences, including in particular the offences committed by improper use, precluded or at least strongly weakened a construction of the ERS Policy which allowed for SDP, as this would otherwise result in insuring, and so "*condoning*" illegal acts. The second point placed reliance on the Closing document, specifically the Schedule identifying the 20 Trade Plates for which the insurance was being (apparently) accepted. On that analysis, there was a clear understanding that no insurance was being provided for vehicles other than those operating (legitimately) under the specified Trade Plates.

d. Finally, Mr Blakesley submitted that this was also supported by business common sense, relying for this purpose on the well known observations of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, at [20]-[30]. The main consideration here was the fact that Motorshifter was a car delivery and collection service, operating under Trade Plates, which business did not need or want SDP cover.

40. Mr Vincent, for Allianz, argued primarily that there was in fact no true conflict in the contractual terms. Instead, the Schedule and the Certificate could be read together, and in effect accumulatively, with the result that insurance cover would extend to that found to be encompassed by either the Schedule or the Certificate. The principal elements of the reasoning were:

41. First, the Policy Booklet confirms that both the Schedule and the Certificate form part of the contract of insurance. Hence, they are both contractual documents, in which relevant contractual terms may be expected to be found. Mr Vincent referred to the guidance of Lord Hope in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523, at [24], to the effect that, if provisions in a contract appear to be inconsistent, the Court must do its best to reconcile them if that can conscientiously and fairly be done.

42. Second, at least within the definition of the insured vehicle, the Policy Booklet provides that either document may be a source of identification: "*any vehicle shown on the schedule or described on the current certificate of motor insurance"* (emphasis added).

43. Third, the effect of this definition is that the description of "*Vehicle details*" in the Schedule is not exclusive. This can only be a description of some of the vehicle details, namely those using Trade Plates, in circumstances where the Certificate contemplates that other vehicles may also be within cover: "*Any private car or commercial vehicle the property of the policyholder or in their custody or control <u>including</u> any motor vehicle bearing a trade plate number owned by the policyholder*" (emphasis added).

44. Fourth, and for the same reason, the description in the Schedule of class of use, namely "*Business use of the Insured*" should not be read as exclusive, both because this relates only to the non-exclusive "*Vehicle details*" and because the Certificate provides in terms for SDP use.

45. Fifth, this analysis is not precluded by either the further Definitions or the decision in *Pilling*, which is distinguishable.

46. Sixth, reference to the Closing document favours Allianz because that also provided for SDP use.

47. Seventh, ERS's resort to business common sense was misplaced. There was nothing in principle to preclude ERS from insuring Motorshifter against the risk that an employee might, for example by driving a vehicle with Trade Plates for SDP, commit an offence. Equally, and although the business of Motorshifter involved the transportation of vehicles, there was nothing inherently uncommercial in such a company seeking insurance cover for the eventuality that its drivers might cause an accident when doing something that was not allowed.

48. Mr Vincent went on to submit that, if there was indeed a conflict between the two documents, then the Certificate ought to prevail over the Schedule. He relied in particular on the fact that the Certificate is a formal and statutory document, and indeed the document which must be produced to the police on request to demonstrate the existence of insurance cover. In contrast, the Schedule has no formal status and is not even necessary. In the present case, he submitted, its main function, so far as relevant, was to identify the type of cover, namely "*comprehensive*".

DISCUSSION

49. There was no dispute over the legal principles. I was referred to the familiar catalogue of cases identifying the principles of contractual construction including, in addition to those I have already mentioned, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

The core principle is that the contract is to 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 language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant.

50. I was not specifically referred to the recent decision of the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649. Although that case concerned a different sort of insurance policy, the identification of the "*reasonable person"* in the majority judgment of Lord Hamblen and Lord Leggatt, at [77], appears to be equally applicable to the present case:

"*... 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 (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."*

51. In applying the above principles, and bearing in mind the guidance in *Geys*, I am unable to accept the proposition advanced by Mr Vincent that the provisions in the Schedule and the Certificate are capable of being reconciled in the manner suggested. This is for the following reasons:

52. First, I approach the construction exercise from the perspective that this would be an unlikely and commercially unsatisfactory outcome. Whist it might achieve the beneficial aim, at least so far as this case is concerned, of arriving at consistency rather than inconsistency, it would do so at the price of commercial certainty. Parties are generally free to conclude contracts on the terms they wish, and so little is impossible, but it seems to me inherently unlikely that the reasonable reader of such an insurance policy would expect that fundamental aspects of the policy, such as the vehicles covered and the uses permitted, would be spread over separate documents and subject to a process of aggregation.

