REINSURANCE ROUND-UP

AUTUMN 2017

There have been a number of important legal developments in the last year, both out of and in the courts.

The Courts have been determining issues of interpretation of the **Insurance Act 2015**, which came into force last year. A new section 13A, inserted into the Act by virtue of the **Enterprise Act 2016**, gives policyholders the right to claim damages from insurers who delay payment of a valid claim.

The EU and US reached a bilateral agreement which included the abolition of regulatory requirements for reinsurers to post collateral for their transatlantic business and the elimination of local presence requirements for reinsurers.

The Lloyd's Market Association, the Association of British Insurers and others produced a joint response to the Information Commissioner's Office, as to the best practice in obtaining express consent from policyholders and beneficiaries when processing sensitive data under the GDPR (which comes into force on 25 May 2018).

The FCA published a consultation paper on the Insurance Distribution Directive, which applies to those who conduct insurance distribution to consumers and replaces the insurance Mediation Directive. New requirements include the standard of "minimum knowledge" that (re)insurance intermediary staff are to have about products, the claims process and regulation.

As Insurance Linked Securities ("ILS") issuance reaches record levels, the UK Government published its "*Risk Transformation Regulations 2017*" and "*Risk Transformation (Tax) Regulations*" (intended to take effect in the UK in October). These introduce corporate protected cell, regulatory and tax regimes to facilitate the issuance of ILS in London. Lloyd's CEO, Inga Beale, is reported as having commented that Lloyd's will encourage managing agents to use the new London ILS framework and may in the future consider using it to buy protection at market level.

AGGREGATION

- **AIG Europe Limited v Woodman and Others [2017] UKSC 18**

Two developments failed when local developers were unable to complete the land purchases. Investors brought two claims (one in relation to each site) against the developers' solicitors alleging they wrongly released monies from an escrow account. The solicitors' insurers sought a declaration that the underlying

claims should be treated as "one claim" arising from "similar acts or omissions in a series of related matters or transactions". The Supreme Court held that a requirement that transactions/matters must be intrinsically linked in order to be aggregated is neither necessary nor satisfactory. Whilst there must be some real connection between the matters or transactions in order for claims to be aggregated, each case will turn on its specific facts. Although the two developments bore a striking similarity, that was not enough to treat them as related transactions.

- **Mic Simmonds (Lloyd's Syndicate 994) v AJ Gammel (Lloyd's Syndicate 102) [2016] EWHC 2515 (Comm)**

Gammel participated in an excess liability insurance programme insuring the Port of New York. Following 9/11, it was alleged that the Port negligently exposed employees to personal injury, such as respiratory damage sustained during the rescue and recovery operations. Reinsurers appealed against an Arbitration Award, arguing that the Arbitrators had erred in construing the phrase "arising from one event". Reinsurers argued that the Port's continuing failure to provide adequate protective equipment did not constitute an "event" but rather a "continuing state of affairs". The Judge held that the Arbitrators had understood and applied the correct legal test of requiring (a) a common factor which could be described as an event, (b) a causative link and (c) an absence of remoteness for the purposes of (re)insurance. Whether there was a significantly causal connection was a matter within the ambit of the Arbitrators' exercise of judgment. As such, a Court deciding the same issue could have reached a different conclusion.

DAMAGES FLOWING FROM PROFESSIONAL NEGLIGENCE

- **BPE Solicitors and Another v Hughes-Holland [2017] UKSC 21**

G loaned L £200,000 to develop a property but, as he had made clear to G's solicitors, L intended to (and did) use it to discharge a loan. This left no money for the development, so the project failed. Applying the principle in SAAMCo v York Montague [1996] UKHL 10, the Supreme Court held that recoverability of losses depended on the scope of the BPE's duty to G. In this case, although BPE had provided "information" to G, which resulted in G entering into a transaction on a mistaken belief, it was found as a fact that he would have lost his money even if that belief had been correct (the project would have failed even if the money had been invested as G intended). BPE's scope of duty in this case did not include providing "advice" whether to enter into the transaction.

