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Annual Insurance Review 2021

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Welcome

Welcome to our Annual Insurance Review.

In our review of developments in 2020 and analysis of some of the important issues on the horizon in 2021, we share insights that we hope will enable you to rise to the challenges, and make the most of the opportunities, which lie ahead across various sectors and lines of business.

The Covid-19 pandemic and Brexit have presented, and will continue to present, many new challenges for insurance markets and financial services generally.

The Supreme Court's Judgment in the FCA Business Interruption Test Case brings some clarity. The impact of the decision on the UK property insurance market will be significant, but, like many of the diverse exposures that will arise out of the pandemic, it will take time to fully assess.

These extraordinary times have tested, and will continue to test, resilience, response, and ability to adapt on every level. Together with our clients, we are finding new ways to help the industry react and transform, preparing for a future where good culture, transparency and trust will be put firmly in the spotlight.

If you have any queries or would like more information about any of the articles in our review, please do not hesitate to contact me or any of the authors; we would be delighted to hear from you.

I hope that you, your colleagues, friends and family all remain safe and well.

Best wishes,

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Business Interruption: Covid-19

This year the insurance headlines have been dominated by Covid-19 related business interruption claims and the resulting FCA Test case on non-damage clauses which was heard before the Divisional Court and then on leapfrog appeal to the Supreme Court.

Background

Many businesses were affected by the measures the Government took to reduce the spread of the Coronavirus pandemic. This resulted in large numbers of claims under the Business Interruption (BI) section of property policies.

Most such policies are focused on property damage and only have basic cover for BI as a consequence of property ‘damage’. However, some policies also cover BI from other ‘non-damage’ causes, in particular infectious or notifiable diseases ('Disease clauses') and/or non-damage denial of access (‘NDDA clauses’) and/or public authority closures or restrictions ('PAR clauses').

Some insurers disputed liability leading to widespread media comment and the emergence of various class action groups. The FCA invited a number of insurers to participate in proceedings it brought in order to clarify key issues for as many policyholders and insurers as possible. The FCA did this by selecting a representative sample of 21 types of policy issued by 8 insurers (“The Test Case”).

The FCA estimated that as many as 370,000 policyholders, holding 700 types of policies issued by 60 insurers, may be affected by the outcome of the Test Case.

In summary, the Divisional Court and subsequently the Supreme Court found largely in favour of the FCA.

The issues:

- **Disease clauses**

The Supreme Court considered the wording in an RSA policy (“RSA 3”) as representative of this type of clause. The clause covered BI losses resulting from any occurrence of a notifiable disease within a specified geographical radius (typically 25 miles) of the insured premises.

The Divisional Court had held that these policies were triggered when it could be identified that a person within the specified radius of the insured premises had Covid-19, and that there was an interruption or interference which caused loss. Losses covered extended beyond those which could be directly linked to a specific local outbreak, or which were temporally proximate to the local outbreak.

The Supreme Court confirmed that ‘occurrence’ means “something which happens at a particular time, at a particular place and in a particular way”. Each individual case of Covid-19 was a separate ‘occurrence’. This type of Disease Clause covers BI losses resulting from cases of the disease which occur within the specified radius. Other disease clause wordings should be interpreted in a similar way.

- **Prevention of access and hybrid clauses**

The Supreme Court held that prevention of access and hybrid clauses specify a series of requirements which must all be met before the insurer is liable to pay. Some clauses apply only where there are “restrictions imposed” by a public authority following an occurrence of a notifiable disease.

However, in a departure from the Divisional Court’s decision the Supreme Court held that an ‘instruction’ given by a public authority may amount to a “restriction imposed” if it carries the imminent threat of legal compulsion or is in mandatory and clear terms and indicates that compliance is required without recourse to legal powers.

Some wordings provide cover only where loss is caused by the policyholder’s “inability to use” the insured premises. The Divisional Court had held that this means complete and not merely partial inability to use the premises. The Supreme Court agreed that ‘inability’ rather than ‘hindrance’ of use must be established but held that this could be satisfied where a policyholder was unable to use the premises for a discrete business activity or was unable to use a discrete part of the premises for its business activities.

- **Causation**

A key question was whether business interruption losses consequent on public health measures taken in response to COVID-19 were, in law, caused by cases of the disease that occurred within the specified radius of the insured premises.

The Divisional Court found that the relevant measures were taken in response to information about all the cases of COVID-19 in the country as a whole.

The Supreme Court held that all the individual cases of COVID-19 which had occurred by the date of any Government measure were equally effective “proximate” causes of that measure (and of the public response to it). It was sufficient for a policyholder to show that at the time of any relevant Government measure there was at least one case of COVID-19 within the geographical area covered by the clause.

The Supreme Court rejected the Insurers’ arguments: (i) that one event cannot in law be a cause of another unless it can be said that the second event would not have occurred in the absence of (“but for”) the first; and (ii) that cases of disease occurring inside and outside the specified radius should be viewed in aggregate, so that the overwhelmingly dominant cause of any Government measure will inevitably have been cases of COVID-19 occurring outside the geographical area covered by the clause.

The Supreme Court held that the “but for” test of causation is sometimes inadequate and that there can be situations (of which the present case is one) where a series of events all cause a result although none of them was individually either necessary or sufficient to cause the result by itself.

In relation to the prevention of access and hybrid clauses, the Supreme Court held that BI losses are covered only if they result from all the elements of the risk covered by the clause operating in the required causal sequence. However, the fact that such losses were also caused by other (uninsured) effects of the COVID-19 pandemic did not exclude them from cover under such clauses.

- **Trends clauses**

Trends Clauses operate to prevent policyholders from claiming losses which would have occurred even if the insured peril had not occurred.

Almost all the sample policy wordings contained Trends Clauses which provided for BI losses to be calculated by adjusting the results of the business in the previous year to take account of trends or other circumstances affecting the business in order to estimate as nearly as possible what results would have been achieved if the insured peril had not occurred.

Insurers argued that, given the substantial impact of Covid-19 on the UK economy, much of the damage caused by any localised outbreak, or the local application of national restrictions, would have occurred anyway.

Insurers relied on the case of Orient Express Hotels Ltd v Assicurazioni Generali SpA, which concerned the losses a New Orleans hotel could claim following Hurricanes Katrina and Rita. In that case, which turned on the application of a Trends Clause, it was held that the policy only covered losses caused by direct damage and prevention-of-access to the hotel itself, and not losses which were caused by wide area damage to New Orleans.

The Divisional Court was critical of Orient Express but, in any event, distinguished the case on its facts. The Court found that, when the incidence of Covid-19 triggered cover, all losses flowing from the national lockdown, Government restrictions and/or the public’s response could be covered (depending on precise formulation of the policy).

The Supreme Court held that these clauses should not be construed so as to take away cover provided by the insuring clauses and that the trends and circumstances for which the clauses require adjustments to be made do not include circumstances arising out of the same underlying or originating cause as the insured peril (i.e. in the present case effects of the COVID-19 pandemic. The Supreme Court held that the Orient-Express case was wrongly decided and should be overruled.

Comment

Each policy needs to be considered against the detailed Supreme Court judgment to work out what it means for that particular policy. Policyholders with affected claims can expect to hear from their insurer soon.

The Supreme Court's judgment will be distilled into a set of declarations giving further guidance as to how the judgment is to be implemented ("the Declarations"). The FCA and Insurers are working with the Supreme Court to enable it to issue those Declarations.

The FCA will publish a set of Q&As for policyholders to assist them in understanding the Test Case. The FCA will also publish a list of BI policy types that potentially respond to the pandemic based on data that they are gathering from insurers.

As to the wider implications of the Supreme Court's decision for non-Covid losses, these could be considerable for insurers going forward. The Supreme Court's decision on causation and the 'but for' test, and on the application of a Trends Clauses and its rejection of the decision in Orient Express, all have major implications for how insurers will have to consider wide area damage losses in the future.

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PI: Legal

It is difficult not to view developments in the legal profession over the last 12 months through Covid-19 tinted glasses, particularly as we go into a recession, which we know is a busy time for solicitors.

Like many professions, the swift transition to remote working coupled with distractions from work despite some areas being increasingly busy is likely to have affected service delivery and, in some cases, errors being made and important deadlines missed. The impact of poor processes and systems which, when solicitors have been ill or furloughed, will have caused important deadlines to be overlooked, including limitation dates.

Undoubtedly claims by disgruntled clients who have suffered poor service and who seek compensation will follow and we anticipate an influx of "loss of chance" cases where, in accordance with the principles enunciated in *Perry v Raleys* and *Edwards v Hugh James Ford Simey,* clients will need to show that: i) on the balance of probabilities but for, say the missed deadline, they would have pursued their claim; and ii) there was a real or substantial chance of obtaining a recovery from the defendant.

Another theme that has emerged during the pandemic is the demand for will writing services. The formal requirements for making a valid will are that it must be in writing and signed by the testator or someone else at their direction in the presence of a witness who also signs the will. The Government has relaxed the requirements on account of the pandemic to allow for video/remote witnessing **here** and the Law Society has published the following guidance **here**. Nevertheless, with the influx of instructions and the complexities involved in execution, there are likely to be more challenges to wills and a flurry of claims against solicitors and will writers as a result.

It will be interesting to see how the new category of "freelance solicitors" fair coming out of the pandemic and what that might mean for their insurers. As a reminder, freelance solicitors can provide "reserved legal services" (including for example conducting litigation, probate work and exercising a right of audience) all without insurance compliant with the Minimum Terms and Conditions which, of course, ordinarily give clients increased protection. For those providing such services, the only requirement as to insurance is that they take out and maintain insurance with "adequate and appropriate cover" for which the SRA has published a **Guidance Note**.

Of course, where the freelance solicitor provides only non-reserved legal services, they do not have to hold any insurance at all. As such, where clients have sought to save money by using more accessible and relatively inexpensive solicitors, but they suffered as a result of negligence, there may a pool of dissatisfied customers who may be left with limited prospects of recovery. The saving grace here, of course, is that freelance solicitors will not be able to hold client money which will provide some protection for clients and insurers.

Cases of interest this year include *Day v Womble Bond Dickinson ("WBD") [2020],* where the claimant brought a professional negligence claim against his former solicitors for their alleged failure to properly defend him in criminal proceedings.

The claimant was prosecuted under the Wildlife and Countryside Act in response to felling of trees on the claimant's newly acquired estate. The claimant's civil action against WBD was struck out on the basis that it breached the doctrine of illegality and was also an abuse of process. It was held that the claimant would have to prove outcomes which were inconsistent with his criminal conviction in order to succeed. The Court of Appeal held that the claim was "an abusive collateral attack on a subsisting conviction." This case demonstrates the strict limits for bringing claims against solicitors by previously convicted criminals and the barring of these claims on the grounds of public policy.