53. Second, far from supporting such an approach, the wording of the ERS Policy is inconsistent with it. Whilst it is of course right that, on the terms of the Policy Booklet, both the Schedule and the Certificate are said to form part of the contract, the Definitions section explains the role each document plays in the contract. The Schedule is the document which shows "*the vehicle we are insuring and the cover which applies*". That wording is, on its face, already inconsistent with Mr Vincent's case: he would

have to argue that it should be read as if to mean, "*a non-exclusive list of the vehicles we are insuring…"* but I see no reason to do so. That is especially so when it is contrasted with the definition of the Certificate, namely "*a document which is legal evidence of your insurance*". Again, Mr Vincent's unpromising case would have to be that that there should be read into that definition, "*and which may also show vehicles we are insuring beyond those in the Schedule".*

54. Third, the content of the Schedule entirely conforms with what I consider to be the plain meaning of the Definitions. The Schedule sets out "*Vehicle details*". It does not set out "*Some Vehicle Details*" and there would be no obvious reason why it should. Further, and importantly, it also states the "*Annual rate per vehicle*" of £1,765, which is the figure that is then used to calculate the premium. This is irreconcilable with Mr Vincent's approach to construction. On its face, as I read the Schedule, the Policy is intended to cover the 20 Trade Plates concerned, at a specific cost per Trade Plate. That is fully consistent with the role of the Schedule, as per the Definitions, as containing a description of "*the*" vehicles insured. If it is only a description of some of the vehicles insured, then not only is the wording used inapposite but the calculation of premium is inexplicable.

55. Similarly, the information contained in the Schedule concerning "*Permitted Drivers*" and "*Vehicle excess details*" can only sensibly be construed as having exclusive effect. A Schedule which placed limits on permitted drivers and set out detailed provisions for excess charges would be substantially incomplete if such details were intended to apply to only some of the vehicles under the Policy.

56. Fourth, this is also consistent with the decision in *Pilling*. In that case, a fire was started inside a motor vehicle during the course of its repair at a garage, causing damage to the vehicle and the garage. The policy provided insurance cover "*if you have an accident in your vehicle*". The insurer sought a declaration of non-liability on the ground that the motorist was not in the vehicle at that time. The Supreme Court held that the policy fell to be construed in such a way as to make it consistent with the obligation in s. 145(3)(a) RTA to insure the policyholder in respect of liability for damage to property "*caused by, or arising out of, the use of the vehicle on a road or other public place"*. However, in the event, there was on the facts no such use and so the declaration of non-liability could be granted.

57. The primary issue before the Supreme Court was whether, if and if so to what extent, the "*insuring clause*" in the Policy Booklet, which defined the scope of the cover, needed to be amended in order to make it compliant with applicable legislation. The appeal succeeded because the amendment arrived at by the Supreme Court was narrower than that of the Court of Appeal.

58. In the course of the appeal, and apparently for the first time, the appellant insurer advanced an alternative case to the effect that it was unnecessary to engage in any corrective construction of the insuring clause in the Policy Booklet because the Policy on its correct construction provided cover in "*two strands*". The second strand was through the operation of the Certificate and, specifically, the declaration of compliance with relevant law (in the same mandated terms as on the Certificate in the ERS Policy). It was argued that a declaration in such terms itself amounted to the promise of insurance cover which did in fact comply with the legislation. The respondent opposed this new argument, on the grounds that the scope of cover was determined by the insuring clause in the Policy Booklet and the Certificate was "*merely a declaration of compliance and does not operate as an additional insuring clause."*

