# (RE)INSURANCE ROUND UP
## Autumn 2018

### DEVELOPMENTS IN THE LAST YEAR

- The past year has seen the (re)insurance industry continue to tackle the difficulties and uncertainties arising out of Brexit. The **European Union (Withdrawal) Bill 2018** received Royal Assent on 26 June 2018 and many businesses have been restructuring whilst trying to predict the impact of any deal. The PRA has been actively seeking information from its regulated firms as to their post-Brexit plans.

In case there is no deal, the Government has published guidance on the steps that it, along with the regulators, will take to protect EEA firms operating within the UK. It is intended that a temporary permissions regime will be put in place should the EU passporting regime cease. The measures that will be taken to smooth the transition include making temporary arrangements to allow EU firms to continue operating in the UK until March 2022, as well as recognising contracts already in place between the firms and their UK customers. The temporary permissions regime will seek to assist inbound passporting firms; it is not yet clear whether EEA regulators will approach this with reciprocity for UK firms passporting outwards.

- The implementation of the **General Data Protection Regulation (GDPR)** has changed how companies must hold and process data. Individuals now have more power over how their information is stored and managed, including the right to access their information and to have it deleted entirely.

- The **Automated and Electric Vehicles Act** received Royal Assent on 19 July 2018. Part I of the Act imposes liability on the insurer of an automated vehicle where an accident is caused by that vehicle, causing damage to any person including the insured. Insurers are entitled then to claim from the responsible party, whether that is another driver or the manufacturer of the vehicle. Section 3 deals with contributory negligence, upholding the law that the amount of liability will be subject to a reduction where the accident was caused, in part, by the injured party. Section 3(2) excludes insurers' liability to the person in charge of the vehicle where the accident was wholly due to the person's negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so. It is yet to be seen how the Courts will construe "appropriate" for the purposes of claims brought under the Act.

- The **Insurance Distribution Directive** replaced the Insurance Mediation Directive earlier this year. It is a minimum harmonising directive aimed at enhancing consumer protection when purchasing insurance. It clarifies which information should be given to consumers prior to entering into an insurance contract and imposes certain conduct of business and transparency rules on distributors. The rules, which include rules for cross-border business, apply to the sale of all insurance products from 1 October 2018.

- The Law Commission and Scottish Law Commission published an updated **Bill on Insurable Interest** on 20 June 2018. It seeks to extend the scope of insurable interest in the case of life-related insurance, including giving cohabitants an automatic insurable interest and covering (grand)children under travel and health policies.

- In April this year, **Pool Re** extended its cover to include physical damage arising out of cyber terrorism. Those who purchase insurance through insurers who are members of the Government sponsored pool can now be covered for business interruption arising out of cyber attacks. Cover excludes intangible assets, specifically money and data, which are considered to be more appropriately covered by the cyber market.

This move by Pool Re is welcomed, especially given that data breaches and cyber attacks have continued to play prominent roles this year. Facebook's Mark Zuckerberg's Senate hearing was in the headlines early in 2018. This related to the 2014 Cambridge Analytica scandal, when 87 million users' information was harvested through a quiz app and allegedly shared to influence the 2016 Presidential campaign. Other companies suffering hacks and breaches this year have included MyHeritage and Under Armour, the company behind MyFitnessPal.

- **Carillion** went into compulsory liquidation in January 2018. Since most of Carillion's UK suppliers were not insured against the risks arising out of the collapse, it is expected that insurers will pay out around £31 million in trade credit insurance claims, out of the estimated losses of £1.2 billion.

As ever, there have also been a number of court cases that will be of interest to the insurance and reinsurance market. We will begin with two decisions that illustrate an increasing willingness on the part of the English courts not only to disallow claims brought dishonestly, but also to invoke criminal sanctions against those responsible.