Conversely, in *Stoffel & Co. v Grondona [2020]* the Supreme Court reviewed the common law defence of illegality for the first time since the decision *Patel v Mirza [2017]*. In Stoffel the Supreme Court allowed a claim against the solicitors for failing to register the relevant property transfer forms despite the Claimant's fraudulent mortgage application. The Supreme Court in applying the Patel "trio of considerations" [(a) purpose of the prohibition; b) public policy which might be rendered ineffective; c) possibility of overkill unless the law is applied proportionately] concluded that the policy considerations favoured the Claimant bringing the claim. This included that the law should incentivise solicitors to perform their role properly in a non-negligent manner and clients whom have suffered negligence should be able to attain a remedy for their loss. The Supreme Court emphasised that a remedy should only be denied when it would be "legally incoherent". This case should therefore be given careful analysis when considering the application of the defence of *ex turpi causa*/illegality.

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PI: Surveyors

Whilst there have been no standout cases involving surveyors' negligence in 2020, the last year has brought up several issues for surveyors to grapple with, which could lead to claims arising out of incorrect analysis on valuations.

The aftermath of the Grenfell Tower tragedy has loomed large. Surveyors immediately refused to recommend to lenders that flats in such high-rise blocks represented adequate security, even where there was no information to the contrary that combustible material made up the cladding. This would have affected most high-rise tower blocks as many had been re-clad and the material within the cladding, as well the structure of the cladding that could give rise to a separate fire risk, could not be examined by a surveyor's vantage point on the ground.

The December 2019 publication on the banks, building societies' and RICS requirements for owners of buildings of 6 storeys and more to obtain a Fire Certificate. This is an official document from the local authority providing that the new standards of combustibility for cladding post-Grenfell have been complied with. Obtaining this could result in higher service charges for flat owners, affecting a surveyor's valuation. It also presents a risk to the ignorant surveyor who may recommend a flat with potential combustible cladding as adequate security, as they have not checked whether the seller has a Fire Certificate or that the Local Authority has provided one to the block.

Another issue affecting the surveyor's work in 2020 has been the Covid-19 pandemic. The effect of the Chancellor's measures, such as the SDLT holiday, initially boosted the housing market. The RICS update for September noted that 55% of respondents reported an increase in sales, with prices growing for freehold and leasehold in all regions apart London. This will be an issue that surveyors will have to focus on when arranging their comparables for sales.

Going forward, however, the property market may slow due to the effect of the pandemic on the employment market. Surveyors should be aware of overvaluing properties over the next year based on comparables which have resulted from the increase in prices due to time restricted government measures. Surveyors of commercial property in particular should be aware of a decline in the market for office blocks, which will likely continue with the popularity of working from home.

However, industrial units such as distribution centres will increase in value due to the increase in online shopping, exacerbating long term trends. Surveyors should be aware of the changing markets in those classes of property and adjust their comparable accordingly in order to not over- or undervalue them for lenders. The implications of Brexit, mixed with these above trends, will mean that surveyors have to be sharply aware of the market and the potential for negligence claims arising out associated risks.

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PI: Estate and Letting Agents

As with previous years, 2020 has seen a continued high number of negligence claims being pursued against letting agents and property managers over failures by those groups to comply with the necessary requirements for collecting, registering and protecting tenancy deposits as governed by the Housing Act 2004.

The law specifies a tight timeframe of 30 days for a tenancy deposit to be registered with an approved scheme. In addition to registering the deposit, a key aspect of the requirements (and one which is often a 'tripping point' for many professionals), is for the tenants to be provided with a set of paperwork known as the "prescribed information" relating to the deposit.

The legal onus strictly lies with the landlord to ensure that these requirements are complied with. If they are not, then the Act triggers a right to compensation. However, as many agents provide this service to landlords as part of their management agreements, the onus is increasingly falling on letting agents in equal measure. Where the agents agree to carry out this work, this provides landlords with a clear legal route to pursuing recovery action against their agents, should their tenant decide to pursue legal action for any failure to comply with the requirements.

As many agents and landlords are acutely aware, the law in this area is increasingly being applied by the courts on a very strict basis. Whilst it is rare for a court to award the maximum "three times" the value of the deposit by way of compensation (this being reserved for the more severe breaches and/or where wider issues with the tenancy exist), courts are often easily persuaded to award lower sums of compensation, even where a deposit may have been registered little less than a week after the initial 30 day timeframe. A simple oversight or error relating to deposits can, therefore, quickly result in liabilities attracting thousands of pounds of damages.

Given the courts' prevalence to award compensation in this area, claims of this nature are increasingly viewed as an "easy win" by many claimants and law firms. Whilst the value of individual claims may be low, the volume of the claims are increasingly high. Claims of this nature allow claimants to adopt the Part 8 claim procedure as set out in the Civil Procedure Rules, which imposes significantly tighter deadlines for defendants to file defences and witness statements. Defending claims of this nature is therefore increasingly onerous and, inevitably, costly.

It should also be emphasised that failure to comply with deposit protection legislation can lead to other consequences, such as invalidating the service of section 21 eviction notices, which may delay the removal of a tenant from a property. This itself can lead to other grounds for negligence claims against agents: if a landlord has to wait longer to remove a difficult tenant (who has failed to pay rent, for example) these losses continue to grow whilst the agent has to see to correcting the error with the deposit and then serving a revised notice.

In light of the current uncertainty surrounding the rental sector from the impact of Covid-19, along with the greater risk to peoples' livelihoods and the insecurity of employment, the risk is that more and more people will be trying to pursue claims wherever they can. Where the law is increasingly on the side of a tenant and onerous to agents, the inevitable outcome is that agents will be increasingly viewed as easy targets for claims, and so further increases in litigation and claims of this nature is a threat that should not be overstated.

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PI: Accountants

When it comes to regulatory activity, as with other professions, the role of accountants in the conduct of their clients' business remains under close scrutiny. The Financial Reporting Council **("FRC")** continued to use its enforcement powers through launching investigations into audits in 2020, such as the investigation into Oliver Clive & Co, PwC and EY relating to the audits of London Capital & Finance Plc. The importance of transparency and integrity is highlighted by the ongoing case against KPMG on the basis that KPMG performed its engagement for clients where its professional judgement was compromised. We expect the FRC to continue to use its powers and keep the profession under close watch in 2021.

In October 2020 a House of Commons select committee, the Business, Energy and Industrial Strategy Committee, published its written evidence submissions for its inquiry on Delivering Audit Reform which included submissions from key participants within the industry. Key proposals for reform included a call for coherent legislation to assist in bringing transformative change within the sector. We expect the urge for reform by these participants to continue in 2021, however, it is unclear how quick the Government will act due to the impact of Covid-19 and the resulting parliamentary business.

In terms of case law, *AssetCo ("AC") v Grant Thornton UK LLP ("GT") [2020]* went to the Court of Appeal in 2020. AC engaged GT to perform its audits during 2009-2010. GT failed to identify fraud perpetrated by AC's management, including dishonest representations. GT produced an audit report showing that AC was profitable, when it was actually insolvent. This case is particularly important as it discussed the application of the SAAMCO principle. AC sought to argue that SAAMCO was not applicable in this situation as GT was carrying out a general audit of the accounts rather than providing advice or information on a specific transaction. However, this was rejected by the Court of Appeal, which concluded that there was no good reason why the principle should not be applied in most cases in order to identify losses which came within the scope of an auditor's duty. Importantly, although SAAMCO applied in this instance, the Court of Appeal emphasised that ultimately SAAMCO was a tool for determining whether losses fell within the scope of an auditor's duty of care (rather than being a rigid rule of law).

In this instance it was held that AC's losses were due to GT not identifying the fraudulent misrepresentations, which enabled AC to continue to trade.

This case demonstrates that an auditor can be liable for significant trading losses if there is a clear link between the auditor's negligence and the continued trading of an "ostensibly sustainable" business. The case is useful in emphasising the broad responsibility that an auditor may have when conducting its duty. It will be interesting to see if auditors are able to defend trading losses through showing the lack of proximity between their duties and losses in the forthcoming year.

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PI: Insurance Brokers

The Covid-19 pandemic has led to widespread claims under business interruption policies, with the judgment of the Supreme Court in the FCA Test Case handed down on 18 January 2021. Any policyholders who do not have the benefit of cover will doubtless be asking why their cover did not respond and considering the advice given at placement. For example:

- Where the business interruption insurance does not respond, a client may believe they were not properly advised of the restrictions under their particular wording

- Where it does respond, they may consider it provides inadequate cover

- Where a client did not have any business interruption insurance they may believe they should have been advised on the risks of being uninsured, particularly in early 2020

- A client may believe they should have been specifically advised on pandemic cover

In many cases, brokers will have strong grounds to resist such claims or complaints. Apart from the argument that brokers could not reasonably have anticipated a global pandemic of such severity, the usual causation arguments as to whether a client would have been willing to move or seek out BI cover that contained the broadest possible pandemic will be persuasive. However, for any customers who renewed or bought BI cover in early 2020 and raised concerns as to the scope of cover in light of the breaking Covid-19 news, it will be harder for brokers to succeed based upon causation arguments alone.

Turning to matters of regulation, in a letter dated 4 September 2020 the FCA wrote to insurance intermediaries to outline its supervision strategy for the next 12 months and to highlight that it considers there is significant risk of potential harm to customers.

The FCA is concerned about the potential failure of firms given the economic environment, ineffective governance, incentive arrangements that do not support a positive conduct culture and business models that provide poor control over sales. They are also concerned about the use of Appointed Representatives and conflicts of interest.

The FCA has also highlighted the importance of good governance generally and the significance of The Senior Management & Certification Regime (SMCR) which came into force for brokers on 9 December 2019. The FCA will be assessing this further and are clearly very focused on the conduct and culture of individuals and firms. They have made very clear that they intend to take robust action where a healthy culture does not exist and firms have until 31 March 2021 to ensure all staff in certified roles are fit and proper to perform them.

It is crucial that all firms take urgent steps to ensure that their businesses and people are fit for the new regulatory regime or further action can be expected.

Finally, challenges will also arise for brokers as the market continues to harden significantly in a number of classes of business. For some brokers, they will be dealing with a hard market for the first time.

It is very important that firms ensure adequate training is given on how to deal with hard markets and client expectations, both commercially and given the potential E&O exposures. Clients are facing much reduced covers and these must be explained fully to them. A failure to do so will lead to claims.

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D&O and Corporate Liability

The economic disruption caused by the Covid-19 pandemic has led to uncertainty and volatility across global markets. In these turbulent times, boards also face an increasingly difficult market for their D&O cover. A recent series of Pulse Surveys conducted by Airmic shows that D&O rates are amongst the hardest to have been hit in the market. With 95.0% of respondents observing higher rates and 85.0% witnessing reduced capacity from their insurers.