59. The two strands argument was rejected by the Supreme Court. As explained by Lord Hodge, at [28]-[31]:

> "28. *I am not persuaded by the two strands approach which UKI advocates. The certificate is relevant to and forms part of the Policy because it alone states the limitations as to use which the Policy imposes (para 9 above). Thus it is readily understandable why UKI requires the policy holder to read the four documents as a whole. But the wording of the Chief Executive's certificate distinguishes between the Certificate of Motor Insurance and the Policy when it speaks of "the Policy to which this Certificate relates". It certifies the legal effect of the Policy without purporting to provide additional cover.*
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> *"29. My concern is also that the two strands approach does not fit in easily with the provisions of the RTA which draw a distinction between an insurance policy and an insurance certificate. The certificate is the product of section 147 of the RTA and the Motor Vehicles (Third Party Risks) Regulations 1972 (SI 1972/1217) as amended ("the 1972 Regulations"). Section 147 provides that an insurer issuing a motor insurance policy must deliver to the insured a certificate of insurance in the form prescribed by the 1972 Regulations. The certificate serves as evidence of the existence of the policy, because, for example, a driver may be required by a police constable to produce the certificate (section 165) and a person against whom a claim is made must give the claimant such particulars of the policy as are specified in the certificate (section 154). The RTA defines "policy of insurance" in section 161 in a non-exclusive way, stating that it "includes a covering note". But the RTA also speaks of "policy" as something separate from the certificate of motor insurance. For example, in section 147 the insurer issuing a policy must also deliver the certificate. In section 144A , which creates the offence of keeping a vehicle which does not meet the insurance requirements, subsection (3) defines the first condition of meeting the insurance requirements in these terms:*
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> > *"The first condition is that the policy or security, or the certificate of insurance or security which relates to it, identifies the vehicle by its registration mark as a vehicle which is covered by the policy or security."*

> *"30. The RTA 's treatment of an insurance policy as a distinct concept from a certificate of insurance points against the two strands approach. Further, if the certificate, although distinct, were interpreted as a separate contractual basis for insurance cover, questions would arise as to whether an insurer may avoid liability for a risk covered only by a certificate of insurance in circumstances in which it is barred from so doing in relation to cover under a policy. Section 151 imposes a duty on insurers to satisfy judgments obtained against persons insured against third party risks up to the maximum at the relevant time of £1m (now £1.2m). The section applies to judgments relating to a liability which section 145 requires to be covered by insurance and "it is a liability covered by the terms of the policy" (subsection (2)(a)). In deciding whether the terms of the policy cover the liability the section disregards any requirement in the policy that the driver have a valid driving licence (section 151(3)). The obligation to pay exists even if the insurer was entitled to avoid or cancel the policy or had avoided or cancelled it (section 151(5)). In short, section 151 focuses on the liability covered by the terms of the policy and excludes certain terms of the policy and the avoidance or cancellation of the policy. It does not envisage liability covered by the certificate or the avoidance or cancellation of the certificate.*
>
> *"31. I am therefore not prepared to adopt the two strands approach. But the outcome of the appeal does not depend upon the two strands submission because I am persuaded that the Court of Appeal erred in interpreting clause 1a to include the words "there is an accident involving your vehicle" in place of the phrase "you have an accident in your vehicle".*

60. There are obvious differences between the matters for consideration in *Pilling* and those in the present case. Mr Vincent does not place reliance upon the terms of the statutorily required wording, on the face of the Certificate itself, that the policy to which it relates satisfies the requirements of the relevant law applicable in Great Britain. The present case is not concerned with what was described as the "*insuring clause*" in *Pilling*, at least in the sense of determining the scope of the cover itself (the equivalent would be at Section 1 of the ERS Policy Booklet, which formed no part of the argument). And, ultimately, the contract was in different terms. For example, it appears that, although there was a Schedule in *Pilling*, this may have taken a different form. That said, the argument advanced appears to me to have a resonance in the present case. Accordingly, whilst the issue in *Pilling* was whether it was possible to derive from a Certificate a new strand of cover, that is not so dissimilar in concept from Mr Vincent's attempts to use the Certificate in order to extend the cover to otherwise new vehicles.

61. The *ratio* of this part of the Judgement in *Pilling*, as I understand, is Lord Hodge's conclusion at [28] that (at least in that case), the declaration certified the legal effect of the Policy but did not provide additional insurance cover. In and of itself, that has no direct bearing on the matters before me. However, the further reasoning at [29]-[30] speaks more broadly of the purpose of the Certificate and of the distinction, drawn in the RTA, between the policy and the Certificate. Lord Hodge clearly thought it relevant that the Certificate is a creature of statute, for specific statutory purposes, and that,

although part of the contract of insurance, it is nevertheless distinct from the policy. He also drew attention to some of the difficulties that might arise should that distinction be blurred.

