ROUND UP OF 2020

Notwithstanding the significant lockdown period during the second quarter of the year, as well as the continuing restrictions that have been imposed since then, the courts have continued to operate. As a result, there have been a number of decisions, which will be of interest to both the insurance and reinsurance markets, some of which we summarise below.

DEVELOPMENTS IN THE LAST YEAR

- **The Financial Conduct Authority v Arch Insurance & others [2020] EWHC 2448 (Comm):** The FCA Business Interruption Test Case was probably the most significant (albeit not yet final) decision of 2020. The case, brought by the FCA, commenced on 20 July 2020 and progressed at rapid speed, culminating in the High Court judgment being handed down on 15 September 2020. Our article summarising the 181-page judgment can be found here. The first instance decision was (largely) in favour of the FCA resulting in six of the eight insurers involved and the FCA submitting leapfrog appeals and cross-appeals to the Supreme Court. That decision is anticipated to be delivered in January.

  From the reinsurance perspective, perhaps the repeated references in Flaux LJ's judgment to Covid-19 being a "*state of affairs*" may be a pointer to how Covid-19 may be treated under event-based and cause-based aggregation clauses respectively. The word "*event*" is generally taken not to encompass a "*state of affairs*", but the word "*cause*" can do so (see *AXA Re v Field [1996]* to which Flaux LJ also referred)..

- **Trade Credit Reinsurance Scheme:** This scheme was introduced in September in response to the coronavirus pandemic. It aims to ensure that trade credit insurance coverage and credit limits are maintained during the coronavirus crisis. In effect, the government will act as a reinsurer to the trade credit insurance industry to ensure the continued availability of trade credit insurance.

- **Lloyd's Part VII Transfer [2020] EWHC 1388 (Ch):** The Court sanctioned the Part VII transfer by Lloyd's Syndicates, of all policies insuring EEA risks, to Lloyd's Insurance Company, Brussels. Snowden J considered the scheme to be an appropriate response to, inter alia, the difficulties that would arise from insurers being unable to pay out under policies after 31 December 2020.

REINSURANCE

- **Munich Re v Ascot [2019] EWHC 2768 (Comm)**: Following delay to an insured project, the facultative excess of loss reinsurance contract was not extended. In deciding that it did not continue to provide cover while the project was ongoing, the Court looked at the meaning of the words from the point of view of a reasonable person with all the background knowledge which would have been available to the parties, including that the commercial rationale of the reinsurance was to provide back-to-back cover, as well as the expectation that, in the event of delays, extension of the Project Period would be on terms and at a premium to be agreed.

- **PJSC Rogosstrakh v Starr Synd & Ors [2020] EWHC 1557 (Comm):** The Claimant applied for summary judgment in the English Courts to enforce Russian judgments obtained by the Claimant against 20 Reinsurers. The Reinsurers opposed this on the basis, inter alia, that the judgments were biased. Finding in favour of Reinsurers, it was held that it was not a requirement to establish a conspiracy in order to establish bias, but only to establish *"improper influence"*.

POLICY INTERPRETATION

- **Manchikalapati and Ors v Zurich Insurance Plc and East West Insurance Company Ltd [2019] EWCA Civ 2163:** Following defects found in 26 new flats, a claim was brought against the warranty provider. The wording of the maximum liability cap was ambiguous. The Court of Appeal found that as this was a case of real doubt, the Court should construe the provision in a manner consistent with, not repugnant to, the purpose of the insurance contract. The Court found in favour of the policyholders.

- **Endurance Corporate Capital v Sartex Quilts [2020] EWCA Civ 308:** This is a Court of Appeal case, the first instance judgment in which was dealt with in last year's Round-Up (here) - Sartex' textile factory, which was damaged by fire. Eight years after the occurrence of the fire, the property still had not been reinstated. The Court of Appeal found, against Insurers, that the proper consideration under the policy was to put the Insured in the financial position in which it would have been, but for the insured peril. Whether the Insured intended to reinstate the building was of no relevance to the measure of indemnity.

  The Court of Appeal upheld the Judge in applying the principle of reduction for betterment on the basis that the onus was on the Insurers to identify and justify particular reductions.