Management teams face intensifying scrutiny over their decision making. With them being increasingly held accountable for their decisions and made personally liable for their actions. This is also being compounded by an ongoing cultural and regulatory shift, leading to a growth in the number of claims, hitting the profitability of the D&O market in recent years. Amongst the litany of traditional business exposures that are facing organisations, there are also a number of emerging and evolving risks or trends that threaten to drive D&O litigation. Two such risks that should be monitored carefully relate to cybersecurity and ‘societal’ risks.

Organisations are facing an evolving landscape of cyber security threats caused by the Covid-19 pandemic and the shift towards an increase in large scale remote working. As data and IT infrastructure becomes even more vital and cyber and privacy liability increases investigations, claims are also likely to increase. More than ever, cyber security risk management has become a critical component in a Director’s risk oversight responsibilities and governance. As any failing in the operational resilience of an organisation risks enforcement action by institutions such as the FCA and/or the ICO. Directors are also at risk of being subject to regulatory action for failing in their supervisory duty to protect the data or implement proper controls to prevent cyber-attacks. There is also increasingly the risk of claims arising if an organisation suffers losses as a result cyber incident. Directors specifically face the risk of claims by shareholders and liquidators (as already seen in the US).

The ‘MeToo’ and ‘Black Lives Matter’ movements have driven societal change, which will naturally lead to a much greater focus on personal accountability. Whilst that is to be welcomed, it means that organisations and Directors are now increasingly likely to be subject to a greater threat of D&O claims related to any type of discrimination. Directors may become a target for shareholders in respect of breaches of fiduciary duties relating to appointments, corporate conduct and culture, if those actions have significantly impacted on the value of shareholders’ investment. Claims of this nature have tended to be limited to United States up to now, where for instance the likes of Facebook and Oracle have seen recent claims brought relating to the diversity of their respective board members. It is likely that the market will see increasing numbers of such claims against Directors and Officers and their employers.

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Employment Practices Liability

January 2020 could not have predicted all the new challenges that employers would face and by extension, EPLI insurers would have to contend with. Businesses have had to deal with enforced closures; significant drops (or in some cases, increases) in demand resulting in substantial changes to working hours; new workplace health and safety requirements; increased sickness, isolation and quarantine absences; new employment terminology and ever-increasing acronyms; and financial grant schemes and the multiple iterations of guidance accompanying them. Employees are also increasingly aware of their rights and employers need to ensure their procedures are up to date with legislation to avoid disputes and the significant expense of defending claims. Certain trends continue to impact the EPLI market, including movements such as Black Lives Matter, #MeToo and Time's Up.

The combination of the speed with which employers have had to react, the financial implications from Covid-19 and wider society trends, has already resulted in claims from employees - and these are only likely to increase once the government financial support available decreases or stops entirely. The majority of claims are likely to be monetary - such as claims that employers did not pay wages, notice pay or holiday pay correctly as a result of the Coronavirus Job Retention Scheme (or any replacement scheme) - or in respect of redundancies. And whilst contractual sums and statutory redundancy payments are excluded under most EPLI policies, the legal costs of defending the claims, together with any unfair dismissal compensation arising from an unfair redundancy process will generally fall for cover. It is likely that employers will not face an uphill battle in establishing a genuine redundancy situation in the current climate.

However, a fair procedure will still be required and internal redundancy proceedings may have been complicated by the need to conduct consultation remotely - particularly in cases of collective redundancies where significant adjustments may have been required to ensure that representatives could discuss matters appropriately with affected employees, and group consultation conducted. In addition, employees may attempt to add on further claims (adopting the "scattergun" approach) - such as alleging that they "blew the whistle" and this is the reason they were selected for redundancy, or that their selection for redundancy amounts to discrimination - in an attempt to lift the cap that applies in standard unfair dismissal cases.

Tribunals too have struggled with the combination of an existing backlog, an increase in claims, the impact of coronavirus on its own staff, Judges and lay members, and the challenges of dealing with some matters remotely.

This has resulted in both increased delays and decisions to postpone given to the parties with less notice and often after legal costs have been incurred. Given that a significant proportion of employment compensation can relate to loss of earnings up to the hearing and future loss, the delays, combined with reduced job prospects, are likely to increase the compensation awarded where claimants are successful.

Lastly, we have already seen some high-profile administrations in the press. As a result of the Third Parties (Rights Against Insurers) Act 2010, insurers will need to be mindful that they may remain liable for compensatory awards including in circumstances where the insured is no longer in a position to provide as full a defence as it otherwise would.

Moving into 2021, the roll-out of a successful vaccination programme will hugely influence how quickly a return to "normality" can be made and therefore will have a significant impact on the number (and quantum) of future EPLI claims.

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Public and Employers' Liability

Vicarious liability was a hot topic last year, and this trend has continued into 2020 with the twinned Supreme Court decisions of *Barclays v Various Claimants and Morrisons v Various Claimants* handed down in April.

Barclays considered the first limb of the test for vicarious liability: was the relevant relationship one of employment or "akin to employment"? The Supreme Court overturned the Court of Appeal's decision and held that the bank was not liable for the actions of a doctor, an independent contractor, who had been engaged by Barclays to examine employees or potential employees whom he subsequently abused. The five factors identified in Christian Brothers were reaffirmed when considering whether a relationship was "akin to employment". Ultimately, if the relationship between the individual and employer is that of an independent contractor, employers will not be liable for the contractor's torts.

In *Morrisons*, the second limb of the test was considered: whether there is a sufficiently close connection between the relationship and the conduct of the wrongdoer. The Supreme Court held that the retailer was not liable for the actions of an employee who had stolen and published sensitive data relating to other employees. Such actions cannot reasonably be said to be within the course of his employment and engaged in furthering the employer's business. The Court held that if the employee's conduct is beyond the reasonable scope of their authorised activities, the employer will not be liable.

Swift v Carpenter provided a less favourable outcome for insurers upon how to address the impact of a negative discount rate on accommodation claims. The Court decided that the method set out in Roberts v Johnstone no longer achieved fair compensation for a Claimant. It found that a sum equivalent to a life interest in the accommodation the injured Claimant required should be awarded, which in reality means providing for the difference in capital between the 'but for' accommodation needs, and the current needs of suitable accommodation, less any reversionary interest. The case is being appealed, and even the Court recognise that cases involving shorter life expectancies *"may require a different approach"*.

In terms of claims volumes, we had already seen a slowing of EL & PL claims in 2019, and the Covid-19 pandemic has seen a further reduction of around 20-25% in registered claims in 2020. Whilst this is a smaller reduction than that seen in motor claims, it is nonetheless considerable.

Looking ahead to 2021, we may start to see an increasing number of Covid-19 related EL claims. These claims could include direct claims, where an employee alleges that they have become infected due to negligent exposure at their place of work. Proving causation of exposure will however be a challenge. It is also anticipated that indirect claims arising from employees working from home in unsuitable ergonomic conditions is likely to see an increase in pain type claims and/or stress where staff are more isolated, there has been a lack of suitably qualified staff and/or a reduction in staff numbers. The mass restrictions on movement in 2020 will inevitably have a longer-term impact on PL claims well into 2021.

We warn of the need to focus on fraud claims and *'old closed cases'* where matters have been revisited either by claimant solicitors keen to address capacity issues, or claimants with financial incentives to pursue their claims with greater vigour. A close eye should also be kept upon average claimant costs, as time pursuing claims could become disproportionate to the requirements of the claim in hand.

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General Insurance Regulation

The FCA is looking to push the market further on the value to customers of general insurance. On 22 September 2020, the FCA published the ‘Final Report’ of its ‘Market Study” of ‘General Insurance (“GI”) Pricing Practices’ (‘MS18/1.3’). The FCA also published a related *“policy statement”*, ‘[GI] Value Measures Reporting and Publication’ (‘PS20/9’). The Market Study’s key findings were:

- “*…extensive evidence of some firms gradually increasing the price to customers who renew with them* [each] *year … called price walking …*

- *complex and opaque pricing techniques to identify consumers who are more likely to renew* [each year] …

- *In addition, some firms use practices that can discourage consumers from shopping around …*

- *… price walking distorts competition and increases costs for both consumers and firms, leading to higher overall prices for consumers.*”

PS20/9’s upshot was that the FCA -

- is “[from 1 July 2021] … introducing new rules [primarily in the ‘Supervision Manual’ (“SUP”), chapter 16, section 27] to report and publish data on value measures …” for certain personal lines - and especially vehicle damage - products;

- will make this data “… available to firms, consumer organisations and the media …

- has the aim that this will -

- “*drive firms to improve … products …* [and]

- *provide … a valuable [supervisory] tool …*”

Moreover, from 1 January 2021, the FCA is changing the ‘Product Intervention and Product Governance Sourcebook’ (“PROD”) to make firms “*take value measures data into account when considering whether their products offer fair value to their customers.*” The new rules in SUP apply to both insurers and intermediaries. Those in PROD apply to:

- insurers as product *"manufacturers"* (ie as *"creating, developing, designing and/or underwriting"* policies) and

- intermediaries as *"distributors"* (ie when *"advising on or proposing"* policies that they don't *"manufacture"*).

The FCA also published a consultation paper (CP20/19) with proposed rule changes in the 'Insurance Conduct of Business Sourcebook' **("ICOBS")** to tackle specific features of 'price walking'. In CP20/19, the FCA returned to an issue that some in the GI market thought had been resolved: publication of "claims ratios" - "broadly the percentage of … premium paid that is paid out in claims by insurers" in respect of a 'book' of a product type and/or customer base (see FCA 'Discussion Paper **["DP"]** 15/4 – General insurance value measures').

The FCA has previously noted GI firms' *"strong opposition to* [reporting on] … *claims ratio[s]*" on the grounds that this measure is "too complex for consumers … *and ineffective for delivering a rounded assessment of value*" (see 'FS16/1: Feedback Statement on DP 15/4'). However, the FCA has proposed rules for firms to report on "expected" and "incurred" claims ratios. As anyone who has negotiated GI distribution agreements or M&A knows, there is an inverse relationship between the size of a book's claims ratio and commercial profitability and value.

Given the market's previous objections, there is a risk that the FCA could regard claims ratios as suggesting an inverse relationship between the commercial value of a book for its insurers and intermediaries, and the value that customers gain from buying the products in the book.

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FCA Investigations

The FCA issued fines of £192.6 million in 2020. The relevant final notices confirm the FCA's continued focus on the key themes that regularly appear in yearly sector priorities:

Enforcement type	Count	Value of fines
Unfair treatment of customers	4	£92,968,600
Wholesale conduct	2	£51,752,500
Financial crime/ AML	1	£37,805,400
Client assets	1	£8,963,200
Market disclosures	1	£873,118
Retail conduct	1	£107,200
Market abuse	1	£100,000
Grand Total	11	£192,570,018

Of course, FCA fines are not insurable as a matter of law, but the costs of mitigating or preventing a regulatory fine may be covered by certain professional indemnity or D&O insurance policies.