62. None of this is to say that a Certificate cannot serve contractual purposes in addition to the statutory one, and in *Pilling* itself it seems that the Certificate did do so to some extent. However, what I take from this decision is that this is something that would have to be clearly expressed, because it does exceed the purpose for which the Certificate is by statute created. Specifically, where relevant details such as the vehicles insured and the uses permitted are already specified within the contract, and in a more conventional location such as the Policy Schedule, it would not be expected (absent clear words) that the Certificate should be viewed as providing scope for an expansion of the scope of the Policy over and above the terms contained in the Schedule. Far from there being such clear words, the ERS Policy Booklet and Schedule point strongly in the other direction.

63. Fifth, that is therefore the context in which to approach the definition in the Policy Booklet of the "*insured vehicle*", perhaps the high point of Mr Vincent's case. I accept that the word "*or*" is on its face a disjunctive conjunction but I do not accept that it can bear the weight which would be needed, when considered in the light of the other factors I have mentioned. Indeed, that word is, at least in the present context, potentially ambiguous. It would mean to the reasonable reader that the identification of the insured vehicle should be capable of being found in one of two documents. But it does not necessarily mean, and in context I find that it does not mean, that if the content of the two documents differs, the insured vehicles will comprise the aggregate of the two. Instead, the word should be construed as reflecting the assumption, which would be the normal assumption in any event (even if not in fact borne out in this case), that the content of the two documents would not differ.

64. On the premise, therefore, that there is a conflict, or at least what appears on its face to be a conflict, between the Schedule and the Certificate, the further question is how that conflict is to be resolved. For largely the same reasons as I have developed above, I find that the conflict should be resolved in ERS's favour. Taking the ERS Policy as a whole, the operative document which defined the insured vehicles and the cover which applied was the Schedule. That Schedule was unambiguous as to those matters. The Certificate served a different purpose and should, in the event of inconsistency, have to yield to the Schedule on such matters. Additional points to mention on this aspect:

    a. I accept and give some weight to the submission by Mr Blakesley that the Schedule contains detailed and bespoke terms, whereas the Certificate appears more generic, non-specific to the ERS Policy itself and potentially erroneous.

The inclusion in the vehicle description of "*Any private car or commercial vehicle the property of the policy holder or in their custody or control"* is mystifying if, as Mr Vincent submitted, it should be taken to extend the Policy to any vehicles owned or controlled by Motorshifter which did not bear Trade Plates. Other than the initial and fleeting reference to the Mercedes minibus, there is nothing in the documentation to suggest that Motorshifter was ever concerned to obtain insurance for any such vehicles: whilst the documentation is admittedly incomplete, the Closing document is strong confirmatory evidence that there was no such intention. Further, the broad inclusion of persons entitled to drive as extending to "*any*" person driving on the order or with the permission of the policy holder is directly inconsistent with the specific exclusion in the Schedule, of drivers under 21.

b. So far as the Closing document is concerned, I consider that this weighs in favour of ERS's construction, given the content of the vehicle schedule, which is limited to the 20 Trade Plates and records the same rate per vehicle as on the Schedule. I accept that there is some ambiguity in this document, given its reference to SDP use, and so I do not place very much weight on it, but I regard its evident focus on the 20 Trade Plates as the insured vehicles as providing further confirmation of the correct construction of the ERS Policy.

c. Beyond the matters I have addressed, I found little value in the commercial considerations pressed upon me by Mr Blakesley. I do not accept the proposition that insurance for SDP would in this case be impossible because it would be to "*condone*" a criminal offence. No authority was cited in support of that proposition. Whilst any individual insurer might or might not be prepared to take on such a risk, I see no reason why this could not be done. Nor do I consider that a policy which might cover such risk either does or does not accord strongly with commercial common sense. I can see scenarios in which this might make sense to both parties. In any event, the question, of course, is not what parties might have agreed but what they did in fact agree, and on this I am in no doubt for the reasons explained.

65. Accordingly, in my judgment, the proper scope of the ERS Policy, so far as material to the present case, is to be found in the Schedule. To the extent that it differs, it is not to be found in the Certificate. The result is that the only insured vehicles under the Policy were vehicles operating under the Trade Plates specified and the only permitted use was for business use. As I have found that the vehicle was not bearing Trade Plates at the time of the Accident and as the parties are agreed that it was not being operated for business use, it follows that the ERS Policy does not respond to the risk.

DISPOSAL

66. I grant the declaration sought in the terms requested, namely that on the true construction of the ERS Policy, ERS is not liable to indemnify Mr Wright and/or Motorshifter in respect of any liability either or both may have for injury loss and damage arising out of the Accident.