LAW AND JURISDICTION

- **Generali v Pelagic Fisheries [2020] EWHC 1228 (Comm) (Jurisdiction):** A hull and machinery policy contained a provision for English jurisdiction whilst

also incorporating an Italian policy form that provided for Italian jurisdiction. The Italian Insured argued that Italian and English Courts both had non-exclusive jurisdiction, but it was held that the specially negotiated terms providing for English jurisdiction took precedence over the incorporated terms and that the Insurers had a good arguable case that the English Courts had exclusive jurisdiction pursuant to Article 25 of Brussels I Recast.

- **Aspen Underwriting v Credit Europe Bank [2020] UKSC 11:** Proceedings were commenced to set aside a previously agreed settlement and seek repayment from the Insured and their Dutch domiciled bank on grounds of misrepresentation. The bank challenged jurisdiction. The Supreme Court, upholding the Court of Appeal (whose judgment is dealt with in last year's Round-Up - here) agreed with the bank's position that, although the bank was a beneficiary (as loss payee under the contract), it had not consented to the English jurisdiction Clause. As the bank had not asserted a claim under the agreement, but had left it to the Insured to negotiate the settlement, it was not bound by the Clause. However, reversing the Courts below, the Supreme Court also held that the bank was considered to be a protected party under EU Regulations[1] and able to rely on that protection to be sued only in its home jurisdiction.

- **Hiscox v Weyerhauser [2019] EWHC 2671 (Comm):** An excess policy incorporated Washington State law, though the underlying policy contained a Clause providing for London arbitration, resulting in a dispute over jurisdiction. Satisfied that there was a high probability of arbitration being incorporated into the excess policy, the Commercial Court held that the interim anti-suit injunction against the Insured (who had filed proceedings in a US Court) should be maintained.

- **Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors [2020] UKSC 38:** Three national systems of law apply to different aspects of an arbitration. They may, or may not, be the same. They are (1) the law of the main contract, which governs the rights/liabilities in dispute; (2) the law of the arbitration agreement, governing the interpretation of the arbitration agreement (regarded as a severable agreement even when included in the main contract); (3) the procedural law of the arbitration (usually the law of the seat of the arbitration).

  The Court accepted that an arbitration agreement would usually be governed by the law chosen to govern the main contract (the Court of Appeal's view had been that the law of the seat would usually apply). However, the majority of the Supreme Court found that the law of the main contract was not expressly stated or implied (so, by default, under the Rome I Regulation was Russian law), and for the law of the arbitration agreement looked to the system of law that had its closest connection with the arbitration agreement. This, the Supreme Court found by a 2:1 majority, was English law.

[1] Brussels Regulation Recast (Regulation (EU) 1215/2012) section 3

NON-DISCLOSURE

- **Niramax Group Ltd v Zurich Insurance Plc [2020] EWHC 535 (Comm):** Zurich avoided the extension of a recycling plant policy, entered into before the Insurance Act 2015 became effective, that added a new piece of machinery. On placing the extension, the Claimant had failed to disclose that conditions under the policy had not been complied with. The loss to existing plant was still covered by the policy without its extension, but this was a relatively small part of the loss.

EU REGULATIONS

- **The Queen on the Application of Lloyd's Underwriters & Ors v HM Treasury & Syrian Arab Republic & Ors. [2020] EWHC 2189 (Admin):** An application was made by Insurers to HM Treasury to disclose information, which was believed to be, relevant to enforcement of a US judgment against the Syrian state. The Treasury refused to provide the information as it considered it lacked the authority to do so under EU Regulations[2]. It was held that the exemptions set out in the Regulation to protect innocent third parties included the interest of Insurers. The Treasury's decision was quashed and remitted back for reconsideration.

- **Bulstrad Vienna Ins Co v Olympic Ins Co Case C-427/19 (European Court of Justice):** A request had been made by a Bulgarian Court to the ECJ for a preliminary ruling on the correct interpretation of Article 274 of the Solvency II Directive ("the Directive"). During procedures in Bulgaria between two insurance companies, it had emerged that the Cypriot Authorities had withdrawn the authorisation of Olympic Insurance (a Cypriot insurer) to operate as an insurance undertaking.

  A liquidator had been appointed. The question put to the ECJ was whether the Directive must be interpreted to mean that a decision of a competent authority to withdraw the authorisation of the insurance undertaking concerned, and to appoint a provisional liquidator, constituted a *"decision to open winding-up proceedings with regard to an insurance undertaking"*. This was found not to be the case, except in certain circumstances. Where these specific circumstances are met, the Courts of other Member States are not obliged to apply the law of the insurance undertaking's Home Member State.