FAIR REPRESENTATION

- **Axa Versicherung Ag v Arab Insurance Group [2017] EWCA Civ 96**

The reinsurer argued that it was entitled to avoid two treaties on the basis that the reinsured had failed to disclose the existence of loss statistics, but the court accepted that the underwriter had not been induced

by the non-disclosure. In upholding the decision, the Court of Appeal found that although an objective test must be applied when determining whether a fair presentation was made, a subjective test is then applied to consider what the insured or broker would have said in addition to encourage the insurer to write the risk. Here, had the statistics been disclosed, the broker would have also told reinsurers that a change in underwriter would lead to a more rigorous practice. It was held that the burden lies with the insurer to prove inducement, whereas the burden lies with the insured or broker to demonstrate that it would have raised further matters if additional facts had been presented.

DISCLOSURE OF INSURANCE POLICY

- **Peel Port Shareholding Finance Co Ltd v Dornoch [2017] EWHC 876 (TCC)**

Under the Third Parties (Rights Against Insurers) Act 2010, a claimant can obtain information regarding an insolvent insured's insurance protection. In this case, the insured defendant was solvent, but it was argued would become insolvent if held liable unless its insurance responded. The court declined to exercise its discretion under CPRr31.16 to give pre-action disclosure of the solvent insured's policy even though it was the subject of a coverage dispute.

JURISDICTION

- **Assens Havn v Navigators Management (UK) Ltd – Case – 368.16**

Navigators insured Skane Enterprise Service AB ("Skane") under a marine liability policy. The policy was expressly subject to English law and jurisdiction. It provided that "*any dispute arising under or in connection with it*" was subject to the exclusive jurisdiction of the High Court in London.

During the course of a claim against it, Skane went into liquidation. Under Article 95 of the Danish law on insurance contracts a claimant can proceed directly against the insurer of any insolvent insured. Assens Havn therefore commenced proceedings against Navigators, but in the Danish Maritime & Commercial Court. The Danish Court dismissed the action, finding that as Assens Havn had effectively stepped into the insured's shoes, it was bound by the exclusive jurisdiction provisions of the policy. The issue was referred to the European Court of Justice (ECJ), whose decision has finally been issued ten years after the loss.

The ECJ decided that the Brussels 1 Regulation (superseded by the Brussels Regulation Recast, although the relevant provisions remain the same) enabled the Claimant to bring its direct action against the insurer in the Danish Courts. The ECJ referred in particular to Recital 11 of the Brussels 1 Regulation: "*the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile* …"; and to Recital 13: "*in relation to insurance … the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provided for*." The

ECJ observed that the victim had not expressly consented to the agreement on jurisdiction and was not bound by it. Whether in similar circumstances a post Brexit English Court will be able to restrain such overseas proceedings remains to be seen, but for the present the ECJ decision is binding.

MEASURE OF INDEMNITY

- **Great Lakes Reinsurance (UK) SE v Western Trading Limited [2016] EWCA Civ 1003**

The policy provided that, should the property be destroyed, the indemnity was the cost of reinstatement but only if such reinstatement were carried out "with reasonable despatch". Interpreting the policy, the Court of Appeal held that, following the destruction of the insured's property by fire, the insured was entitled to be indemnified for the costs of reinstating the property in the future on the condition that reinstatement works were actually undertaken and costs actually incurred.

ASCERTAINMENT OF LIABILITY

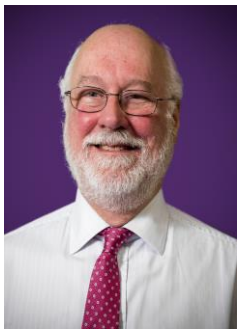
- **WR Berkley Insurance (Europe) Limited & Another v Teal Assurance Company Limited [2017] EWCA Civ 25**

Payment into an escrow account following settlement does not mean liability has been ascertained and does not qualify as the insured having "become legally obliged to pay Damages" for the purposes of triggering an indemnity under the insured's professional liability policy. The escrow account was a fund from which money might be drawn down in the future to make payments in respect of compensatory damages. Such payments would ascertain liability but payments into the escrow account did not.

NOTIFICATION CLAUSES

- **Zurich Insurance PLC v Maccaferri Limited [2016] EWCA Civ 1302**

Mr McKenna suffered an injury in 2011 handling a pneumatic lacing gun supplied by Maccaferri. At the time, Maccaferri was told of "an incident" but no other details. Maccaferri was first notified of a claim in July 2013 and immediately informed its insurers, who declined to indemnify on the basis of non-compliance with the policy's notification clause: "The Insured shall give notice in writing to the insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof." The Court of Appeal held that the obligation to notify should be determined by reference to the position immediately after the event occurred and there was no obligation to carry out a rolling assessment of whether a past event is likely to give rise to a claim.



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