### FRAUDULENT CLAIMS / FUNDAMENTAL DISHONESTY

- **Pinkus v Direct Line [2018] EWHC 1671 (QB)**

Mr Pinkus sought £850,000 for injuries arising out of a road traffic accident, including minor whiplash and severe post traumatic stress disorder. Direct Line, the other driver's insurer, admitted liability but disputed quantum. The Court dismissed the entire claim, finding Mr Pinkus to have exaggerated the claim and acted dishonesty, including failing to disclose previous accidents and giving contradictory evidence as to whether a passenger had been present at the time of the accident.

- **Liverpool Victoria Insurance Company v Yavuz [2017] EWHC 3088**

Defendants who had been part of a 'crash for cash' conspiracy were found guilty of contempt of court. Insurers argued that the defendants had submitted "false and dishonest statements" in their witness statements, schedules of loss, and particulars of claim, amongst other

documents. The decision demonstrates the Court's increasing willingness to impose criminal penalties for insurance fraud and will no doubt be welcomed by insurers.

## NOTIFICATION

### ❖ Euro Pools plc (in administration) v Royal and Sun Alliance Insurance plc [2018] EWHC 46 (Comm)

Euro Pools was insured under two claims-made policies (the first policy covering the period of 30 June 2006 – 29 June 2007; the second covering 30 June 2007 – 29 June 2008) which contained a mitigation works clause. When it became aware of problems with stainless-steel tanks in February 2007, Euro Pools informed RSA and installed inflatable bags to remedy the fault. In May 2008, Euro Pools identified issues with the bags and told RSA it would change the boom system to a hydraulic system. Euro Pools argued the relevant loss was the failure of the bags, which had been notified under the second policy; RSA contended that the notification was the one in February 2007 and fell under the first policy, limiting the amount the claimant could recover since the losses exceeded both policies' limits.

The Judge concluded that there was "no causal link between the failures in the tanks and the decision to abandon an air drive system and move to hydraulics" and, in any event, Euro Pools "was not aware in February 2007 of problems with the air drive system such that it could not notify the circumstances which led to a claim for the expenses of the move to a hydraulic system". Euro Pools had therefore validly notified the claim under the second policy and the claim for mitigation works was within the policy period.

Euro Pools also sought to recover costs and expenses relating to the installation of a diving pool where the 'moveable' floors failed to move, informing RSA of the issue in November 2007. RSA again argued that this was part of the February 2007 notification. The Court again found in Euro Pools' favour: it was not aware in February 2007 of the design defect which subsequently affected the pool floor, and there was no causal link between the February 2007 notification and the later claim.

## ALLOCATION

### ❖ Equitas v MMI Limited [2018] EWCA Civ 991

This is an ongoing appeal as to whether reinsureds can choose under which reinsurance year to claim mesothelioma losses (also known as 'spiking'). Judge-Arbitrator Flaux J held that MMI could 'spike' each reinsurance claim to any applicable year of cover. The Court of Appeal granted permission to Equitas to appeal pursuant to s.69 Arbitration Act 1996, which allows appeals from arbitration awards only on a point of law, only in very limited circumstances and only with leave from the Court. The Court of Appeal granted leave to appeal on the following issues:

(a) Implied allocation - Flaux J held that a reinsurer could be liable for the whole loss even when it had only been on risk for part of the period. The Court of Appeal has accepted that there is a "seriously arguable case for treating the insurance and reinsurance positions differently".

(b) Good faith - Flaux J had considered a reinsured's duty of good faith to be only a duty not to act dishonestly. If this is held to be correct, it will mean that a reinsured has a choice as to how its losses are allocated to reinsurers.

(c) Recoupment and contribution - Flaux J had concluded that contributions from other reinsurers should be apportioned on an 'independent liability' basis, i.e. the independent amount each reinsurer would have been liable to pay regardless of the existence of other reinsurers. These issues will be decided at a full Court of Appeal hearing, the judgment in respect of which is eagerly awaited.