[2] Article 29(2) of Council Regulation EU 36/2012; this provides that any "information provided or received in accordance with this Article shall be used only for the purposes for which is was provided or received".

ARBITRATION

- **Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48:** An appointed Arbitrator had failed to disclose his appointment as an Arbitrator in two other matters which arose out of the same circumstances. The Supreme Court found that an arbitrator's duty of disclosure does not override his duty of confidentiality, and that a failure to disclose does not necessarily infer bias. However, it did find that there is a duty to disclose and although on the facts of this case there was no apparent bias, it is clear that often that will not be the case. Arbitrators should consider carefully seeking agreement to disclose relationships, and whether they may accept an appointment if they cannot disclose because that permission is not given.

PROFESSIONAL INDEMNITY

- **Lord Bishop of Leeds and Ors v Dixon Coles & Gill (a firm) and Ors [2020] EWHC 2809 (Ch):** A partner at a law firm had misappropriated over £4m from the firm's client account over a number of years. The firm's indemnity insurance had a £2m single event limit of indemnity cover. The insurer argued that the misappropriation arose from one act or omission, or one series of related acts or omissions. The Court held that, although the thefts were carried out with the view to accomplish one ultimate objective, each theft was a single act.

- **Stoffel & Co. v Grondona [2020] UKSC 42:** The Supreme Court considered the illegality defence in relation to a solicitor who had negligently failed to register a long lease that had been arranged as part of a mortgage fraud scheme. The Supreme Court dismissed the defence considering it an important countervailing policy that conveyancing solicitors should perform their duties to their clients without negligence.

- **AssetCo Plc v Grant Thornton UK LLP [2020] EWCA Civ 1151:** Grant Thornton failed to identify fraud committed by the company's management during an audit. As a result, assets were significantly overstated and the company was stated a going concern when it was, in fact, insolvent. The company brought proceedings against the auditors arguing that, had the fraud been discovered sooner, the company would have been able to take steps that would have saved it. The judgment discusses the SAAMCO[3] principles in the context of auditors' negligence and found that the auditors' negligence had deprived the client from taking necessary steps to terminate loss making activities.

VICARIOUS LIABILITY

- **Barclays Bank plc v Various Claimants [2020] UKSC 13:** This judgment was handed down the same day as the **Morrisons Supermarkets** judgment concerning vicarious liability[4] (our article on this case can be found here). The Barclays Bank judgment clarified that the five elements set out in the Christian Brothers Case[5] which normally makes it fair, just and reasonable to impose vicarious liability are only relevant to consider when there is actual doubt as to whether the wrongdoer is an independent contractor or an employee. In Barclays Bank, there was no doubt that a doctor who carried out medical examinations of employees of the bank was acting as a third-party contractor therefore so the bank was not liable for his sexual assaults.

FUNDAMENTAL DISHONESTY

- **Baker v Pellikaan Construction Limited (unreported):** CPB acted in this unreported case which considered the concept of fundamental dishonesty. Our article on that case can be found here.

- **Pegg v Webb (1) Allianz Insurance PLC (2) [2020] EWHC 2095 (QB):** When attending a medico-legal examination, the Claimant failed to disclose to the medical expert that he had been involved in another accident shortly before the assessment, which had resulted in his attendance at A&E. On appeal, the Claimant was found to be fundamentally dishonest and ordered to pay costs on an indemnity basis.

- **Jason Roberts v (1) Alan Kesson (2) Tesco Underwriting LTD [2020] EWHC 521 (QB):** The Court of Appeal held that a Claimant should be treated as having been fundamentally dishonest if an untrue witness statement had been submitted, regardless of whether the dishonesty actually persisted at trial.

PERSONAL INJURY - ACCOMMODATION CLAIMS

- **Swift v Carpenter [2018] EWHC 2060 (QB):** In a landmark ruling, the Court of Appeal found that the method set out in the case of Roberts[6] of calculating the claim for accommodation following severe personal injuries, was a means to an end rather than a principle. The Roberts approach was not viable in circumstances where it did not result in fair compensation being awarded, as had started to happen in 2017, when the discount rate used for the loss of return on capital calculation dropped below zero.

[3] South Australia Asset Management Corporation v. York Montague Ltd [1997] A.C.

[4] WM Morrisons Supermarkets plc v Various Claimants. [2020] UKSC 12

[5] Various Claimants v Catholic Child Welfare Society [2012] UKSC 56

[6] The "Roberts Approach" Roberts v Johnstone [1989]

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