A key indicator of the costs of such mitigation will necessarily be the length of FCA investigations. The average length of investigations has increased to 2 years in the 2019/20 financial year, the highest level since 2015/16, with the most complex cases taking much longer to resolve.

Another indicator relevant to insurers' and financial services firms' consideration of insurance cover is the level of enforcement activity. While recent FOIA requests suggest a recent drop in the overall number of open investigations, numbers remain at almost 600 and may only signal a brief pause in the steady year-on-year increases of the last five years - in a year that has seen the FCA devote significant resource to Brexit-preparations and Covid-19 related issues.

It may also indicate a consolidation of the FCA's caseload. While one FOIA request suggested that the FCA had closed half of its 14 criminal investigations into for Money Laundering Regulation 2017 breaches in 2020 (in favour of regulatory-only investigations), the FCA's interest in deploying its full range of prosecution powers remains as it took the rare step to charge an individual with a money laundering offence (absent a primary offence) late in 2020.

We expect the FCA's recent levels of investigative activity to persist into 2021.

Focus areas

The FCA's 2020/21 **Business Plan** announced a shift in supervisory focus towards "smaller firms" noting that while many of the 60,000 regulated firms "are committed to acting in line with our rules and principles.

Some are not." The focus will be on firms that consistently fail to meet standards and to "move swiftly to enforcement action against those that fail to do this and so cause harm".

This focus on smaller firms will likely coincide with the wider transformation program the regulator has been implementing within its authorisations and supervision divisions, in light of Dame Gloster's anticipated **Report** into the FCA's actions in regulating the collapsed investment company, London & Capital Finance ("LCF"). While SFO and FCA investigations into the events at LCF continue, Dame Gloster's Report criticised the FCA's supervision of the company and emphasised the need for a holistic approach to supervision. It is therefore likely that increased scrutiny on smaller financial services firms will initially focus on getting the basics right: governance, culture, treating customers fairly, financial crime, effective risk monitoring, and adherence to reporting obligations. The pandemic has also placed a spotlight on key cross-sector issues such as operational resilience, climate change and cyber risks, all of which have been pushed to the top of the FCA's agenda for 2021.

Impact of Brexit

As a final point, the UK-EU free trade agreement agreed in late 2020 does not make any provision for continued regulatory passporting. There is also no mutual recognition or equivalence regime, and financial services are expressly excluded from the 'most-favoured nation' clause; although there is a 'best endeavours' commitment that both sides will implement international standards in matters such as anti-money laundering and the Basel Rules on banking supervision. Crucially, it has been reported that the UK and EU will remain in talks at least until March 2021 in respect of a potential agreement on enhanced equivalence.

In the meantime, UK and EU financial services firms operating cross-border will need to implement contingency plans to continue business. EEA firms continuing through the Temporary Permissions Regime will need to decide whether to set up a UK authorised subsidiary or branch, or wind down. UK firms continuing in the EEA will need to be clear on local rules in the absence of a consistent regime, notably given they are likely to face increased scrutiny from local regulators. Insurers, intermediaries, and other financial services firms will therefore necessarily face heightened risk of regulatory intervention (and possibly investigation) in the UK and the EEA in 2021 as a result of the challenges in navigating these changes.

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Climate Change: Regulatory Requirements

On 29 June 2020 the Climate Financial Risk Forum **("FRF")** published a guide (the "**Guide**") for addressing climate-related risks. The CFRF was established in 2019 by the Prudential Regulation Authority **("PRA")** and the Financial Conduct Authority **("FCA")**; members include insurers, banks and asset managers.

The Guide seeks to supplement, but not modify, regulatory requirements, such as in the PRA's Supervisory Statement ("SS") 3/19, "Enhancing … approaches to managing the financial risks from climate change". The Guide addresses climate change in the context of insurers' compliance with 'Solvency II' (Directive 2009/138/EC - "S2"), and states that it "aligns well" with SS3/19's chapter on "risk management" ("RM").

SS3/19 details PRA expectations for firms' response to "financial risks from climate change". The areas of response can be summarised as:

- 'Governance'
- 'Risk Management'
- 'Capital management' ('Prudential') and
- 'Disclosures'

The sections on RM address:

- RM polices
- Data, risk and scenario modelling and analysis
- Metrics and monitoring, and
- Risk mitigation

SS3/19 identifies the need for insurers to include climate-related financial risks in their 'Own Risk and Solvency Assessments' (as per S2 Art 45 - "ORSAs"). The Guide suggests caution here as "The ORSA time-horizon is typically shorter than the timespan over which climate risks will evolve …"

The Guide makes it clear that managing "climate risk as a financial risk type" is a factor independent of "broader sustainability / ESG [environmental, social and governance] risks". This highlights a difference in the current formal approaches of UK regulators. The FCA's 'Feedback Statement' on "Climate Change and Green Finance" (FS19/6) shows that the FCA is developing methodologies to ensure that clear, fair and accurate information about ESG is a feature of markets for financial products and services. By contrast, the PRA in SS3/19 is immediately focused on methodologies for managing climate change risks categorised as:

- "physical" – such as "heatwaves, floods, wildfires and storms" (described in the Guide as "acute" risks) and "longer-term shifts … in precipitation, extreme weather variability, sea level … and … mean temperatures" (described in the Guide as "chronic" risks); and

- "transition" - ie "the process of adjustment towards a low-carbon economy", such as "developments in [public] policy … technology … and legal [evidence and] interpretations"

The Guide has extensive ideas for general insurers' approach to climate risks, in particular highlighting the potential ramifications for:

- Key business lines, such as property, casualty (such as D&O), and specialty (such as agriculture, credit & surety, marine/avation/transport, and engineering); and

- 'Solvency Capital Requirements' (as per S2, Ch VI, section 4 – "SCR"); the Guide notes that the "standard formula" (sub-section 2 on SCRs) "does not explicitly consider climate change risk [but] … internal models [under sub-section 3] … may cover environmental factors more appropriately".

Regulators obviously see insurers as playing a leading role in the global response to climate change. As SS3/19 states: "[insurers] would benefit from greater disclosure [of climate risks] in the wider economy, and they would be in a strong position to encourage it through their ownership [and, we would add, protection] of financial assets".

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Intellectual Property

2020 has continued the trend of challenges to trade mark specifications.

The European Court of Justice in *Sky v Skykick* said that demonstrating bad faith requires “objective, relevant and consistent indicia” tending to show an intention to obtain a registration for improper purposes. Applying the CJEU’s ruling, Arnold LJ found that Sky’s marks had been partially filed in bad faith, as the telecoms giant had no intention of using the marks for all the relevant goods and services at the time of filing. This makes it easier to defend trade mark claims, and we are seeing similar ‘*Skykick* arguments’ in a lot of cases. This will likely continue but not without adding to the overall cost and complexity of trade mark disputes.

The Court of Appeal has given guidance about search orders. *TBD (Owen Holland) Ltd v Simons* and others concerned allegations of copyright infringement and breach of confidence by a former TBD employee and their new employer (a competitor of TBD). TBD had a robust claim for infringement; 9 level arch files had been taken by an ex-employee. However, they misused the information they received under a search order. They inspected the documents and devices obtained and imaged under these orders using keywords that had not been agreed or approved by the Court. TBD then used these documents, which included a former employee’s confession, to introduce claims against new defendants and even write to the SRA.

The Court of Appeal upheld the first instance decision that TBD had breached the terms of the orders by inspecting the documents. The Court emphasised that *“the purpose of a search order is to preserve evidence…in order to prevent the defendant from altering, destroying or hiding such evidence”*, rather than serving as a form of early disclosure. Because of their breach, TBD was ordered to pay large sums in costs and their claims have been stayed unless and until they provide security for the other side’s costs. The Court of Appeal has also said that guidance will be forthcoming about “Imaging Orders” – a search order where a hard drive has been imaged.

In copyright, *Response v Edinburgh Woollen Mill* is the first English decision to apply the CJEU’s decision in *Cofemel*. *Cofemel* said that there was only one standard for copyright protection, and that member states could not impose a higher standard of copyright on particular works – in that case, jeans. The implication is that copyright may extend much more broadly to 3D works than English law had allowed. HHJ Hacon found in *Response v Edinburgh Woollen Mill* that a machine-made jacquard fabric was a “work of artistic craftsmanship” and so was infringed. The CJEU in Brompton subsequently held that the shape of a bicycle could also be a copyright work. There is an apparent conflict between English statute and CJEU jurisprudence, and it remains to be seen whether the English courts will change their previous narrow view of copyright subsistence.

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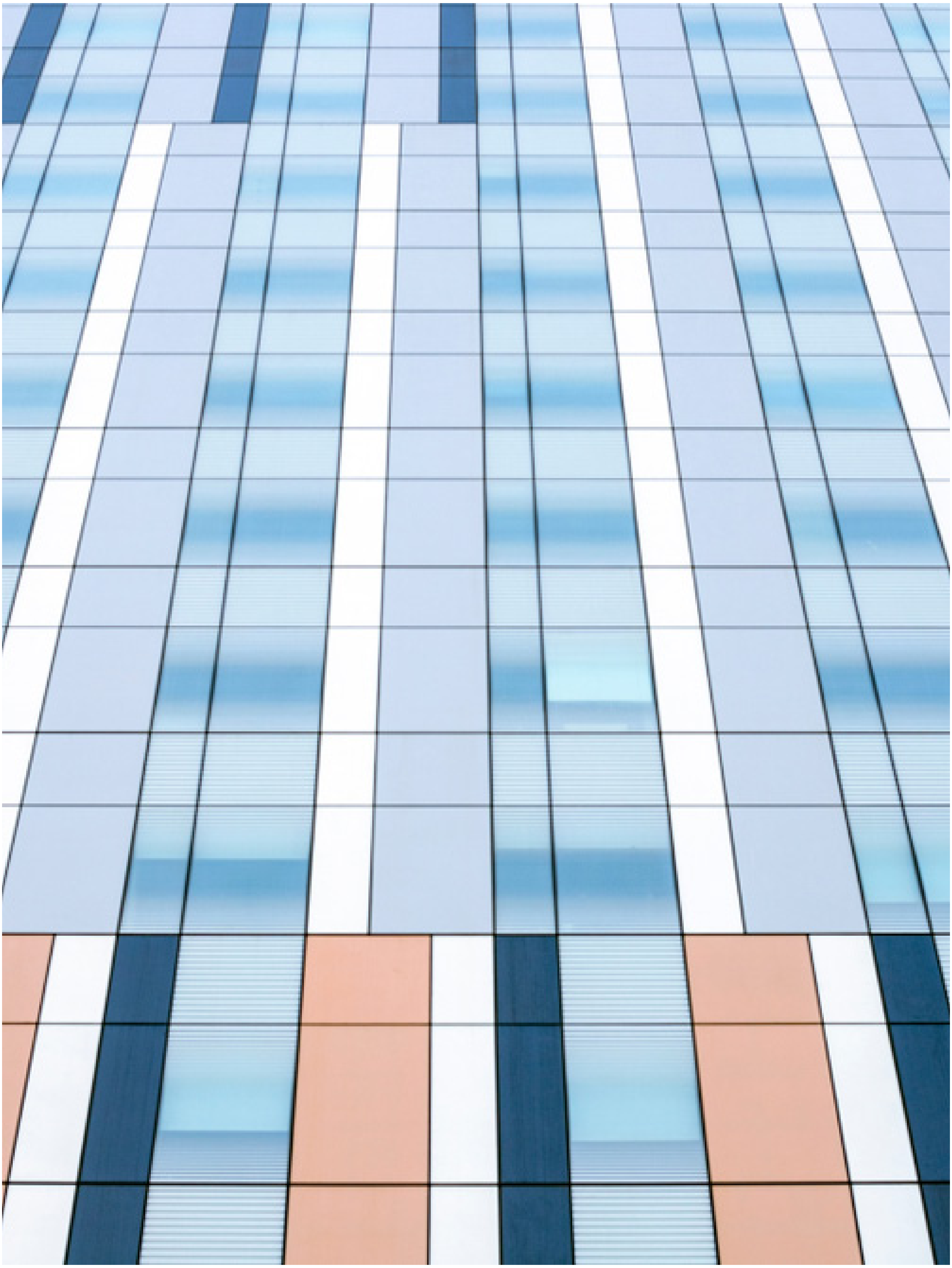