## LIMITATION

### ❖ RSA Insurance plc v Assicurazoni Generali SpA

The High Court has ruled that insurers who are liable to pay asbestos claims under the Compensation Act 2006 ("CA") are only entitled to claim a contribution from other insurers within two years from settlement. The claimant in the underlying action had contracted mesothelioma and sought compensation from his employer, RSA's insured. Despite having insured the employer for only 6 months of the claimant's 10 year employment, RSA were liable for the entire claim by virtue of s.3, CA. RSA sought to recover from the other two insurers on risk during the Claimant's employment, Aviva and Generali. The Court held that liability arising out of an insurance contract is a 'Damages Indemnity Liability' and therefore such a claim would be a damages claim under the Civil Liability (Contribution) Act 1978, with a limitation of two years. Insurers will therefore need to be alive to this 'shortened' timeframe and quickly identify other insurers on risk to avoid being time-barred.

## PROOF OF COVER / LIMITATION

### ❖ R&Q (Malta) Limited and Others v Continental Insurance Company [2017] EWHC 3666 (Comm)

The claimants, R&Q (Malta) Limited, Aviva Assurances UK Branch and Societa Reale Mutua di Assicurazioni, contended that they had entered into four reinsurance contracts with Continental in respect of underlying policies for an Australian building company. The insured Australian company became the subject of a mesothelioma claim due to its products containing asbestos. The claimants paid several of the claims and sought to recover from Continental. However, the original reinsurance cover notes, slips and policies could not be produced by the claimants; Continental denied it was a party to the reinsurance.

The Court accepted the claimants' evidence that despite extensive efforts, the documentation could not be found. However, the Court was prepared to look beyond the missing contractual documents, to other evidence establishing that there was a contract. In this respect, the Court was persuaded by the broker's, PWS, evidence that the reinsurance had been placed in the relevant PWS pool and that Continental had reinsured a 20% share. Further, it was found that, from 1983 Continental had agreed to front the whole pool, assuming 100% of the risk placed with the pool (but would then have recourse against other reinsurers). The claimants argued that fronting was a basic feature of PWS' business and that Continental's fronting role

was well-known in the market. Continental failed to produce evidence to the contrary.

The Court then was asked to decide on the issue of limitation under s29 Limitation Act 1980 that where any right of action has accrued to recover any debt or other pecuniary claim, and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of the claim, shall be treated as having accrued on and not before the date of that acknowledgement or payment. Referring to Dungate v Dungate, the Court held that there is no particular format for an acknowledgement; a general acknowledgement would suffice if quantum could be ascertained by extrinsic evidence.

## DISCLOSURE

- **Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited [2018] EWHC 1311 (QB)**

Avondale Exhibitions was owned by a husband and wife. Following a fire in 2012 which caused damage to its property and stock, Avondale made a claim under its 2012/2013 policy. Insurers declined cover under not only that policy but also the preceding 2010/2011 and 2011/2012 policies due to non-disclosure of the husband's two prior criminal convictions.

Avondale contended that the broker, Arthur J Gallagher, had been informed of the convictions and had negligently failed to inform insurers and/or had failed to elicit the relevant information from Avondale. The Court found Arthur J Gallagher had not been told of the convictions. The Court considered that, if Arthur J Gallagher had been so told, it would have acknowledged the importance of such an admission and taken action accordingly.

Nor was the Judge persuaded that Arthur J Gallagher's paperwork was too complex for Avondale to have understood its disclosure obligations. The husband was a businessman, who the Court found to have paid more attention to his insurance details than he was willing to admit. Whilst many documents had been sent by Arthur J Gallagher, they were "clear, concise and easy to read and verify or correct" and "the explanations of the duty of full disclosure of material facts were clear and full and attention was properly drawn to them".

## ARBITRATION

- **Allianz v Tonic Star [2018] EWCA Civ 434**

In the first instance hearing of this case in 2017, Allianz wished to appoint a well-known QC, with over 10 years' insurance and reinsurance experience, as arbitrator. Tonicstar objected. Mr Justice Tear followed the precedent set by Mr Justice Morrison in the 2002 case of Company X v Company Y (unreported) when determining whether the QC was qualified under the Institute Joint Excess of Loss Clause ("JELC") CL400, which states that "unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than 10 years' experience of insurance or reinsurance". In X v Y, Mr Justice Morrison held that the clause envisaged "trade arbitration" and required any arbitrator to have been employed in the (re)insurance industry, such that a lawyer would not qualify. In Allianz v Tonicstar, Mr Justice Tear considered himself bound by that precedent such that he had no option but to hold that the proposed QC did not qualify.

The matter went to the Court of Appeal which overruled Company X v Company Y and allowed the appeal. It held that although the clause was drafted by the "trade body" this did not mean that only members of the trade could be appointed. The fact that, in default of agreement, arbitrators were to be appointed by the Chairman of the London Underwriting Association, did not mean that the Chairman could not appoint a lawyer. Giving the tribunal the ability to dispense with the strict rules of evidence was not found to be a significant consideration, especially as compared to the more important fact that the contract was subject to English law. In short, the clear and unambiguous clause did not expressly confine the appointment to trade arbitrators and a lawyer would qualify.

- **Halliburton Company v Chubb Bermuda Insurance Limited [2018] EWCA Civ 817**

The underlying case involved a Bermuda Form insurance policy. Before being appointed as arbitrator in the 'Halliburton/Chubb arbitration', 'M' disclosed that he had previously been appointed in other arbitrations involving Chubb. Following the 'Halliburton/Chubb arbitration' appointment, M accepted two further appointments in arbitral proceedings in which the subject matter overlapped with the 'Halliburton/Chubb arbitration'. This, however, was not disclosed. When Halliburton discovered this, it applied to have M removed as arbitrator of the 'Halliburton/Chubb arbitration' under s24(1)(a) Arbitration Act 1996.

The Court held that, whilst inside information and knowledge could be a legitimate concern in overlapping arbitrations, it was not in itself an inference of apparent bias. Arbitrators are "assumed to be trustworthy and to understand that they should approach every case with an open mind." To conclude that an open mind and objective judgment would not be brought by the tribunal, required "something of substance". However, disclosure should have been made to Halliburton of the circumstances which might have given rise to justifiable doubts about M's impartiality. Such disclosure depends on what the arbitrator knew at the time of his appointment, and should not be viewed in hindsight. In the circumstances, the Court found that the non-disclosure did not give rise to justifiable doubts as to M's impartiality. Halliburton's appeal was accordingly dismissed.

## COSTS

- **Travelers Insurance Company Limited v XYZ [2018] EWCA Civ 1099**

Transform was co-defendant in 623 claims brought as part of group litigation relating to defective PIP breast implants. Travelers had provided cover for 197 of those claims, a fact which was not disclosed to the claimants. The claimants were successful in a trial of the preliminary issues. When Transform went into administration, Travelers settled the 197 cases. The uninsured claimants obtained default judgment against Transform and sought costs of the preliminary hearing from Travelers by way of a non-party

costs order, which obliges a funder to pay the costs of the litigation, even though they were not in fact a party to it.

The Court held that, pursuant to s51 Senior Courts Act 1981, this case was 'exceptional': should the claimants have been unsuccessful, they all would have been liable to contribute towards the Travelers' costs; it would be unjust to say that upon a successful outcome for all claimants, Travelers should only meet the costs of insured claimants. Transform's non-disclosure regarding the lack of insurance was influenced by the Travelers' wish to conceal details of the policy – thus its interests "were in play even when the uninsured claims were being considered".

If lack of coverage had been disclosed, many of the claims may have been abandoned. Travelers should bear some responsibility for the flawed advice given under the joint retainer since it had funded the costs of the preliminary issues and stood to benefit from a successful outcome since the sample claims raised common issues. The case should remind insurers of the Court's discretion under s.51 and the risk of liability pursuant to this should the absence of cover not be disclosed.


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