Fraud

Fundamental Dishonesty and fraud in claims remain significant issues for insurers. There have been helpful judgments, with changes in the Rules and clarification since the Criminal Justice and Courts Act 2015 which arm Insurers with potent weapons in litigation to uncover, prevent and deter fraud.

The impact of dishonesty in court should not be underestimated and subverts the effective administration of justice. The Civil Procedure Rule Committee in April 2020 changed statements of truth under **PD 22.2.** to warn of contempt of court if false statements were made in proceedings.

In October 2020, **CPR Part 81** was simplified to allow for a more streamlined process for bringing applications for committal to prison for contempt – allowing for commencement by single application under CPR Part 23, in both High and County Court, and for service to be effected against the Defendant's solicitors where there are existing proceedings.

In those proceedings, clients (and advisers) should be alert to the possibility of Court initiated contempt procedure **(CPR 81.6)** akin to the old referral to the DPP, where the Court may require assistance at that party's expense to bring contempt proceedings.

Beware also the mandatory requirements to inform the contemnor of among others, their right to legal aid, legal representation and an interpreter and reasonable time to prepare the case, for fear of challenge and risk of strike out. The Notes in the White Book remain sparse so expect changes there as the contempt process is rolled out.

Once identified, the Defendant should know in terms the case against it – and the pleading should fully particularise the evidence of dishonesty and in the case of corporate bodies its state of knowledge of the wrongdoers or participants at the earliest opportunity.

In *Sofer v SwissIndependent Trustees SA [2020] EWCA Civ 699* the absence of a positive assertion (whether by mere failure to plead or otherwise) would not render a claim susceptible to strike out, provided as in this case, on the facts, when the amended particulars were served, there was a sustainable case of dishonesty and fraud on inference. So, even if the primary case is by inference, and does not identify specific directors, officers or employees, provided it is cogent, there is no automatic right to strike out and the court will allow wronged parties time to perfect the pleading which substantiates the allegations.

There has been a helpful reassertion of the burden of proof in dishonesty cases. The standard to which allegations of dishonesty is applied was reaffirmed in Sir Geoffrey Vos' leading judgment in the Court of Appeal decision in *Bank St Petersburg PJSC v Vitaly Arkhangelsky [2020] EWCA Civ 408* allowing an appeal against a decision not to find dishonesty in a complex banking dispute. In deciding the burden of proof was discharged only where "the facts were incapable of innocent explanation" set the bar too high, the correct approach, whilst the evidential burden was high for a finding of dishonesty (and the extraordinary facts and circumstances needed to be considered as a whole) was on the balance of probabilities – "namely what explanation was more probable than not, having taken account of the nature and gravity of the allegation" (para 53).

Grounds for Setting Aside

Finality of judgments or settlement agreements since *Hayward v Zurich Insurance Company plc [2016] UKSC 48* in suspected fraud cases can be problematic if discovery of the fraud does not materialise in time to influence the course of proceedings and settlement.

Following the Supreme Court decision in *Takhar (Appellant) v Gracefield Developments Limited and others (Respondents) [2019] UKSC 13 On appeal from [2017] EWCA Civ 147* which confirmed the test for setting aside judgment obtained by fraud was not dependent on the applicant showing it could not have uncovered the fraud with reasonable due diligence, Mrs Takhar in **Takhar v Gracefield Developments Ltd and others [2020] EWHC 2791 (Ch)** was able to set aside judgment where she was able to show her signature on a document which was material to judgment was a forgery.

The test was succinctly summarised citing LJ Aitkens earlier judgment by Mr Steven Gasztowicz QC, as requiring a) evidence or concealment of "conscious and deliberate dishonesty", relevant to the judgment; and b) that such evidence was material to the judgment; and c) the fresh evidence would have to have a material impact on the earlier decision. As this 11-year-old claim demonstrates, where fraud is afoot, there is no disqualifying bar as earlier decisions are vitiated by the fraud and are not binding.

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Health and Social Care Regulation

The Care Quality Commission (“CQC”) is the independent regulator of all health and social care services in England.

The CQC has been established for many years but have historically rarely brought enforcement action in the form of prosecution despite powers to do so. Indeed, as a regulator they have been criticised in the past for lack of enforcement, no more so than by Robert Francis QC in his report following the Mid Staffordshire Hospital Inquiry. The CQC promised a more robust and interventionist approach and we have now seen the signs of that in terms of criminal investigation and prosecutions.

The CQC has also been actively increasing its capacity to conduct such investigations and has recently appointed Alan Fox as Head of Governance and Legal Services. Mr Fox is a regulatory prosecutor with very considerable experience. He was previously Head of Casework at the Health and Safety Executive and before that a senior lawyer at the Crown Prosecution Service.

As with many types of regulatory prosecution in recent years the courts have begun to impose fines intended to have an impact upon shareholders and send out a message to providers. In December 2019 a provider of care home services, Derby County Council, was fined £500,000 having pleaded guilty to a failure to provide safe care and treatment to a resident who subsequently died.

The CQC has also begun to prosecute for failing to comply with the Duty of Candour requirements as set out in Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 whereas previously such breaches had been dealt with outside the criminal courts through civil penalties or warnings. Fines have been significant alongside the attendant negative publicity a public prosecution brings.

Even aside from the challenges presented to providers of care services by a criminal investigation such as disclosure of material, interviews of staff and potential interview under caution of the organisation it is also clear the criminal courts are now recognising the seriousness of matters the CQC bring before them.

A combination of a new head of governance and legal services at the CQC and a recognition by the Courts, rather akin to that which we have seen in health and safety cases, that fines must match the seriousness of the offending means we can expect a further increase in CQC criminal investigations and prosecutions. We are already seeing the CQC investigating more incidents and trying to conclude investigations more rapidly. In the normal way providers should take steps to ensure that their current systems and processes can withstand scrutiny by the regulator and in the event of an incident or accident they have in place a protocol to manage investigations with the aim of avoiding prosecution.

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Costs

2020's Part 36 decisions with *Rawbank SA v Travelex Banknotes Ltd* holding that a 99.7% offer was a valid Part 36 offer, attracting the full benefits for the Claimant; *Akinola v Ovardare [2020]* confirming that a 'drop hands' offer was not a valid Part 36 offer; and in B*lackpool BC v Volkerfitzpartrick Ltd [2020]* where a withdrawn Part 36 offer still carried weight at the end of the case, albeit with reference to CPR 44 rather than CPR 36) have been overshadowed by ADR.

Previously, Lord Justice Dyson accepted in Halsey v Milton Keynes Trust (2004) that the Court cannot force parties into ADR. In fact, in the Judge's view, to do so would potentially amount to a breach of Article 6 of the ECHR. The burden was thus imposed on the unsuccessful party to show that the successful party had acted unreasonably in refusing mediation. Each case would be fact specific. ADR would be encouraged, but not obligatory. This remained the consensus – with conflicting decisions as to what amounted to an 'unreasonable request' - until *PGF v OMFS (2013).*

2020 saw even more sanctions imposed, but this time in favour of the successful party. In *DSN V Blackpool*, the Defendant refused ADR as they were adamant that they could not lose the case. They lost the trial and, not only did the Claimant get the Part 36 sanctions from beating his offers, he was given a further year of indemnity costs for the Defendant refusing to engage with ADR.

This was followed shortly thereafter by *BXB v Watch Tower & Bible Tract Society of Pennsylvania*, when the Defendant was again penalised and ordered to pay indemnity costs for part of the case – this time not only because they failed to engage in ADR, but also for failing to provide a witness statement explaining why.

What can you do? If you think a dispute is capable of alternative resolution then propose engagement in ADR. If you are invited to participate in ADR by your opponent then consider carefully whether there really is any basis to decline. As the High Court said in DSN: Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. But if you are going to refuse, make sure that you have a good reason to do so. And don't forget to communicate that reason to your opponent in a form which can be produced to the Court if required.

The Courts have long sought to encourage parties to engage in ADR and compromise their disputes with as little intervention as possible. This pressure is unlikely to ease into 2021, particularly at a time when the Courts are facing a huge 'COVID inspired' backlog (months, not weeks) and the opportunities for ADR are the cheapest and easiest than they have ever been.

It is not a concept that is going to go away and, with Sir Geoffroy Vos QC due to take up the position of Master of Rolls, it is likely we will see more of a shit in favour of ADR than away from it. To some degree, it has already begun.

In Lomax v Lomax the Court decided that, in exercising its case management powers and further the Overriding Objective, while it could not impose ADR, it could compel the parties to Early Neutral Evaluation, and that is exactly what it did. This was quickly picked up by Master McCloud in *Telecom Centre v Thomas Sanderson (2020)* who produced a draft order compelling the parties to attend ENE before her. The world will be a very different place in 2021 and the Courts will be no exception.

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Cyber and Data

2020 has been a busy year for cyber and data protection. The Information Commissioner's Office has issued some of its biggest financial penalties for non-compliance to date (British Airways and Marriott Hotels; £20m & £18.4m, respectively); a landmark decision (Schrems II) was held to invalidate the EEA/US 'Privacy Shield' (a widely used mechanism for data exports from the UK and EU to the USA) and the majority of global workforces are now working remotely.

Over the past year, the range of virtual and computer-based products, and the volumes of data stored electronically have continued to rise: and so has the ransomware designed to attack it. The 2020 Crowdstrike® 'Global Threat Report' highlights a number of worrying trends, including increasing global ransom demands (hackers demanding a ransom for safe data repatriation); and 'weaponisation' of sensitive personal data (legal information, HR records, intellectual property) to emotionally blackmail victims.

Coalition's **'2020 Cyber Insurance Claims Report'** considers just over 40% of cyber-insurance claims now involve ransomware; with a 260% increase in the frequency of ransomware amongst its own policyholders. Safe repatriation of that data comes at a price, and losses don't just come in the form of ransom payments; the downtime itself causes significant operational inconvenience and wasted management time.

The best ways for businesses to protect and minimise the effects of cyber-attacks are to:

- Robustly and consistently back-up databases;
- Invest in effective anti-virus software (malware, virus cleaners, active threat monitoring software with alerts);
- Train staff to recognise suspicious email links;
- Carry out regular penetration tests;
- Protect network connected computers to disable remote access;
- Keep software up to date (many operating systems often patch known security vulnerabilities which lowers susceptibility); and
- Consider cyber insurance to help with the costs of data recovery.

Any business that uses electronic data (personal or otherwise) may benefit from suitable cyber insurance. Since 1 January 2020, the Y5258 **Lloyd's market bulletin** (4 July 2019) confirmed that all first party property damage policies (new or renewed after 1 January) must expressly affirm or exclude cyber coverage, regardless of whether the policy is written on an 'All Risks' or 'Named Perils' basis. Cyber risks should also cover both malicious (cyber-attack) and non-malicious (accidental loss) acts. Model clauses for policy draftsmen are widely available.

Going forward, the global cyber-insurance market is only going to increase. Projections put it to reach US$20bn (globally) by 2025 (US$8bn in 2020).

Cybersecurity and related insurance are likely to play greater roles in business strategies, which will increase the demand for comprehensive cyber insurance solutions. Naturally, as more businesses opt to pay the ransoms rather than incur extensive time recovering data, premiums will rise, and business policyholders are likely to be required to implement more stringent cybersecurity measures to maintain valid cover.

Now that the Brexit transition period is over, UK businesses must comply with the UK and the EU GDPRs if they offer goods and services to, or monitor the behaviour of, EEA individuals, or host data from servers in an EEA country. Amongst other things, this will require the appointment of an EU representative.

Businesses must also decide which supervisory authority they should be registered with and how to manage overseas data transfers to and from EEA and non-EEA countries. This will involve amending a great deal of documentation (such as privacy policies and records of processing activities to deal with the changes to international transfers).

The UK Trade and Co-operation Agreement with the EU contains an interim bridging mechanism (Part Seven, Article FINPROV.10A) to permit the continued free flow of personal data to the EU/EEA from the UK (and vice versa) for 6 months, until adequacy decisions come into effect. Therefore, there are no current changes to how businesses send and receive EU/EEA data. If the UK were to receive an adequacy assessment from the EU, the free flows of data could continue. For that, UK data laws must be “essentially equivalent” to EU data laws. As EU data laws have been converted into UK domestic laws (subject to minor technical amendments), via the (UK adapted) GDPR, the hope is that “essential equivalence” will be easy to achieve.

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Medical Malpractice

2020 has brought a lot of changes, but most noticeably within the medical malpractice landscape, 2020 saw the handing down of the Court of Appeal judgement in the case of *Swift v Carpenter* which fundamentally changed the calculation of accommodation awards. The previous methodology established in Roberts v Johnstone sought not to compensate the Claimant for the capital value of suitable accommodation, but the annual loss incurred by the Claimant in securing that accommodation (i.e. multiplying the capital cost of the property by the discount rate and then by the life multiplier). This principle has been long overdue a review, particularly after the Lord Chancellor lowered the discount rate from 2.5% to minus 0.75% in 2017, which, by applying this calculation, resulted in a negative damages value.

The Claimant in *Swift* was 43 years old and had suffered a left below knee amputation and significant injury to her right leg as a result of a road traffic accident in 2013. The Court accepted that the Claimant required special accommodation that would cost £900,000 more than her existing home, however, applying Roberts v Johnstone meant that she was not awarded damages for this head of loss. The Claimant appealed the decision and on 9 October 2020, the Court of Appeal judgment was handed down, allowing the appeal and adopting a new principle in calculating damages for accommodation claims, one which fairly compensated Claimants for their additional accommodation costs, without providing their estates with the "windfall" of a capital asset after they die.

Full (but not over) compensation should be achieved by awarding a sum equivalent to a life interest in the special accommodation that injured Claimants required. The life interest figure can be calculated by taking the present capital cost of the property (i.e. the difference between the value of the property the Claimant now requires and the property he or she would have required in the uninjured scenario) and deducting the nominal value of the reversionary interest (value based at the hypothetical date of death). The Court accepted that there were practical problems associated with calculating the value of the reversionary interest. Whilst a market rate approach was right in principle, there was not a sufficiently active market in the purchase of reversionary interests to set a rate on that basis. On the expert evidence before it the court decided to set the rate at 5%.

The Swift decision is beneficial to Claimants as they will now receive substantially higher damages in accommodation claims whereas insurers will bear the brunt of an increase in costs, but only in claims which include an accommodation award. We do not expect the story to quite end here however, not least because this new principle is not a case of "one size fits all", particularly where Claimants have a much shorter life expectancy than the Claimant in Swift. Nonetheless, insurers should consider their claim portfolios and review any additional risk exposure they may endure as a result of this very significant decision.

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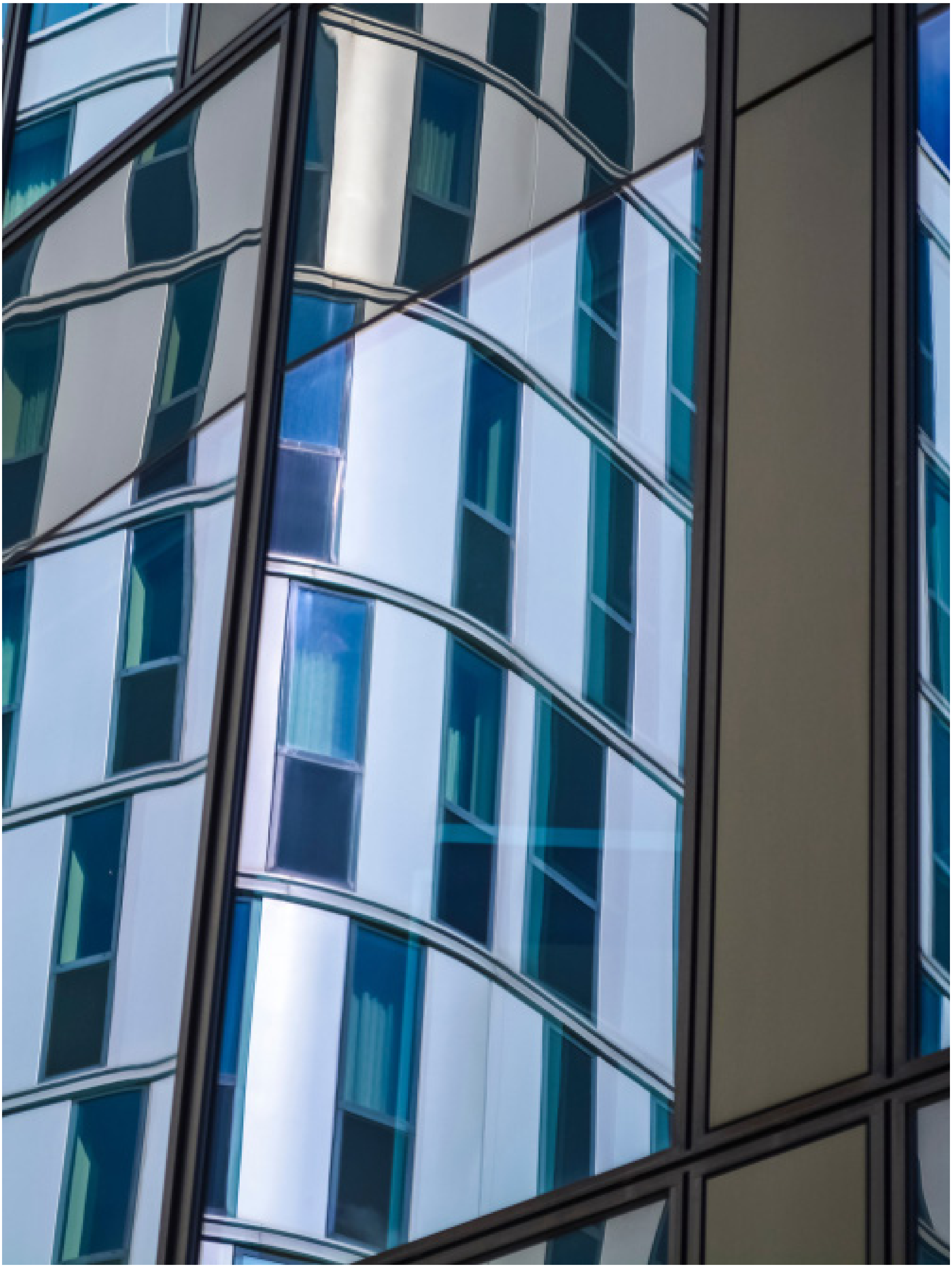

Property Damage

In last year's Review, we reported on the Commercial Court decision in *Sartex Quilts and Textiles Ltd v Endurance Corporate Capital Ltd [2019]* relating to the test for awarding an indemnity on a reinstatement basis under a property policy. We advised that Insurers had appealed and that the appeal would be heard in January 2020. The Court of Appeal handed down its decision on 5 March 2020 and held that the way to calculate which was appropriate out of replacing/repairing, or paying the reduction in market value, was to determine which would put the Insured back into the position it would have been in had the insured peril not occurred.

The Court determined that payment of reduction in market value would have only been appropriate had the Insured intended to sell the property at the time the damage occurred. As this was not the case here, the Court held that replacing/ repairing the insured property was the appropriate measure for calculating the Insured's loss. Of note is the Court of the Appeal's comments that it could not envision many situations where reinstatement of the property would not be appropriate.

The decision serves as a reminder of the benefits of having an express clause within policies as to how damage is to be calculated. Without such a clause, the decision in *Sartex Quilts and Textiles Ltd* means that there is now a good chance that an Insured will be entitled to damages equivalent to the cost of reinstatement if they can demonstrate that they were intending to continue the business at the time of the loss.

This year Covid-19 related business interruption claims have been an almost permanent fixture in the headlines, resulting in the FCA Test Case on non-damage clauses before the Divisional Court and then on leapfrog appeal to the Supreme Court.

One case which was heard separately from the FCA Test Case but which was a Covid-19 related business interruption claim was the recent decision in *TKC London Limited. v. Allianz Insurance plc*. The case involved a London restaurant called The Kensington Creperie ("TKC") who brought a claim against their insurer Allianz for losses following the national lockdown which forced the restaurant to close.

The policy concerned was an All Risks policy and provided cover for Business Interruption by any Event. 'Event' was a defined term within the policy as:

"accidental loss of or destruction of or damage to property used by the Insured at the Premises for the purposes of the Business."

The Insured believed that the policy was triggered as a result of the enforced national lockdown and sought payment for spoiled stock and loss of income. Allianz maintained the policy was not triggered. The Insured brought a claim against them. Allianz sought summary judgment, and on 15 October 2020, the High Court found in Allianz's favour. The Court found that the temporary enforced closure of the restaurant was a business interruption, but the national lockdown was not an event as defined within the policy. The Insured had not suffered a 'loss' of its property but had only suffered a temporary loss of use of the property.

The lack of physical damage to the property was crucial to the failure of its claim under the policy. The Court held that as 'loss' was followed within the policy by '*...destruction of, or damage to...*', it was clear that the policy would only be triggered by physical damage to the property. The FCA Test Case of course concerned the interpretation of various Non-Damage Denial of Access clauses and/or Public Authority Restriction clauses, neither of which require damage. The FCA Test Case of course concerned the interpretation of various Disease, Non-Damage Denial of Access clauses and/or Public Authority Restriction clauses, none of which require 'damage'.

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Environmental Risks

2020 has seen continued efforts across various organisations and economic sectors to address climate change, improve resilience in the face of such change, and in particular to reduce carbon emissions. To continue to provide products and services fit for a changing economy, the insurance market needs to be aware of the full range of technological developments set to change the energy landscape, including the digitalisation of organisations' operations which will be part of the 'greening' process.

On 8th July 2020, the Chancellor presented his summer statement to Parliament, which outlined the government's economic recovery plan in the wake of the coronavirus pandemic. The statement included a significant amount of money for de-carbonisation: £1 billion of investment in making public buildings greener and a voucher scheme allowing landlords and homeowners to pay for energy improvements to their homes out of the £2 billion Green Homes Grant.

The use of nuclear power has always been a politically contentious issue and has presented technical challenges such as the requirement for sites near the sea. However, there is now increasing development of Small Modular Reactors **(SMRs)**, where a nuclear plant is constructed from smaller component units that have already been manufactured off-site. These have the potential to provide sustainable power at a much lower cost than traditional nuclear plants. Roll-Royce has taken the lead in the development of SMRs, with the recent announcement that it intends to build sixteen of these plants with the creation of 6000 jobs in the Midlands and North England. The SMR construction model involves various risks, such as specification adherence and component transportation, which could present opportunities for insurance.

Hydrogen is now becoming a realistic and feasible source for energy, particularly in the transport and domestic energy sectors. The sole emission from hydrogen power is water. The key is for the hydrogen to be produced using renewable power and there is a compelling need for a national infrastructure to be developed. For example, Jaguar Land Rover has received a share of government funding, given to the car industry to help with green recovery post-Covid, to develop a vehicle powered by a hydrogen fuel cell. In addition, the University of Birmingham is also researching and developing the use of trains powered by Hydrogen fuel cells; indeed, in collaboration with Porterbrook (a rolling stock company) it developed a prototype "Hydrogen Train" in 2018.

With the UK's significant number of former deep shaft coal mines, the use of minewater for heating presents a new source than can contribute to decarbonisation.

Essentially the minewater is relatively warm and that warmth can be extracted and used to provide heating in the vicinity of the former coal mine. The potential is large because around a quarter of Britain's homes sit on coalfields.

Earlier in 2020, the government announced that the South Seaham garden village development in County Durham will be heated by minewater provided by one of the Coal Authority's treatment facilities in the area.

District networks, where heat is supplied from a central location to homes and commercial buildings using insulated pipes, are another contribution to heating de-carbonisation. In 2018, the government launched the Heat Networks Investment Project (HNIP) to provide £320 million funding for investments in district heating. Extensive work is now being undertaken in a number of cities including Manchester and Bristol to install new district heating networks.

The Environment Bill when enacted will require the Secretary of State to set legally binding targets in respect of air quality through the use of regulations and to review the government's Air Quality Strategy a minimum of once every five years. Local authorities are also introducing Clean Air Zones (CAZs) in many cities to tackle poor air quality. Air pollution can also cause serious impacts on the natural environment and extensive work is under way to mitigate such impacts.

We see no let-up in the demands for carbon neutrality objectives and efforts, and insurance market participants, like all other businesses, need to adopt measures now to ensure that they can respond to current, new and emerging risks and themselves contribute to the reduction of carbon emissions.

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Construction and Engineering

At the beginning of 2020, the construction industry was looking forward confidently, buoyed by optimism and encouraged by ongoing government investment in infrastructure projects such as Crossrail and HS2. However, as 2020 draws to a close, the change in outlook is stark, with the construction industry having suffered a 40.1% contraction of output (see the ONS Construction Output Figures April 2019 **here**) as a result of unprecedented disruption caused by Covid-19 and continuing Brexit uncertainty.

Working restrictions, fewer tender opportunities and wider financial pressures in the economy, all arising out of Covid-19, have left their mark. Whilst output is now expected to fall less than originally predicted, a downturn of some 14.5% is still expected when compared to 2019, the biggest one-year fall on record (see **here**). Many businesses fear an extremely challenging period ahead, although – as ever – the outlook is different in the various sub-sectors: in infrastructure, the downturn in output was only 3%, with a 30%+ output increase forecast for 2021; housing is buoyant for now, but that may change depending on the wider economic picture going forward; and the commercial sector remains difficult.

Covid-19 also gave rise to an initial flurry of claims for time and money. Whilst the **JCT** and **NEC** both issued relevant guidance, so far as we are aware there has not yet been any reported cases in this regard, and our experience is that the vast majority of these claims have been settled through negotiation, reflecting a wider reduced appetite for processing smaller claims in the industry. It will be interesting to see the extent to which 2021 sees the industry re-set in this respect.

A sadly unavoidable consequence of the pandemic was an increase in contractors falling into financial distress. Since many of these companies were already debt-laden before the pandemic, the impact may be particularly acute when the government begins to withdraw support packages, with the potential for a significant number of insolvencies on the horizon (see **here**).

This precarious position is only exacerbated by the uncertainties surrounding the UK's exit from the EU, including a lack of clarity relating to future building standards, tariffs and immigration regulations (see **here**).

In light of the above, the Supreme Court judgment in *Bresco v Lonsdale*[1] was particularly significant, ruling that insolvent businesses can refer disputes to adjudication – reversing the previous longstanding position that had been reflected in both the first instance and Court of Appeal judgments. Despite the decision, summary enforcement of such awards still depends on factual questions such as the existence of cross-claims, and the risk of any over-payment not being recoverable later. However, these issues are now to be dealt with at the enforcement stage, rather than amounting to issues preventing an adjudication in the first place.

This issue was considered further in *John Doyle v Erith*[2]. The Court confirmed that summary enforcement would not be granted if there were a real risk that the opposing party would not receive security for its cross-claim. We have already seen an increase in this type of adjudication, and expect this trend to continue.

The inquiry into the Grenfell Tower fire continues (and will do so into 2021), with the allegations of some witnesses creating concerning headlines regarding the conduct of the construction industry. The inquiry has heard **evidence** citing failures of construction companies to comply with building regulations and a desire 'to put profit above safety.'

Despite the above challenges, the construction industry has been remarkably resilient and adaptable, and the government selected it as an integral component to its Covid-19 recovery policies, which seek to accelerate the wider economy's return to normality (see **here**). Even so, investment in large construction projects is likely to be stifled until there is greater clarity associated with the long-term impact of the pandemic and investor sentiment recovers (see **here**).

Ongoing concerns regarding the risk profile of the industry, arising out of the Grenfell inquiry and Carillion's collapse, have contributed to a significant hardening of the market's approach to this industry, and many contractors now need to self-insure (including using captives) as a result of unsustainable policy costs (see **here**).

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[1]Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25
[2]John Doyle Construction Ltd v Erith Contractors Ltd [2020] EWHC 2451 (TCC).

International: Political Risks

These last few years have seen a rise in popular protests and in strikes, riots and civil commotion (SRCC) losses globally, including the "Yellow Vest" movement in France (with insured losses totalling around US$90 million), the protests against the extradition bill in Hong Kong, also known as the "Umbrella Movement" (US$77 million in insured losses) and the Chilean riots (US$2 billion in insured losses).

Until these protests occurred, these countries were considered as being politically stable, which has caught out underwriters. Political risk is usually thought of as affecting war-torn and developing countries; whilst there have been an uptick in civil protests in countries such as Nigeria, Suan Haiti and Lebanon, it will come as no surprise to claims teams that Hong Kong and Chile have recently been cited as the world's riskiest countries. Underwriters must have risk analysis and profiles at the forefront of their minds when presented with a risk which includes political violence and/or terrorism cover.

This year, the "Black Lives Matter" (BLM) protests in the US, which took place across all 50 states, created significant exposure to All Risks and property policies in a way that has not been seen for decades. US losses are set to surpass the previous record for civil unrest damages in 1992 from rioting that erupted during protests after a jury acquitted police officers who had been videotaped beating Rodney King. Insured losses from those protests totalled US$1.4 billion at current values, according to the Insurance Information Institute. Relevant exclusions mainly fall under "strikes, riots and civil commotion" but can at times fall under wide "terrorism" exclusions where the definition includes wording such as "action taken with the aim of influencing the government".

As the death of George Floyd took place in America, it is perhaps not surprising that the riots took on a different nature in comparison to relatively peaceful protests in other countries across the globe. These have hugely impacted large and small businesses alike, but perhaps most notably some well known global supermarket chains which were considered as easy targets. Insurers have been forced to rethink policy renewals and reconsider inclusion of coverage for damages caused by riots of any nature.

Covid-19 has led to an unprecedented global health crisis with devastating economic impacts; as the pandemic continues to affect livelihoods, the insurance sector should be mindful of a number of geopolitical challenges to evolve, with healthcare systems at breaking point, country-wide lockdowns and unprecedented levels of state intervention.

Whilst the introduction of a vaccine has largely stemmed extreme political unrest, global connectivity and distribution still remain severely impacted and lockdowns have meant that a US and Eurozone recession is inevitable. Insurers with significant business in the tourism and retail sector will need to balance the losses in these areas going forward. Contract and payment risk is also likely to increase considerably. Economic nationalism is on the rise due to a slowdown in trade, labour and capital flows. This is likely to lead to popular protests and civil unrest in those countries home to the worst-hit industries.

This increasing frequency of populism in its extreme form should also be something for underwriters to bear in mind when protecting businesses', people and premises, particularly in countries such as the US and Germany. This increase in backlash against globalisation is likely to increase as a result of the pandemic. Companies within the banking sector are most exposed to these risks; underwriters should bear in mind how insurance programmes will respond to such attacks; the potential for business interruption with no property damage can be significant, not just from the initial attack, but also as a result of the long-term effects of a police investigation, injuries and/or deaths.

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International: Catastrophic Losses

2020 has seen significant and devastating **fire activity in Australia and California** that has been linked to human-induced climate change. Insurance industry trends suggest that so-called "secondary perils" such as bushfires are likely to be more frequent and are having an increasingly large impact on insured catastrophic losses. Secondary perils may be described as small to medium sized independent events (such as hail, drought, and flooding events), or the secondary effects of a primary peril (such as heavy rain or a storm surge following a hurricane or liquefaction or landslides following an earthquake).

Insurance risk modelling has traditionally focussed on large primary perils, giving rise to a potential underestimation of the impact of **secondary perils**. The resultant underwriting uncertainties may, in turn, be compounded by the fact that losses arising out of **secondary perils** (such as flooding following an earthquake) are often subsumed in to the losses arising out of the earthquake itself.

However, it is apparent that losses arising out of secondary perils will continue to have a significant impact on total catastrophic losses. **Aon has reported** that, over the last decade, secondary perils have accounted for higher economic losses than primary perils in all but two years (those being years where major earthquake and cyclone events occurred)[8]. This trend appears set to continue with 60% of 2020's insured catastrophic losses arising out of secondary perils.

Swiss Re cites climate change, together with increased urbanisation and a rising concentration of assets in areas exposed to extreme weather conditions as drivers of increased secondary peril losses.

Record breaking bushfires in Australia burned more than 46 million acres of land between late 2019 and early 2020. **Zurich's PERILS has reported** that insured losses are estimated at around $1.3 billion USD. This year, in California, Oregon, and other Western US states wildfires have burned more than 5 million acres. **Moody's Investors Service estimate** that the losses arising out of the 2020 US wildfires are the third highest on record, with records previously set in 2017 and 2018. Overall insured losses range between $5 billion and $8 billion.

2019 was Australia's hottest and driest year on record. While there are various factors that may give rise to fire risk, **a recent scientific study** has concluded that human [created] climate change increased the risk of the hot and dry weather conditions that drove the Australian bushfires by at least 30%. The recent Royal Commission into National Natural Disaster Arrangements report commissioned by the Australian government concluded that global warming over the next 20 years "is inevitable", and bushfires are expected to become "more frequent and intense". Similarly, while scientists acknowledge that climate change is not the only cause of increased wildfire risk in the US, **studies have confirmed** that human-induced warming has already led to a global increase in the likelihood and severity of fire weather, increasing the risks of wildfire.

The sustained impact of secondary perils on catastrophic losses and the intensifying impact of climate change means insurers should act quickly to model and prepare for the increasing risk of fire and other secondary perils.

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Covid-19 and Overarching Cross-Sectoral Trends/Impact

We have collated an array of resources specifically aimed at financial services and insurance businesses, including our Covid-19 webinars where our team discusses key issues arising from the pandemic, which can be found on our dedicated **Coronavirus Hub.**

Over the last 9 months, businesses have needed to do all they can to mitigate the impact of the pandemic. A key consideration of this has been looking at the insurance cover available to businesses under new or existing insurance policies. The main policies likely to be relevant and affected by Covid-19 are travel, event cancellation and business interruption, as well as some liability insurance policies. For a more detailed look at the issues effecting these policies, partner Tim Johnson wrote an article back in March setting out key **insurance considerations for Covid-19.**

Many businesses suffering from financial difficulties as a result of the pandemic may have failed to pay insurance premiums. In most cases, payment of the insurance premium is not a requirement for the creation of a binding insurance contract and so insurers will remain bound regardless (with a right to set-off the premium against the amount of any claim payable). Read our article on **non-payment of insurance premiums** for more on this issue.

We are likely to see an increase in claims against professionals as a result of the pandemic. With many professional firms moving to homeworking (whilst juggling other commitments, such as home-schooling), particularly whilst business get used to and adapt to the new working conditions, there is an increased risk of mistakes and potential for the quality of services to be reduced. Professionals most likely to effected by this include solicitors, accountants, insurance brokers and IFAs. For more on the impact of Covid-19 on professionals, click **here.**

Another unfortunate but seemingly inevitable consequence of Covid-19 will be a continuing increase in the number of corporate insolvencies. In due course, it is likely that this will lead to liquidators bringing more claims claims against directors, which will hit D&O markets, particularly in the SME sector.

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Harmonie Group Law Firms - Covid-19 Updates

Browne Jacobson is the sole English member firm of the Harmonie Group, an invitation-only international network of elite and vetted law firms providing defence services to corporations, TPAs, insurance companies, RRGs, and captives. Member firms throughout the USA, Canada, Europe, Scandinavia and Australasia must meet exacting standards, ethics, and values before being invited to join. We are delighted to include guest articles from member firms in Australia, France and the Netherlands summarising Covid-19 related claims and litigation to date in those jurisdictions.

France

Since the beginning of the Covid-19 outbreak, many publications in France have criticised insurers for refusing to adequately cover the losses suffered by companies as a result of the interruption of their business following the governmental measures implemented to prevent the spread of the coronavirus. However, it should be first noted that damage insurance policies in France only very rarely cover losses that do not result from material damage to insured property. Nevertheless, when insurance policies do cover such losses, the contracts usually take care to limit such coverage to a few specific events and generally exclude, more or less clearly, epidemic/pandemic risks, certainly because of the difficulty of pooling such risk. Consequently, current litigation in this respect mainly concerns the validity of such exclusions. The first decisions in this respect have been handed down in France in the scope of AXA professional multi-risk insurance policy and it must be said that there is no clear and consistent case law so far:

Some decisions have been handed down in the scope of summary proceedings, where the judge stated that he does not have jurisdiction to rule upon the interpretation of the exclusion clause of the contract *(Commercial Court of Lyon, 10 June 2020, Le Bacchus / AXA France IARD)*. Another judge decided however the opposite and declared the clause null and void *(Commercial Court of Marseille, 23 July 2020, Société X. / AXA France IARD)*. Other decisions on the merits ruled that the exclusion clause was valid *(Commercial Court of Toulouse, 18 August 2020, SARL Sarran / AXA France IARD)*. Other commercial courts also ruled on the merits that the exclusion clause deprived the contract of its substance and should be null and void *(Commercial Court of Tarascon, 24 August 2020, Société X / AXA France IARD, Commercial Court of Paris, 17 September 2020 or Commercial Court of Rennes, 24 September 2020)*. Insurers must therefore clarify the wording of their insurance policies to avoid further disputes in the future. Finally, the French Insurance Federation suggested that an "exceptional disaster" guarantee fund is created, given the limited capacity of the insurance market for this kind of risk.

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Netherlands

In the Netherlands, case law on coverage issues in respect of damage as a result of Covid-19 measures and/or Covid-19 disease (in short: **"Covid-19"**) seems to be very limited. Possibly because the most obvious damage (at this stage) is business interruption damage and damage as a result of event cancellations, while the (standard) policy conditions of business interruption insurance seem to be rather straight forward in this jurisdiction.

In principle, business interruption damage is only covered by BI insurance in case of material damage to insured property caused by a risk specified in the policy conditions. Generally, damage as a result of Covid-19 does not qualify as such pursuant to most standard policy conditions. As far as we know, there is no case law yet in which an insured challenged a denial of coverage in this respect. In practice we do come across discussions between insurers and insureds in respect of BI insurance that provide for additional coverage for damage as a result of 'infectious diseases' broken out on the insured premises. To date, these discussions have not led to case law yet.

As far as event insurance is concerned, most event insurance policies (taken out before the outbreak of Covid-19) seem to provide cover for expenses made as a result of Covid-19. To our knowledge, only one (relevant) court decision was (in preliminary relief proceedings brought up by an event agency before the Court of Amsterdam) published.

The core of the dispute was whether or not (i) an exclusion for damage as a result of a contagious diseases applied to this policy, (ii) the uncertainty requirement was fulfilled (which is amongst others met if, in short, at the time of concluding the relevant policy it was uncertain for all parties that damage would arise or has arisen as a result of an insured event) and (iii) it is contrary to the Dutch doctrine of reasonableness and fairness to deny coverage since the offer made by the insurers to the event agency dates from January 9 2020 and at that point in time the event agency knew about the outbreak of Covid-19.

The court held that: (i) it is assumed that the policy does not contain an exclusion relating to Covid-19, (ii) it was not already clear at the beginning of 2020 that the outbreak would have major consequences for events and (iii) denying coverage on this ground is unacceptable since the insurers themselves were also aware of the outbreak of Covid-19. The court ruled that it is plausible that the insurance policy will provide coverage for the cancellation of the relevant events.

Finally, we note that the Dutch Association of Insurers and the Dutch Insurance Exchange Association (VNAB) announced initiatives to accommodate insured persons that are faced with liquidity problems as a result of Covid-19 in July 2020.

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Australia

On 18 November 2020 a five Judge Bench of the New South Wales Court of Appeal found against insurers in *HDI Global Specialty v Wonkana No. 3 Pty Ltd [2020] NSWCA 296 (Wonkana),* a business interruption insurance (BII) test case as to the efficacy of 'Quarantine Act Exclusions' with respect to the Covid-19 outbreak.

Australian Industrial Special Risks **(ISR)** policies often extend the traditional BII cover to interruption or interference to business operations as a result of an outbreak of a notifiable, contagious or infectious disease **(Disease Extension)**. The Disease Extension generally applies when there is an outbreak at the business premises, or within a specified radius (normally 20-25 kms).

A common exclusion to the Disease Extension is with respect to 'listed human diseases' under the Biosecurity Act 2015 (Cth) **(Biosecurity Act)**, however many insurance policies refer in their exclusions to 'quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments'. The Quarantine Act 1908 (Cth) **(Quarantine Act)**, was repealed and replaced by the Biosecurity Act in 2016.

Covid-19 was classified as a *'listed human disease'* under the Biosecurity Act 2015 in early 2020.
The Court unanimously found that a *Quarantine Act* exclusion did not capture a 'listed human disease' under the *Biosecurity Act*.

Wonkana is currently subject to an application for special leave to appeal to the High Court of Australia. Given the widespread impact of the decision on insurers and insured alike, special leave is likely to be granted.

Success for insurers in the High Court would deal a knock-out blow for those insured holding a policy with a *Quarantine Act* exclusion, however a loss for insurers in the High Court still means an insured will need to satisfy the insuring clauses and other conditions of the policy before being entitled to indemnity.

A second *'test case'* is under consideration by the Insurance Council of Australia, potentially dealing with issues such as proximity and prevention of access, however at the time of writing has not been filed.

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